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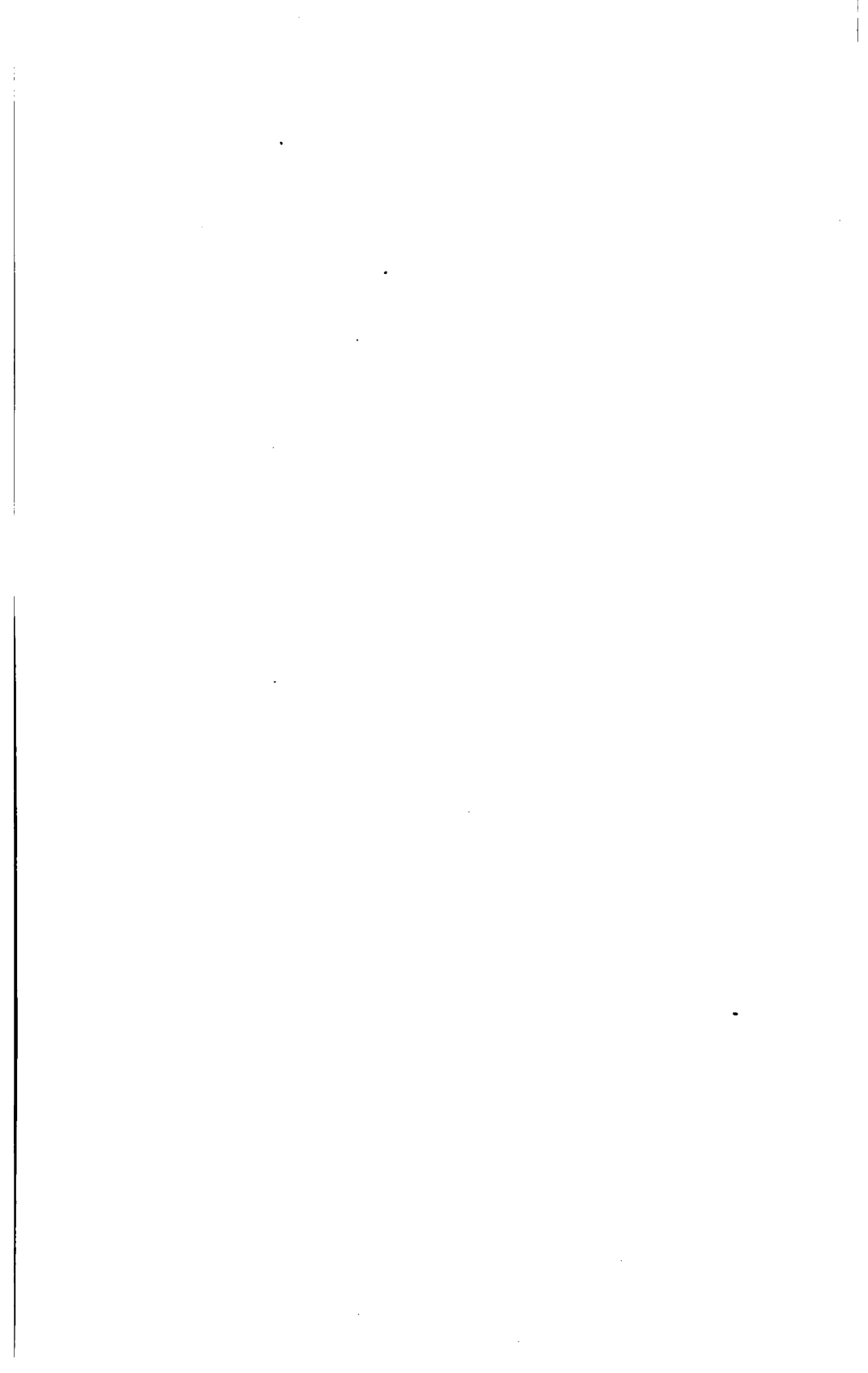
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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

HARVEY LEE,
REPORTER.

VOLUME 11

WITH

NOTES ON CAL. REPORTS

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JUDGES

OF THE SUPREME COURT DURING THE YEAR 1858

During July Term:

HON. DAVID S. TERRY,.....CHIEF JUSTICE.

HON. STEPHEN J. FIELD,.... }
*HON. PETER H. BURNETT,.... } ASSOCIATE JUSTICES.

During October Term:

HON. DAVID S. TERRY,..... CHIEF JUSTICE.

HON. STEPHEN J. FIELD, }
†HON. JOSEPH G. BALDWIN,..... } ASSOCIATE JUSTICES.

HARVEY LEE,..... REPORTER.

THOS. H. WILLIAMS,..... ATTORNEY-GENERAL.

CHARLES S. FAIRFAX,CLERK.

* Term expired October 24, 1858.

† Qualified October 24, 1858.



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OCTOBER TERM.

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OCTOBER TERM, 1858.

HUNTER & DAVIS v. LEVAN AND WIFE.

Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into Court, to await the further decree of the Court, is proper, or at least there is no error in such a decree to the prejudice of the defendants.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

The facts sufficiently appear in the opinion of the Court.

Hall & Hume and Howes for Appellants.

Sanderson & Newell for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

Martin and Davis v. Browner.

This suit was brought on a note and mortgage executed by defendants to one Howard, and assigned by him to the plaintiffs. The assignment was unconditional, and in the usual form of such instruments. The Court finds that this assignment was made to plaintiffs by Howard to indemnify them against injury on account of their suretyship for him on a bail bond—the proceedings on which are now pending in this Court. This proof of the purpose and character of this instrument seems to have been made by parol. The Court ordered a sale of the mortgaged property, with directions to pay the money into Court to await its further decree.

We do not see any error in this decree to the prejudice of the defendants. By this arrangement, to say the least of it, the plaintiffs were made the pledgees or bailees of Howard, in respect to this debt assigned, and were bound to take the proper care of the subject of the Court. They were not bound to suffer the debt to be barred, or the chances of the property going to waste, before collecting the debt or foreclosing the mortgage, as might be the case if proceedings were delayed until the question of their liability on the bond was settled.

It is not necessary to decide whether, as this assignment was in writing, it would be admissible for Howard, or those claiming under him, to show by parol that what imparted an absolute sale or transfer was really a sale only on condition.

There was no error in striking out the answer of the defendants, to their prejudice, as it merely set up the facts upon which we have already passed, and some others not affecting the merits.

Decree affirmed.

MARTIN & DAVIS v. BROWNER *et als.*

A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and enclose twelve acres of mineral land, in the mining district, as against persons who subsequently enter upon the land in good faith for the purpose of digging for gold therein, and who, in such operations, do no injury to the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

Martin and Davis v. Browner.

The facts sufficiently appear in the opinion of the Court. Defendants had judgment in the Court below, and plaintiffs appealed.

Francis J. Dunn for Appellants.

McConnell & Niles for Respondents.

The law in California affecting the respective rights of farmers and miners upon the mineral lands, has been thoroughly discussed and settled in this Court.

The doctrine settled in the cases of *McClintock v. Bryden*, 5 Cal. 97, and *Barrett v. Stokes*, *Ib.*, 36; has never been disturbed.

That any appropriation of lands in the mineral regions for agricultural purposes, is subject to the right of any citizen to enter upon the same and dig for gold, is now the settled law of the land.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

Waiving the serious question whether this appeal is properly before us for want of a statement of facts, so far as the errors assigned by appellants are concerned, we think their case is without merit. The action was ejectment for a portion of a lot of about twelve acres in a small mining town. The plaintiffs claimed to have title to it, by having taken possession of and inclosing it, it being public land. It seems that the site of this village, including a portion of this lot sued for, was mining land, and parts of it had been worked as such before plaintiffs' inclosure. The defendants entered upon and were using a portion of this lot for mining purposes, but this portion was not contiguous to the buildings or the ground immediately about the buildings of the plaintiffs; nor was the use of this portion by defendants shown to injure or in any way conflict with the comfortable use of the premises by plaintiffs as a residence, or for the carrying on of any mechanical or commercial business. At most, it could only interfere with them in cultivating the soil. The Court instructed the jury, in effect, that a person cannot, under the pretense of a town lot, locate and hold a large tract of mining land in the mineral region of this State, as against persons who enter in good faith for the purpose of digging gold therein; that,

Raun v. Reynolds.

while a person might be entitled to hold a town lot by location or purchase, as against miners, such lot must be so holden in good faith and for that purpose; and that one cannot, under the mere pretext of a town lot, hold a large portion of land for agricultural purposes as against the claim of the miner.

We think the law was correctly put to the jury on this state of facts. It is apparent that, if under pretense of holding land in exclusive occupancy as a town lot, a party can take up twelve acres of mineral land in the mining district, which, before his appropriation, was used and is mainly valuable for mining purposes, and hold it as owner, he may take up twice or four times that quantity; and the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated. This would be to destroy to a great extent, if not entirely, the principle held by this Court in *McClintock v. Bryden*, 5 Cal. 97, and *Barrett v. Stokes*, 5 Cal. 36, which we have no desire to disturb.

We limit our decision as a precedent to the facts of this particular case, as it is impossible to prescribe a rule in such cases which must be of universal application. All that we deem it necessary now to hold is, that the facts of *this* case do not exempt it from the rule in the case of *McClintock v. Bryden*, 5 Cal. 97.

Judgment affirmed.

RAUN v. REYNOLDS *et al.*

The act to regulate interest on money is in derogation of the common law, and must be strictly construed.

Apply this rule of construction to the language of the second section of the act, and it will confine its provisions to contracts, *fixing the rate of interest*.

According to the common acceptation, the expression, "rate of interest," has reference to the percentage or amount of interest, and not to the manner of computing. The provision of the statute which authorizes judgments to bear the same interest as the contracts on which they are recovered, was intended to be confined to contracts fixing the rate of interest.

In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill.

Rann v. Reynolds.

Where proceedings in a foreclosure suit were delayed by agreement, in consideration of the execution of a second mortgage on other property in which third parties joined as additional security, and subsequently plaintiff filed a supplemental bill, setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale; but that no bid should be received for a less sum than the full sum of judgment and costs. If this sum was not bid, then the whole property included in the two mortgages — from Reynolds and from Kirk and Reynolds — was to be sold together: *Held*, that the decree is erroneous.

The well established rules of equity proceedings require, in such cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted, before recourse is had to the second. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem.

John Hume for Appellant.

The above named defendants, appellants herein, assign for error in said cause —

1. That judgment is so rendered that interest is compounded on the judgment.
2. That the judgment is contingent and uncertain.
3. That the portion of the judgment which directs the manner of the sale of the mortgaged property, grants to said plaintiff greater relief than was by him demanded in his complaint, and was greater than the Court could grant in case of default.

And as to the first point. Independently of statutes, the only remedy by which interest can be recovered upon a judgment, is an action of debt upon the judgment. And. Leading Cases, vol. 1, page 501.

"At common law, on an execution upon a judgment, interest cannot be levied, because the execution must pursue the judgment, and there is nothing on the record to authorize the collecting of interest." *Ib.*, 6 Johns. 283; 2 Vesey, p. 162; 2 Johns. Chy. 172, 180; 1 Paige. 182; Brown and Wife v. Kip *et al.*, 6 Paige, 88.

Our statute provides that when a simple rate of interest is agreed upon, the judgment shall bear the same rate. Wood's Digest, art 2838, sec. 2.

In the next section it is provided that parties may agree for the payment of compound interest, but it is not provided that the judgment shall conform to such a contract.

Baun v. Reynolds.

A judgment cannot be made to bear compound interest except by virtue of express provision of law. There is no such provision in our statute, therefore the judgment in this cause was erroneous in this particular.

As to the second point, the Court will find by examination of the record, that the judgment is contingent. The authorities before cited lay down the rule, that a judgment for money is a final determination by the Court of the amount due upon the day of the rendition of the judgment.

The amount of the judgment in this case is left contingent upon the future act or omission of the defendant. If paid before the seventeenth of February, it is for one sum; if not paid until after that day it is for another sum. Practice Act, sec. 144.

Compound interest is not a *rate* of interest. Our statute provides that an agreement may be made by which the interest shall, from time to time, be added to the principal, and a *rate of interest* calculated thereon. There is no provision in the statute for incorporating such agreement into the judgment.

As to the third point. Where defendant does not appear in a suit, no relief can be given except such as is expressly demanded in the complaint. Practice Act, sec. 147.

The order directing the manner of sale of the property, was in this case a portion of the relief granted plaintiff; but no demand was made in the complaint for any such relief, nor was notice given in any manner to defendants that such relief would be applied for. Therefore, the granting of such relief was so far an excess of jurisdiction on the part of the Court below.

It is the universal general rule, that property in separate parcels or lots shall be sold separately. Sales in mass of real estate held in several parcels, are not to be countenanced or tolerated. Allen on Sheriffs, page 188; 1 Binney, 61; Woods v. Monell *et al.*, 1 Johns. Chy. 502; 13 Johns. 132.

"When the sale is of real estate, and consisting of several known lots or parcels, they shall be sold separately." Practice Act, sec. 223. "The judgment-debtor, if present at the sale, may direct the order in which property shall be sold." *Ib.*

Rann v. Reynolds.

Chancery follows the law, and the same reason which makes the law as it is, applies in general to Chancery. There being in this case no prayer in the complaint that the property be sold as one parcel, defendants had a right to expect that only the usual order would be made, and that the property would be sold in separate parcels, and that they would be permitted to direct the order in which the property would be sold.

Sanderson & Newell for Respondents.

There is no error in the computation of the interest up to the time of the judgment. The note drew compound interest, and the calculation is in fact correct.

But were it wrong, it is too late to raise the objection for the first time in this Court. *Wood's Digest*, 551, sec. 2; *Guy v. Franklin*, 5 Cal. 416.

There was no error in making the judgment draw compound interest. Such a judgment is authorized by the statute, and has been sustained by the decisions of this Court. *Wood's Digest*, 551, sec. 2; *Guy v. Franklin*, 5 Cal. 416; *Mount v. Chapman*, 9 Cal. 294; *Emeric v. Tama*, 6 Cal. 155.

There was no error in directing the manner in which the mortgaged property should be sold. The Court had power to do so. *Practice Act*, sec. 246, 7 and 8; 1 *Paige*, 451; 9 *W.* 648; 3 *Scammon*, 268.

This case does not come within the 223d section of the *Practice Act*, concerning sale under execution.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., and FIELD, J., concurring.

The defendant, Reynolds, in January, 1857, executed and delivered to the plaintiff his promissory note for the sum of \$32,000, payable six months after date, with interest at the rate of two and a half per cent. per month, payable monthly, and if not paid, to be compounded.

To secure the payment of this note, at the same time, he executed a mortgage on three-fifths of the South Fork Canal, in El Dorado county.

Baun v. Reynolds.

The note not having been paid at maturity, proceedings were instituted for its recovery, and a foreclosure and sale of the mortgaged premises.

Pending these proceedings, defendants, Reynolds and Kirk, in consideration of thirty days delay, and as further security for the payment of the note, executed a mortgage on their joint interest in a ditch known as the "Gold Hill" or "Smith's Ditch," which connected with the South Fork Canal.

At the expiration of the time agreed, the debt not having been satisfied, plaintiffs filed a supplemental bill, setting up the second mortgage, and asking for a sale of the premises therein conveyed.

Defendants were duly served, and having failed to answer, a default was taken against them; and a judgment was rendered against Reynolds for the amount of the note and interest, with interest on the judgment at two and a half per cent. per month, to be compounded monthly.

The Court also decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale; but that no bid should be received for a less sum than the full amount of judgment and costs. If this sum was not bid, then the whole property included in the two mortgages — from Reynolds, and from Kirk and Reynolds — was to be sold together. The errors assigned are:

First, The order directing compound interest to be computed on the judgment.

Second, The decree directing the property conveyed in separate mortgages to be sold together.

The first point is one of much general interest, and involves a construction of the statute of March, 1850, "to regulate interest on money." The second section of this Act is as follows: "Parties may agree in writing for the payment of any rate of interest whatever on money due, or to become due on any contract. Any judgment rendered on such contract shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment." The third section permits parties to agree that the interest, if not punctually paid, may be added to the principal, and bear the same rate of interest.

Baun v. Reynolds.

The question presented is, whether the provision of the statute which authorizes judgments to bear the same interest as the contracts on which they are recovered, was intended to be confined to contracts fixing the rate of interest, or to include the contracts authorized by the third section of the Act.

The Act in question is in derogation of the common law, and must be strictly construed. This rule of construction applied to the language of the section would confine its provisions to contracts *fixing the rate of interest*. "Parties may contract," says the statute, "for any rate of interest," and judgments recovered on *such* contracts, that is contracts *fixing the rate of interest*, shall bear the same interest as the contract.

According to the common acceptance, the expression "rate of interest" has reference to the percentage or amount of interest, and not to the manner of computing. Rate is defined by Webster to be "the price or amount stated or fixed on anything." That it was used in this sense by the Legislature is, we think, evident from the fact that it was thought necessary that direct authority for the compounding of interest by contract should be given in a separate section of the Act. Statutes must be so construed as to give validity and meaning to all the parts.

If the construction of the words "rate of interest," contended for by respondent, is correct, the third section of the Act is mere surplusage.

Upon the second assignment we think the decree is clearly erroneous. Judgment was taken in the cause by default, and the decree could give no relief beyond that which was demanded in the bill. (Practice Act, section 147.)

The complaint simply asked a foreclosure of the mortgage and a sale of the property to satisfy the judgment; there was no prayer that the sale should be had in a manner differing from that prescribed in the statute for sales of real property under execution. Admitting the authority of the Courts to direct in the decree the manner in which the sale should be conducted, there is no allegation in the complaint which would warrant a demand that the usual course adopted in judicial sales should be departed from in this instance. On the contrary, the facts disclosed by the complaint furnished the strongest reason for refusing to depart from the usual course.

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The property to be sold consisted of separate and distinct parcels, owned under different titles. Kirk, one of the parties to the second mortgage, owed no portion of the debt; he was merely a surety for its payment, to the extent of the value of his property.

The well established rules of equity proceedings require, in such cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. "Where there is a lien on different parcels of land, for the payment of the same debt, and some of these lands still belong to the man who, in equity and justice, owes, or ought to pay the debt, and other parcels have been transferred by him to third parties, his part of the land, as between himself and them, shall be first chargeable with the debt. (1 Story, Eq., 223, 2, page 300; 8 *Ib.*, 182.) The principle of this rule applies with equal force to the case of a surety, whose property is pledged by a subsequent conveyance to answer the debt of the principal.

An additional reason why, in this case, a separate sale of the property should have been decreed, is found in the fact that, under our statute, such sales are made subject to the right of the owner to redeem. The exercise of this right, as far as Kirk is concerned, is entirely destroyed by the decree, as it is impossible to ascertain the price at which his interest was sold, or the amount of money necessary to redeem it.

If the property conveyed in the prior mortgage had been first sold, Kirk could, by paying the residue of the judgment, have released his property. Or, if the sale had been made separately, the statute gave him the right to redeem by payment of the price, with the percentage allowed by law. By the decree these rights are taken away, and he is left entirely without remedy.

The judgment and decree of the Court below is reversed, and the cause remanded.

Turner v. Morrison.

TURNER *et al.* v. MORRISON *et al.*

A party who is unprepared for trial at the time of the calling of the case, should move for a continuance, and if he fail to do this, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

The facts appear in the opinion of the Court.

McConnell & Niles for Appellants.

A. A. Sargent for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This cause was tried below by a jury, and a verdict rendered for plaintiff. The defendant moved for a new trial on the ground of surprise, and in support of his motion filed affidavits setting out that one Henry Day was a necessary witness for the defense, that he had been duly served with a *subpoena* before the trial, and his fees tendered him, but that he did not attend on account of sickness.

It also appears by the statement that, at time of the trial, defendants' counsel stated in Court that the witness, who resided sixteen miles from the place of trial, had been *subpoenaed* by defendants, that the party who served the *subpoena* had neglected to return it, in consequence of which neglect, they were unable to make such proof of service as would entitle them to an attachment against the witness, and that they could not ask for a continuance of the cause, for the same reason.

The Court below granted a new trial, and plaintiffs appealed.

The order of the Court below was clearly erroneous. The facts set out in the affidavits in support of the motion for a new trial should have been made the foundation of an application for a continuance, so that the plaintiffs might, if they desired, have avoided the delay by admitting the evidence as stated in the affidavit of defendants. "That

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a party came to trial unprepared to make out his case, or establish his defense, has not even the appearance of a valid excuse. It is true that, sometimes, no amount of diligence or effort will suffice to arrange all the details and procure everything needful in time for the trial. But injury need not for that reason be sustained. Courts are extremely indulgent and liberal in granting adjournments, and they are seldom or never appealed to in vain in a proper case. Even where it is simply expedient that a continuance should be had, and much more where any necessity for it exists, they will not deny a postponement. It is therefore incumbent upon a party, if for any good reason he finds himself unprepared to go on, to state the circumstances to the Court and move for an adjournment. If he fail to do this, he waives his want of preparation, and all right after to object. Any other rule would work great injustice, and be attended with innumerable evils." (3 Graham & Waterman on New Trials, p. 894.)

"The parties," says Judge Kent, in *Alexander v. Bryan*, (2 John. Cas., 318) "must come to trial prepared, at their peril, and if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. It has, therefore, been repeatedly held, that the subsequent allegation of a party that he was not prepared, is no reason for granting a new trial, unless it be founded on the discovery of testimony of which the party was not at the time apprised.

By failing to apply for a postponement of the trial, plaintiffs waived their right to move for a new trial for reasons which existed at the time of the trial.

Judgment reversed.

PHELPS v. OWENS *et al.*

When a demurrer is general to a complaint, Courts are not bound to notice defects, which are mere matter of form.

In an action against a Sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure; the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict.

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APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

A statement of facts, sufficient to elucidate the points decided, appears in the opinion of the Court.

Baine & Bouldin and D. W. Perley for Appellants.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

This was an action of trespass — or in the nature of such an action — brought by plaintiff, Phelps, against defendants, for wrongfully and unlawfully taking away certain goods and converting them to their own use. The complaint further alleges that at the time of this taking and conversion, the plaintiff was a merchant and doing a prosperous business; that the goods constituted nearly all his stock in trade, and that the taking of the goods has thrown him out of business, and nearly ruined his fortunes.

To this complaint defendants demurred assigning several causes of demurrer — none of which were well taken. The complaint states — unnecessarily, it is true, but harmlessly — in the commencement, that the defendants are indebted to the plaintiff in the sum of \$5,000; but this does not make it an action on contract, for the body of the complaint shows very clearly the cause of action to be a trespass, out of which the claim for money proceeds. There is no misjoinder, because there is but one count and one claim; the claim to recover, or to aggravate the damages — as it may be construed — or for special damages, arising from interruption of business, though not stated with sufficient particularity or definiteness, is not specifically demurred to on that ground. The damages might or might not be enlarged for this cause, according to the circumstances. If the trespass were “willfully and wrongfully committed,” as the complaint charges, the jury *might* go beyond the actual value of the goods taken and give compensation for the loss of business, credit, etc., if these injuries were properly stated. But as the demurrer does not specifically object to the generality of the statement in this respect, the Court was not bound to notice the defect, which is of matter of form.

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After the demurrer was overruled, the defendants separately answered, putting the matters of the complaint in issue, and setting up new matter — which last will be noticed more particularly hereafter.

On the trial, it appeared that defendant, Owens, sued out an attachment against one Gove, in the hands of Webster, Deputy Sheriff of San Joaquin. Owens gave Webster a bond of indemnity after this levy, on the requisition of the Sheriff. The officer levied the attachment on this property as subject to the process, and Owens, having subsequently obtained judgment in his suit against Gove, sued out execution, under which Webster, the officer, sold the goods. The goods brought at the sale \$1,492.42. There is some discrepancy in the proofs as to the actual value of the goods. The goods were claimed as the property of the plaintiff, who claimed to have bought them of Gove prior to the levy. The main question contested before the jury was, whether this sale to the plaintiff by Gove was or was not fraudulent; and the defendants' proof, as usual in such cases, was mostly circumstantial. The jury returned a verdict of \$1,800.

It seems that there was no circumstance of wantonness or oppression on the part of the officer shown in this case. It was only, if made out, the common case of a levy by the officer upon the property of a party, when that property was not subject to the levy. The Court were asked by the defendants to instruct the jury that the defendant, Webster, is not responsible in damages beyond the value of the property, at the time it was seized under the attachment, and interest on such amount from the time of seizure up to the time of the verdict. This instruction was refused to be given without, and was given with, this qualification, that they might find any damages the party proved he had sustained.

The complaint claimed no other damages than for the taking and conversion, unless the latter clause of the complaint be considered as a claim for damages for the injury — beyond the value of the goods — to the business of the plaintiff as a merchant. But these last damages, if so stated as to be admissible of proof, could only be awarded in cases of willful and wanton trespass, or trespass marked by some circumstance of malice, oppression or fraud, and of this, as we intimated, we see no evidence in the record.

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The question upon which this case turns is this: What is the proper measure of damages against an officer for levying upon and selling goods not subject to the process, when the levy is made without any motive of oppression, or wanton disregard of the duties of his office, or the rights of the owner. The rule is thus stated: (Sedg. on Law of Damages, p. 530.) "We proceed now to notice the general rules which govern in trespass for taking personal property, or, as it is technically called, trespass *de bonis asportatis*. And, as we have said, although this is eminently an action where, in case of evil motive, the damages are under the control of the jury, and although for that purpose all the circumstances of the transaction may be given in evidence, still the determination, of which I have spoken, to adhere to the rule of compensation, has been frequently made manifest.

"So it has been decided that when trespass is brought for personal property and no circumstances of aggravation are shown, the action is to be regarded as one of trover, and the value of the property with interest furnishes the measure of damages." (Brannin v. Johnson, 19 Maine, 361; Smith v. Sherwood, 2 Texas, 460; Row v. Story, 2 Barr, 191; Thomas v. Isett, 1 Greene, Iowa, 470.)

Mr. Justice Baldwin (in Pacific Insurance Company v. Conrad, 1 Baldwin, U. S. C. C. R., 138) so fully states and so ably supports the true rule of recovery in this class of cases, that we feel justified in quoting at some length from his opinion. "The rule which ought to govern jurors in assessing damages for injuries to personal property, depends much upon the circumstances of the case. When a trespass is committed in a wanton, rude, and aggravated manner, indicating malice or a desire to injure, a jury ought to be liberal in compensating the party injured, in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard; for a jury may properly take into view not only what is due to the party complaining, but to the public, by inflicting what are called in law speculative, exemplary, or vindictive damages. But when an individual, acting in pursuance of what he conceived a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is

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claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the trial, is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done to *the property taken*, and not to any collateral or consequential damages *resulting to the owner* by the trespass. These are taken into consideration only in a case more or less aggravated. But when the party taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case the defendant acted under the orders of the government, in the execution of his duties as a public officer; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him; he has taken the property of the plaintiffs for the debt of Edward Thompson, and must make them compensation for the injury they have sustained thereby, but no further."

"It has long since been well settled that a jury ought in no case to find exemplary damages against a public officer, acting in obedience to orders from the government, without any circumstance of aggravation, if he violates the law in making a seizure of the property. In the case of Nicoll against the present defendant, Judge Washington instructed the jury that they might give the plaintiff such damages as he had proved himself to be justly entitled to, on account of any actual injury he had proved to their satisfaction he had sustained by the seizure and detention of the property levied on, but that they ought not to give vindictive, imaginary, or speculative damages. The affirmance of his charge makes it the guide for us in this case. Our true inquiry, then, must be, What damages have the plaintiffs so proved themselves to be entitled to?"

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It will be seen by applying the principle thus laid down to the instruction as qualified, that the Court below erred in refusing the instruction in the original form, which gives the exact rule of damages. and also erred in allowing the qualification; for the qualification, in fact, allows the jury to give damages for supposed *injury indirectly resulting to the owner* by the trespass, instead of confining it to the injury done him immediately by taking the property; the legal standard of that injury being, in such cases as this, its value with interest. We do not think the other points of appellant well taken. It is not necessary for us to enter into, nor do we intimate any opinion on the facts.

Judgment reversed and cause remanded.

RITTER v. STEVENSON.

Where a case has been decided upon the same statement of facts upon a former appeal, that decision has become the law of the case.

For the points decided in this case, see 7 Cal. Rep. 388.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

This case was before this Court and decided at the April Term, 1857, (see 7 Cal. 388.)

Shafters, Park & Heydenfeldt for Appellant.

E. Cook for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

This case has been heretofore decided by this Court upon the same statement of facts, and that decision has become the law of the case. Judgment affirmed.

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Parties taking possession of a quartz lead under an agreement made with another party, cannot retain possession and refuse compliance with their agreement made in consideration of such possession and right to the lead. And where such parties conveyed to H one-third interest in the lead, by deed purporting to convey in fee simple absolute, and subsequently acquired other title: *Held*, that such subsequent acquisition of title inured to H's benefit.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

A statement of the facts sufficiently appears in the opinion of the Court.

Coffroth & Howes for Appellants.

I. The judgment is unsustained by the evidence, and the decree is more than the complaint prayed for. The complaint asks an annulment of the contract, or specific performance. The new or large mill, and the railroad, are unknown to it. They are not directly or indirectly connected with it, but entirely separate and apart. The decree appropriates our property to another party, without even that party making a demand for it. But it may be said that this portion of the decree is deduced from the wording of the contract, which gives to Mary Hitchens one-third of the "money or property" which may arise from a certain state of facts; but it will be perceived that this clause of the contract has a contingency, and that nothing is to flow to the interest of Mary, except where there should be an increase of shares, or "new and additional partners admitted," or a "joint stock company be formed." If either one of these contingencies should happen, and money, property, or profits should accrue therefrom, why, then she would be entitled to an interest equal to one-third share. These things did not exist. There were no additional partners admitted; no joint stock company formed; no increase of shares. The new mill was built alone by defendants, and by their money, and although it was used to crush the quartz taken from the lode in dispute, yet it was disconnected with and separated from, the quartz ledge. The testimony is that it was half a mile distant from the vein. The

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portable mill, or "Cummings mill," is the only one recognized by the contract, and the only one to which the plaintiffs can lay claim. This mill was connected with, or near to the vein; the new mill a half a mile distant. The old mill was of inferior value, and was, under the contract, an appendage to the quartz vein; but to say that the new mill belonged to or was connected with the contract, is to say that simply because the defendants covenanted with plaintiffs, any other property the former might possess should be decreed to be divisional with Mary Hitchens. Hitchens paid nothing towards the erection of the new mill. Although present during the period of its building, he exercised no control over nor contributed a cent to its cost; and yet the decree appropriates to his wife one-third interest in it!

II. The Court erred in adjudging to plaintiffs one-third of the quartz mill. This assignment of error, with the third, possibly is the most potential against and the most fatal to respondents. This property was acquired independent of plaintiffs. It was built by the money of defendants. Its erection was at their entire cost; and so well convinced were the plaintiffs that it was defendants' sole property, that they do not even lay claim to it in their complaint; yet the Court decrees them one-third of it! It is unknown to the contract — it is foreign to the issue. It was and is the enterprise of defendants alone, and it was a violent thrust at their rights to decree an interest in it to other parties. The portable, or Cummings mill, belonged to the defendants, and plaintiffs had interest in the proceeds of the quartz crushed by it, in proportion to the extent of their interest in the vein, and no more. They could have no interest in the larger mill, and they do not claim an interest. We built both mills at our own cost.

The contract gives plaintiffs nothing but one-third interest in the vein. The mills and improvements are excepted. They could not claim them. The labor in mining the quartz and extracting the gold was the consideration given by defendants for plaintiff's interest in the vein. If it proved a lucrative business it would be continued, not otherwise.

III and IV. The third and fourth assignments of error may properly be united. The Court erred in adjudging plaintiffs entitled to one-third of the quartz ledge, and erred in adjudging them one-third

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of the profits arising therefrom. If they held but four-sevenths, as the Court finds, and as an inducement for us to enter into the contract represented themselves to be the proprietors of the entire vein, by what process of reasoning is the conclusion arrived at, that they should have one-third? They owned but one-half the vein, and yet it is decreed that we shall give them back one-third, with all of our improvements. And again, if they owned four-sevenths, what reasoning would give them one-third of the profits? It is shown in the testimony that we purchased the other three-sevenths from other parties, although when the contract was entered into, from plaintiff's representations and from his deed, we were led to believe that he held the entire vein. It was erroneous, then, to decree one-third of the profits and one-third of the vein. They were entitled to their *pro rata* on four-sevenths, and no more.

V. The Court erred in compelling a specific performance of the contract on the part of defendants, when the proof shows that plaintiffs had not fulfilled their obligations. The plaintiffs sold to defendants the entire vein. It is true that the deed of conveyance says "all the right, title and interest" of John Hitchens, yet the representation he made was that he was the entire proprietor. (See Dickson's Ev., p. 27.) The entire testimony leads to the conclusion that he held out the false representation of entire proprietorship. Defendants, then, must be looked upon, by every rule, as innocent purchasers without notice. The records did not disclose proprietary interest in any other party. The defendants were thus forced to put confidence in plaintiff's representations; and upon the statement of Hitchens, entered into the contract. The Court finds that Hitchens was not the owner of the vein, "but only four-sevenths," and that "the other three-sevenths were owned by" other parties. Hitchens gave us, then, under the finding of the Court, but four-sevenths, and we under the contract are to give his wife one-third of the whole! Or in other words, we are to erect a mill and improvements, in consideration of his permitting us to enjoy what he does not possess! Does it not at once suggest itself that the false representations of plaintiffs led defendants into the contract? Then, has Hitchens complied with the contract, and has he given us a title to, and possession of the lead he sold to us under his

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deed of September 15, 1858? We say he has not; and if we have, as we think we have, clearly demonstrated this to the Court, he is estopped from demanding from us a specific performance of the contract; and the Court consequently erred in thus decreeing. The authorities are strongly in our favor. In Bailey's Equity, vol. 1, p. 373, *Doar v. Gibbs*, the doctrines laid down fully sustain us. Again, in Kentucky, Littell, vol. 4, p. 255, *Mason v. Chambers*. In vol. 7, of Kentucky Reports, (J. J. Marshall) p. 370, *Grundy v. Edwards*, the Court says:

"Applications to the Chancellor for the specific enforcement of contracts are always addressed to his discretion, and he will rarely, if ever, in the exercise of that discretion, extend relief in such cases to any one who has willfully violated an essential part of the agreement which constituted an inducement to the purchase."

We were induced to purchase from the representation of Hitchens that he was full proprietor, and the title to the whole vein was an "essential part of the agreement." This doctrine is broadly laid down in Story's Equity Jurisprudence, vol. 2, p. 51, sec. 736: p. 91, sec. 769; p. 96, sec. 771; and p. 102, sec. 776. And again, it is fully asserted in Willard's Equity Jurisprudence, pp. 286 and 287; and again, in the same work, pp. 296 and 297, the principle is positively asserted.

Sanderson and Newell for Respondents.

1st. The judgment of the Court below is fully sustained by the testimony, and the relief granted is not greater than the case made by the testimony entitled the plaintiffs to receive. The prayer for relief in the bill is ample enough to cover all that is given by the judgment; but were it not, it could make no difference, for this Court has decided that where the parties are in Court, and a trial is had, it is the duty of the Court to grant all the relief to which the parties are entitled under the case made by the testimony.

2d. Although respondent did not own but four-sevenths of the lode, yet appellants knew that fact, and knew that the other three-sevenths had been abandoned by their owners. They then purchased with full knowledge of all the facts, as the Court below found.

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3d. There is no force in the position that the appellants were compelled to purchase the three-fourths owned by other parties. Nougues never dreamed of purchasing them until after this action was commenced, and then *only agreed to pay for them in the event he should be successful in this action.*

4th. That the respondents were entitled to a conveyance of one-third of the whole lode, and to an account and their share of the profits, there can be no doubt.

The only question about which there can be any difference of opinion is, whether they are entitled to one-third of the mill and railroad; and to determine this, a careful examination of the contract is only necessary.

Under this contract, the only mill the appellants were required to put upon the "lead" was the "Cummings portable mill," which they owned and had in operation in the neighborhood. This once upon the lead, of course became the property of both appellants and respondent Mary Hitchens. They never put it on the lead, but instead thereof put up the present mill. The fact that they more than performed their contract, can in no respect change the legal effect of the contract, or performed it in a manner and at a cost not required by the contract. From this it follows, that if the portable mill would have become the property of the concern, the present mill would also. The contract provides the respondent, Mary Hitchens, shall share in all property, and money, and advantages arising from the prosecution of the business. The erection of a mill, building of a railroad, &c., were the very things which the respondent Hitchens was unable to accomplish, and the very consideration which moved him to make the contract, and for which he gave two-thirds of the lead, then believed to be of immense value.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This was an equity proceeding, brought by respondents for a rescission of a contract made by Hitchens with the defendants in regard to a certain mining claim, or for a specific execution of the contract, with which is connected a prayer for account. The case was tried by the

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judge on bill, answer and proofs, and a decree rendered in favor of the complainants. No demurrer was filed. The contract was made with Hitchens, who, it would seem, was the owner, or contracted as the owner of the premises sold to the defendants. There appears to be an evident incongruity in the bill, in this: That complainants, *Hitchens and wife*, sue to set aside or rescind the contract made by *Hitchens alone* with defendants, Hitchens, at the time of making the contract, being solely interested in the subject of the contract, and yet Hitchens and wife assert the right of the wife to enforce the contract *as made*, the wife deriving her right to intervene from the fact that, by the contract and the deed executed under, or as a part of it, she was entitled to a certain portion of the property sold, and a share of the profits of the business of mining proposed to be carried on afterwards. In consideration of the deed of Hitchens to defendants, they conveyed to Mrs. Hitchens one-third of the mining claim described in the bill, and they also agreed to account in a certain manner with her for the profits arising from working the claim. In one aspect of this claim, it is apparent that Mrs. Hitchens would not be interested as a plaintiff; in the other she would. But, as this point was not taken by demurrer, or in any other form on the trial, we will proceed to consider the case as the District Court considered it, *viz*: as a bill for specific performance. The case is simple and without difficulty. The record shows that Hitchens claimed and was in possession of a mining claim or quartz lode, in the county of El Dorado; that he entered into a written contract with Nougues and Smith, by which he purported to sell them all his right, title and interest in this claim. In consideration of this conveyance and contract, Nougues and Smith executed an instrument under seal, on the 15th of September, 1857, whereby they granted, bargained and sold to Mrs. Hitchens, and her heirs and assigns forever, one-third part of the premises in dispute; this deed is averred to be in consideration of a sale and transfer by deed and delivery of possession of the right, title and interest of John Hitchens of this claim, and also a nominal consideration of five dollars from Mrs. Hitchens to the grantors. The Court especially find that, under and by virtue of Hitchens' conveyance to the defendants, they took possession of the claim. The deed proceeds as follows:

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“And we, the said parties of the first part, for ourselves, our heirs, executors, administrators and assigns, in consideration aforesaid, do covenant, stipulate and agree, with and to the said party of the second part, her heirs, executors, administrators and assigns, that the said parties of the first part will erect, establish, and put in operation, within twenty days from the date of these presents, upon said quartz lode, a quartz crushing mill which is now owned by said parties of the first part, and at work near the village of Kelsey, being a two stamp mill, known as Cummings’ Portable Mill, and that said parties of the first part will run said mill diligently, crushing quartz from said lode, and manage and conduct the same in a prudent and economical manner, and will pay over to the said party of the second part one-third part of the neat proceeds of said mill, after paying out of the gross yield all expenses necessarily incurred in procuring quartz and crushing the same, which payment of one-third of the neat proceeds as aforesaid to said party of the second part shall be made at each and every washing or cleaning up of gold at said mill. And the said party of the second part shall have the right and privilege, at any and all such washings or cleaning up, of being present either in person or by agent, for the purpose of inspecting and ascertaining the amount of such yield, and shall at any and all reasonable times have access to the books of the concern, and may examine said parties of the first part, or either of them, or their agent or clerk, on oath, respecting the condition of the accounts of the concern.”

“It is further covenanted, stipulated and agreed by the said parties of the first part, for themselves, their heirs, representatives and assigns, with and to said party of the second part, her heirs, representatives and assigns, that should there be at any time an increase of shares of stock in said quartz lode, or should new and additional partners be admitted into the concern, or should a joint stock company be formed for the purpose of improving and working said quartz lode, that in any such case said party of the second part is to share in the advantages and profits of any and all such arrangements with said parties of the first part, in proportion to their several interests. And if in any such case money or property is realized by reason of such arrangement, said party of the second part shall be entitled to and shall have one-third of such money or property.”

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"And said parties of the first part further covenant and stipulate with and to the said party of the second part, her heirs, representatives and assigns, that said business shall be carried on and conducted for the benefit of the said several parties to these presents, as aforesaid, in a fair and economical manner, without incurring any unnecessary expense or outlay in conducting the same."

"In witness whereof, we, the said parties of the first part, have hereunto set our hands and seals, this day and year first above written.

"J. M. SMITH, [L. s.]

"Joa. NOUGUES, [L. s.]"

"Witness: EARL S. POWERS."

Smith and Nougues, after going into possession, gave, by advertisement, notice to all persons concerned, that they would sell the shares in this claim, if payments were not made of the assessments due on such shares by the time of sale — 10th January, 1858. It is also found by the Court that Nougues and Smith did not, within twenty days after the date of the contract, nor at any time, erect the portable mill described in the agreement; but in lieu of it, proceeded to erect a large and costly mill, with eighteen stamps, without the consent of the plaintiff except so far as that consent might be inferred from the knowledge of the latter that the mill put up was being built, and his making no objections thereto. It appears, further, that at the date of the deed to defendants, Hitchens was the owner of only four-sevenths of the quartz lead; but it was found that defendants knew at the time of the purchase that Hitchens had only this interest; and that they took the risk of the other interests being forfeited or abandoned; and it is further found that these outstanding claims were bought after this contract, and by the terms of the purchases they were only to be paid for if the defendants succeeded in this suit. The defendants retaining the possession, refused to render any account, and claimed to hold the premises in their own right, unaffected by the stipulations of the contract. The Court below rendered a decree declaring the right of the plaintiffs to enforce the contract, and for an account. This decree is appealed from.

The Court below was clearly right upon the construction given to

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the evidence after hearing the witnesses, who were not entirely agreed in their statements. On looking over the proofs we are by no means satisfied that the Court below erred in its conclusion of facts; but as there was some conflict in the testimony, we are not disposed to interfere, unless it is clear that the District Judge, whose opportunities for judging the value of, and weighing correctly the evidence, are better than ours, erred in his decision upon it.

The defendants, having taken possession under Hitchens, cannot retain that possession, and refuse compliance with their agreement made in consideration of such possession and right to it. This is a plain, and, we believe, almost universal principle of law. But beyond this, it seems that the defendants only contracted, not for the title to the premises, but for the right and interest of Hitchens; and this they got; and still more, by force of this possession, doubtless, they were able to acquire, for what is equivalent to title or nothing, the outstanding interests; for not getting which immediately from Hitchens they claim a right to refuse performance of their covenants. Nongues is evidently estopped by his deed (and Smith, too, if he executed the deed, and we think he did in effect, for he says in his answer that the deed is sufficiently executed to pass title to Mrs. Hitchens.)

It follows, therefore, that under the statute of 1855, whether Nongues and Smith had title or not, at the time of their deed to Mrs. Hitchens, having conveyed to her by deed purporting to convey in fee simple absolute, their subsequent acquisition of title inured to her benefit.

The only question about which there can be any doubt is whether, as Nongues and Smith did not put up the sort of mill intended in the contract, but another and more costly one, if it appeared on the final hearing that the complainant has made or lost by this change, or if she did or did not assent to it, whether the proper expenditure for this, or the value of its use, or the injury for not putting on the premises the mill stipulated for, should be taken into the estimate in settling the account. But this matter can be better determined on the final settlement of the accounts when the facts are more fully developed.

The judgment is affirmed.

Glotzback v. Foster.

GLOTZBACK v. FOSTER.

The Supreme Court will not examine errors assigned on appeal, where, after the service of the notice of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment, were waived.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

In this case the notice of appeal was served on the Respondent's attorneys on the 15th day of May, 1858, and on the 23d day of May, 1858, the following stipulation was filed in the clerk's office of the Court below:

"Glotzback v. Foster — It is hereby stipulated and agreed between the parties hereto, that defendant is entitled to a credit of one hundred and fifty dollars on the execution in this case, being the amount claimed in defendant's answer. Hereby waiving all errors in record and referee returns of amount due, also decree and execution made May 23d, 1858.

McCONNELL & STEWART,
Attorneys for Defendant.

BUCKNER & HILL,
Attorneys for Plaintiff."

McConnell & Niles for Appellants.

Buckner & Hill for Respondent.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., concurring.

It is not necessary to examine the errors assigned in this case, for the reason that it appears from the record that after service of the notice of appeal the parties filed a stipulation, in which it was agreed that defendant should be credited on the execution, in the sum of one hundred and fifty dollars, and that all errors in the "record, referee's report, decree and judgment," were waived.

Judgment affirmed.

Sherman v. Rollberg.

SHERMAN v. ROLLBERG.

The Supreme Court will not notice errors assigned, unless there is a proper statement on appeal.

An answer to a suit on a promissory note by the assignee, which sets up as one defense: 1st. That the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order." 2d. That the defendant paid the note before assignment. 3d. Note was assigned to plaintiff after maturity, etc.: *Held*, not fatally defective.

APPEAL from the County Court of Colusa county.

This was an action brought in a Justice's Court on the following promissory note:

"\$95.

COLUSA, Feb. 1st, 1856.

"For value received, I promise to pay Harvey Phelps, or bearer, the sum of ninety-five dollars, one day after date, with interest at three per cent. per month.

"HENRY ROLLBERG."

The defendant filed his answer in the Justice's Court; a jury trial was had, and verdict and judgment for plaintiff, from which the defendant appealed to the County Court.

The defendant made an application to the County Court to amend his answer, which was granted, and thereupon he filed an amended answer of great length, setting up various grounds of defense as one defense. The grounds upon which this Court considered, sufficiently appear in the opinion of the Court.

The answer was verified.

The plaintiff demurred to this answer, and the demurrer was overruled. The cause was tried in the County Court by a jury, who returned a verdict for the defendant, upon which judgment was entered. Plaintiff moved the Court for a new trial, which was granted on condition that plaintiff pay all costs, which he declined to do and appealed to this Court.

O. Stewart for Appellant.

The defendant's amended answer in this case only makes two points as a defense; one, an alleged alteration of the note sued on, the other, payment; neither of which under the pleadings can amount to a defense.

Sherman v. Rollberg.

1st. The defense set up as to the alteration is not good, because it is not averred that the alleged alteration was made with the knowledge, or by the authority or direction of plaintiff. *Humphreys v. Crane & Yale*, 5 Cal. 173; *U. S. v. Linn*, 1 How. 110; *Henfree v. Bromly*, 6 East, 309; *Lewis v. Payne & Cow.*, 71; *Nichols v. Johnson*, 10 Conn. 192; *Rees v. Ovenbaugh*, 6 Cow. 746; *Warring v. Smith et al.*, 2 Barb. Ch. R. 119.

Any other doctrine would destroy all faith in commercial transactions, for every suit upon a written instrument might be defeated, without any fault of plaintiff either by the defendant or a third person.

2d. The alteration of an instrument to avoid it must be material. *Turner v. Billagram*, 2 Cal. 520. An alteration to be material must be such as to materially affect the rights of the obligor. *Ib.*

3d. The alteration alleged in defendant's answer does not affect the rights of the obligor, for it makes no difference to him whether the note reads payable to order or bearer, as far as his liability to pay is concerned. From the admissions in defendant's amended answer, if the alteration (for the sake of the argument) could be considered material, it would only temporarily suspend the right of recovery in the plaintiff until he could get the note endorsed over to himself, which is conclusive that the alleged alteration is immaterial, as far as the rights of the obligor are affected.

4th. An alteration is immaterial which does not vary the nature, subject matter or value of the contract. *Humphreys v. Crane and Yale*, 5 Cal. 173; *Martindale v. Follet*, 1 N. H. 97; *Hunt v. Adams*, 6 Mass. 519; *Granite R. R. Co. v. Bacon*, 15 Pick. 242. I cannot see how defendant's alleged alteration can have any such effect.

5th. The defense of alteration is not good, because it does not allege any time at which such alteration was made. To be a good defense, it should have been alleged to have been made after the execution of the note; for the presumption of law is, that it was made at or before its execution. 1 vol. Greenleaf on Ev. § 564.

6th. Any change in a written instrument, to make it an alteration so as to amount to a defense, must be charged to have been done by the party claiming under it; otherwise it is a mere spoliation, and no defense. 1 vol. Greenleaf on Ev. § 566.

Sherman v. Rollberg.

7th. The allegations of other alterations and defacements are too vague to demand any notice.

8th. Defendant charges, that if the note was assigned to A. L. Sherman, "'twas after it was due." Said Sherman does not sue as assignee, but as holder of the note payable to bearer; hence none of these charges are any defense.

9th. If plaintiff took the note after due, he would only be affected by equities between the original parties, and not subject to such as subsisted between intermediate holders. *Vinton v. Crow*, 4 Cal. 309; *Story on Promissory Notes*, § 178; *Ib.*, note 4; *Chitty on Bills*, page 246. Also, note *a*; *Ib.* 24, and a note.

10th. If Neal was the agent of Rollberg, and took the note up as such agent, and passed it to a third person, such third person becomes an innocent *bona fide* holder; and as between such holder and Rollberg, Neal's acts are binding, unless fraud or collusion is charged between them, which defendant has not charged.

11th. Neal must have held said note either in the character of intermediate holder or agent. If intermediate holder, no off-sets are good as against plaintiff; if agent, his acts must bind defendant unless fraud or collusion is charged with plaintiff; either horn of the dilemma will defeat the defense set up. If the former decisions of this Court are correct, then our position is right, and the defense must fall.

L. Sanders, jr., for Respondent.

As to the matters set forth in the defendant's answer, and the plaintiff's demurrer thereto, respondent supposes it cannot be assigned or regarded as error here; first, because there was no complaint on the part of plaintiff below; secondly, our statutes regulating proceedings before justices of the peace do not require the pleadings to be in writing, and although the answer may not be technically correct, it shows two grounds of objection to any judgment of this Court directing a reversal of the judgment of the County Court. Because the cause was submitted to the jury, both on the question of payment, and on the question of alteration made by some holder without the authority or consent of the respondent, we therefore ask for an affirmance of the judgment as well for this as the previous reason.

Heston v. Martin.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This is an appeal from a judgment. Various errors are assigned, but we cannot notice them for want of a proper statement.

No other error is assigned except the overruling of the demurrer to the amended answer. This pleading is rather loosely drawn, even for County Court practice, but we think it not fatally defective. If the point of the defense were the alteration of the note, the argument of the appellant would be conclusive; but we do not so consider it. The real defense attempted to be set up is, that the note was made payable to order, and was afterwards fraudulently made payable to bearer; that the defendant paid the note before the plaintiff became assignee of it; that the defendant became assignee after the note was due. All these matters are stated as one defense, and not separately, and if true, are amply sufficient to defeat the action.

Judgment affirmed.

HESTON v. MARTIN.

In a mechanic's lien, it is not necessary to give the items of the work and materials, in the statement of the lien filed, where the contract for the construction of the building is in a sum in gross.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action to enforce a mechanic's lien, for the construction of a house and materials furnished.

Plaintiff made a written contract with the defendant for the construction of a house. Defendant was to pay therefor a specified sum in instalments.

The case was tried by the Court, and judgment rendered for the defendants — the Court finding that, under the contract, there was nothing due. By a stipulation entered into, it was agreed to submit

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to the Court for its decision, the question, whether the amount of \$2,080.75 — this being the balance due under the contract — was a lien upon the premises. The Court rendered a decision establishing a lien to this amount, from which decision this appeal is taken.

Robert C. & Daniel Rogers for Appellant.

Harmon & Lobbatt for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This appeal is without merit, and it is apparent that the only point seriously urged by the appellant — to wit: that an account is necessary, giving the items of work and materials in the statement of lien filed — cannot be maintained in case of a contract for a sum in gross.

Judgment affirmed, with ten per cent. damages.

THE PEOPLE *ex rel.* THE SAN FRANCISCO GAS COMPANY
v. THE BOARD OF SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO.

A *mandamus* directing a Board of Supervisors to proceed and audit certain accounts of the relator, does not necessarily require the Board to allow the accounts; such Board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an application, on the part of the plaintiffs, to the Court below, for a *mandamus* to compel the defendants, as a Board of Supervisors of the City and County of San Francisco, to audit an account of the plaintiffs for gas furnished the city for lighting the streets and City Hall, in pursuance of a contract made with the city and James Donahue & Co., and assigned by Donahue & Co. to the relators. The

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application was made upon affidavit and notice to the defendants. Three separate grounds of defense were set up by the defendants in their answer, as reason why the writ should not issue, but as they were not passed upon by the Court, they are not given. The following is the order of the Court below, granting the writ:

"On filing affidavits in this cause, and after hearing F. M. Haight on the part of the relator, and F. P. Tracy on the part of the defendants, and due notice having been given of the application according to law: It is ordered, adjudged and decreed that a writ of mandate be ordered to the Board of Supervisors of the City and County of San Francisco, commanding them to audit the accounts of the relator, set forth in the affidavit of J. G. Eastland, which have accrued since the first day of July, 1856, in accordance with the original contract made with James Donahue & Co., and in pursuance of the provisions of an Act of the Legislature, entitled 'An Act for the Relief of the San Francisco Gas Company,' approved March 5th, 1858."

From which order the defendants appealed to this Court.

F. P. Tracy, City and County Attorney, for Appellant.

The *mandamus*, as granted, commands the Supervisors "*to audit the accounts of the relator set forth in the affidavit of J. G. Eastland,*" &c.

The term *audited* in reference to demands on the treasury, is to be understood as meaning "*passed upon and finally allowed.*" Consolidation Act, 1856, § 83.

The Legislature at the session of 1858, passed an Act for the Relief of the San Francisco Gas Company, (Stat. 1858, p. 46) which gives to the Supervisors the only power they have in relation to the claims of the Gas Company. Sec. 1 authorizes them to ADJUST, audit, allow and cause to be paid, &c., the claims in question.

Nothing can be more evident than that the Legislature intended to give the Supervisors power to determine how much was due the San Francisco Gas Company, on any bill presented, and never did intend to take away their power to examine and reject any claim that was not due.

The power to *adjust* is the power to consider how much, if anything, is due the plaintiffs.

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2d. It is admitted that if it were true that the Supervisors had refused to *adjust*, audit and allow the claim of the Gas Company, according to law, the Court might properly issue *mandamus* to put them in motion, and compel them to act.

But the Supervisors have not refused. They deny it on oath, and the relator does not attempt to prove their allegation.

3d. The only point in controversy is, whether the Supervisors can be compelled by *mandamus* to *approve* a demand of the San Francisco Gas Company for \$39,601.70, when there is proof offered them that that sum is due.

The Supervisors maintain that no Court can, by *mandamus*, take away from them the right to examine this account, and "*adjust*" it by ascertaining how much is due on it. They require, of course, some proofs or vouchers to show the amount of indebtedness, and have a right to a reasonable time for their examination.

But the Gas Company, not content with the pound of flesh to which it is entitled by law, undertakes to obtain a *mandamus*, which shall compel the Supervisors to allow their demand for the exact sum of \$39,601.70, without examination or proof, and when they dispute their indebtedness to that amount, and deprive them of their right to a jury trial to ascertain the amount.

This is perhaps the first case where any Court has issued *mandamus* to compel the allowance and payment of a *specific sum not ascertained to be due*.

Mandamus is not the process to ascertain an indebtedness and liquidate an open account.

The *mandamus*, as well as the petition, is in its terms a cheat and fraud on the part of the relators.

Both the petition and the writ, as drawn by the counsel for the relator, carefully exclude the words of the Act which give a discretion to the Supervisors. They drop and keep out of sight the word *adjust*. They do not require that the Supervisors shall allow such sum as they find to be due, but that they shall allow the claim for \$39,601.70.

4th. *Mandamus* will issue to the Supervisors to compel them to act upon a demand — to set them in motion — but not to control their discretion or oblige them to allow specific sums.

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The appellant relies upon the authorities in the respondent's brief to sustain this doctrine which has again and again been held by this Court.

5th. The appellant submits that it does not object to the issuance of a *mandamus*, if the relator desires it to require the Supervisors in the language and true intent of the Act, (Stat. 1858, p. 46, sec. 1) to adjust, audit, allow and cause to be paid, etc., the demand of the relators for such sum as shall be found to be due according to the contract mentioned in relators' affidavit, and the provisions of law in relation thereto.

But they say, the judgment of the Court below ought not to stand, for the foregoing reasons and for those set forth in the defendant's answer.

F. M. Haight for Respondents.

This writ is the proper remedy to enforce obedience to acts of Parliament and to the King's charters, and in such cases is demandable "*ex debito justitiæ*." Bacon's Abridgment, the title *mandamus*, page 118 of edition of 1854. Pursuing this principle, it is the appropriate remedy to compel obedience to the Legislative Acts of a State. Such has been the course of decision in the State of California, and is supported by adjudications in other States of the Union. It becomes necessary to examine the statutes in relation to this subject. No payments can be made out of the Treasury until the same have been duly approved by the Board of Supervisors and audited. Sec. 95 of the original act, session laws of 1856, page 172. Sec. 85 as amended, page 217 of the session laws of 1857, especially requires that all demands of the description of the demand in this case, must first be approved by the Board of Supervisors before it can be audited or paid. In the original bill, fifth subdivision of Sec. 74, page 165, the Supervisors were expressly authorized to provide for lighting the streets, but by a singular provision in Sec. 95, page 172 of the statutes of 1857, and the amendment of the same section, page 218, session laws of 1856, they are not authorized but prohibited to pay anything for this object. It is not necessary to discuss how far the power of the Legislature extended to exempt the corporation from a compliance with its

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contracts, because by a law passed in 1858, page 46 of the session laws of that year, the defendants were expressly authorized to adjust, audit and allow, and cause to be paid the amounts due the relator for gas furnished since the first day of July 1856. A duty has by this Act devolved upon the Board of Supervisors, which they have failed to discharge. "Words of permission, when tending to promote the public benefit, are always held to be compulsory." Bacon's Abridgment, and the authorities cited, page 439.

In the case of the Commonwealth v. the Mayor, 5th Watts, (Penn. R.) it is said: "The performance of a corporate function is not a duty to be demanded by action but compelled by *mandamus*." The People *ex rel.* of Wilson v. the Supervisors of Albany County, 12 John. 415, illustrates the position.

Bright v. the Supervisors of Chenango, 18th John. R. 243, illustrates the same principle.

The case of McCullough v. The Mayor of Brooklyn, 23 Wendell R. 458, is more to our present purpose.

In the case of Hull v. the Supervisors of Oneida, 19th John. R. 259, the Court says: "The superintending control over inferior courts, magistrates, corporations, etc., by *mandamus* is in *subsidium justitiæ*. The King v. the Archbishop of Canterbury, (15 East, 117); the People v. Steele, 2 Barbour Sup. Court Rep., page 418.

See 2 Pickering Rep. 414. Rex v. Doctor Windham, 1 Cowper, 378. In Davis v. the Commissioners of Bristol, Morton, J., "*Mandamus* lies to all inferior tribunals, magistrates and officers, and extends to all cases of neglect to perform a legal duty where there is no other adequate remedy. It applies to judicial as well as ministerial acts. If the duty be judicial, the mandate will be to the officers to *exercise their official discretion or judgment*, without any direction as to the manner in which it shall be done. If ministerial, the *mandamus* will direct the specific act performed." 21 Pick. R. 259.

In the case of Selkirk v. The Board of Supervisors of the County of Sacramento, 3 Cal. Rep. page 323, a *mandamus* was granted to compel the Supervisors to act. They refused to exercise the legal discretion confided in them.

The People *ex rel.* McDougal v. Bell, Comptroller, 4 Cal. 177, illustrates our position.

McGregor v. Shaw.

Tuolumne County v. Stanislaus County, 6 Cal. Rep. 440. In this case the Court held the proper order was to command the Supervisors to audit the account; exactly what we claim in this.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

In this case, we understand the *mandamus* merely to direct that the Supervisors shall proceed to audit the claims of the relator in this proceeding. This does not necessarily require of the Board to allow the account; they have a discretion in respect to their action in this regard, and though they are compelled to proceed to act on the subject matter of the claim, yet the *mandamus* does not control or prescribe the mode, or determine the result of their action.

The judgment is affirmed.

McGREGOR v. SHAW *et al.*

The allegations of a complaint are confessed by a default.

APPEAL from the District Court of the Fourth Judicial District, County of San Francisco.

The question in this case turned on the sufficiency of the complaint, which is in substance as follows:

The defendant had commenced an action against the plaintiff, to recover some \$3000, alleged to have been loaned to her by the plaintiff. The plaintiff had a valid and meritorious defense against this claim, but for the sake of peace, and to avoid litigation, he paid her five hundred dollars in full satisfaction of her pretended cause of action. She accepted that amount in full satisfaction, and executed and delivered to him a full release under seal, a copy of which is annexed to his complaint.

When he paid the money, she also promised to have her action im-

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mediately dismissed. Relying upon this promise, the plaintiff filed no answer. Instead of complying with her promise, and notwithstanding she had formally released the cause of action and received the consideration for the release, the defendant fraudulently caused a judgment by default to be entered in the action against the plaintiff, for the full amount of the claim, and fraudulently withheld the execution upon the judgment until after the term expired at which the judgment was entered, with the design thereby of precluding the plaintiff from having the judgment set aside by motion in the Court in which it was entered.

The plaintiff had no notice of the entry of judgment until the term had expired. The defendant then issued execution on the judgment, and the first information the plaintiff had of the fraud practiced upon him, was by the levy of an execution on his property. He applied to the Court to set aside the judgment, which was done; but on the defendant's appeal, the Supreme Court reversed this order of the Court, on the ground that the term having expired, the Court had no power to set aside the judgment.

To this complaint the defendant demurred.

The demurrer was overruled, and the defendant having declined to answer, a decree was entered in the Court below, declaring the former judgment fraudulent and void, and perpetually enjoining its execution.

From this decree the defendant appealed.

B. S. Brooks for Appellants.

Crockett & Crittenden for Respondent.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The complaint in this case states facts sufficient to entitle the plaintiff to the relief he seeks; and its allegations being confessed by the default, the decree was properly entered, and must be affirmed. So ordered.

McKune v. John B. Weller.

PEOPLE *ex rel.* MCKUNE v. JOHN B. WELLER, GOVERNOR.

An election to fill a vacancy in the office of District Judge is invalid, unless made under and in pursuance of the proclamation of the Governor.

The statute requiring the Governor to issue his proclamation of election to fill vacancies in certain offices is mandatory, and an essential prerequisite to all such elections.

The object of the proclamation is to give notice to the electors that such an election will be held.

An election cannot take place under the Constitution without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law making power and through legislative enactments; and the Legislature must provide for and regulate the conduct of an election, or there can be none.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an application to the Court below for a *mandamus*. The facts are as follows:

A. C. Monson was elected Judge of the Sixth Judicial District at the September general election, 1852; he resigned in 1857, when Charles T. Botts was appointed and commissioned by the Governor. No proclamation was made by the Governor for an election for Judge at the general election of 1858, for the unexpired term of Monson; that is for the intervening period between September, 1858, and January, 1859. At the general election of September, 1858, John H. McKune received, for the short term, two thousand and fifty-six votes, being a majority of those cast for Judge for that term, but not a majority of votes cast at the election; and he is also returned as having received a majority of all the votes cast for the long term. He obtained the certificate of the proper county officer of his election for the short term, and applied to the Governor for a commission, which was refused. This proceeding is taken to enforce that demand.

The Court below refused to issue the writ and the relator appealed to this Court.

Currey & Crocker for Appellant.

1. Has the relator right to the office for which he demands a commission?

McKune v. John B. Weller.

By the Constitution, vacancies in office were contemplated, and provision is therein made for supplying the same, by the grant of a commission by the Governor, which should expire upon the occurrence of a specified event. (Cons., art. 5, sec. 8.)

By the statute entitled "Courts of Justice," (Wood's Dig., 150, sec. 15) it is provided that the Governor shall fill a vacancy which may happen in the office of District Judge, by granting a commission, which shall continue until the election and qualification of a Judge in the place of the one so appointed and commissioned; and also, it is declared by the same statute, that "a Judge to fill the vacancy shall be chosen at the first general election subsequent to the occurrence of the vacancy."

By section 43 of the statute entitled "Office," (Wood's Dig., 561) it is also provided, that whenever a vacancy shall happen in the office of District Judge, the Governor shall fill the same by granting a commission, which shall expire at the next general election by the people, at which election such officer shall be chosen for the balance of the unexpired term.

There was a vacancy in the office of the District Judge of the Sixth Judicial District, which occurred long before the general election of 1858, which was filled as provided by the Constitution and laws; and here arises the inquiry, was the relator elected at the last general election District Judge for the balance of the unexpired term existing in the office of District Judge of such district?

The answer to this is, that he was so elected, if there then existed a balance of a term then unexpired.

The term of six years, mentioned in sec. 6, art. 8, of the Constitution, is an entity, however many incumbents thereof there may be during such term. See in connection to this question, sec. 5, art. 6, of the Constitution; and *Smith v. Halfacre*, 6 How. (Miss.) R. 581; *People v. Green*, 2 Wend. 266; *Coutant v. People*, 11 Wend. 512; *Nubling's Case*, 6 Ohio State R. 40; *Hughes v. Buckingham*, 5 Sm. and M. R. 648; *People v. Langdon*, 8 Cal. R. 12; *Wood's Dig.* 375, sec. 4; *Ib.* 150, sec. 15; *Ib.* 561, sec. 43.

The relator received a large majority of all the votes cast at the last general election for the "balance of the unexpired term" men-

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tioned, and obtained a certificate of election from the proper officer: such being the case, he has a right to the office, unless some objection or circumstance exists rendering such election a nullity.

It is said the proclamation of the Governor did not designate the office in question as one to be filled at the last general election. Here a dereliction of duty is interposed by the respondent as a defense, strange as it may seem.

But such defense is untenable.

The statute provides, that "a Judge to fill the vacancy shall be chosen at the first general election subsequent to the occurrence of the vacancy."

The statute entitled "Elections" (Wood's Dig. 375) provides that the annual election generally held in September of each year shall be called the general election. Special elections are therein defined; and it thereby appears, that special elections can only be held for the purpose of filling vacancies in office. No special election can be held without the proclamation of the Governor *ordering* it, and appointing the time at which the same shall be held. The proclamation is a condition precedent to the validity of a special election. Not so with a general election; because it is appointed by the statute, and by the statute the time for holding the same is fixed.

As already appears, special elections can only be held to supply vacancies in office; but the converse of this, that all vacancies in office must be supplied at special elections, is not true, because the statute has declared otherwise. Certain vacancies must be filled at the general election.

See on this subject, Wood's Dig. 375, sections 1, 3, 5, 8; *Ib.* 561, sec. 43; *Ib.* 148, 150, sections 4, 15; *People ex rel. Harris v. Brenham*, 3 Cal. 477; *People ex rel. Davis v. Cowles*, 3 Kernan, 350.

If these authorities are to be followed, then the relator has right to the office and commission demanded.

Attorney General for Respondent.

The question is whether relator is entitled to the commission sought. Upon this question I would submit the following propositions:

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1. That under our Constitution, District Judges are elected for the term of six years, and that it is immaterial, so far as the term is concerned, as to whether they are elected to fill a vacancy which *has* occurred by death, resignation, or otherwise, or is *about* to occur by the expiration of the term of an incumbent.

2. That the Constitution does not fix the day at which any term shall commence, and therefore it is competent for the Legislature to do so.

This power is deduced from the general doctrine that the Legislature may exercise all power not prohibited by the Constitution, and I have not found such prohibition.

3. That the Legislature has, by law, fixed the time at which the term shall commence, and that such time depends upon the particular facts and circumstances attending each case.

If, for instance, a Judge was elected at the last election, to fill the *vacancy about* to occur by the expiration of the term of another, then, under the law, his term would commence on the first of January next. Wood's Dig. 150, art. 634.

But if elected to fill a *vacancy* which had already happened, then his term would commence immediately upon his qualification. Art. 635.

4. That although every District Judge is elected for the term of six years, yet the legality of his election, when brought in question, depends upon the circumstances under which the election took place.

To illustrate: if the election had been to fill a vacancy which is *about* to occur, then his receiving the proper number of votes, &c., at the general election, would entitle him to the office, without regard to whether notice of such an election by proclamation had been given, the law in that case being sufficient notice. But if the election was to fill a vacancy which *had occurred* by death, resignation, or otherwise, before the expiration of the term of another, then the notice by proclamation would have been absolutely necessary to the legality of the election. *People v. Porter*, 6 Cal. 26.

No election of a District Judge would be valid without a proclamation calling it, except that provided for in art. 634, p. 150, Wood's Digest.

An election to fill the vacancy caused by the resignation of Monson would have been a special election, although held at the same time as the general election.

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Before such an election could have been held, a proclamation for that purpose must have been issued. (*People v. Porter.*) Without such a proclamation, the people would not be supposed to know that Monson had ever resigned. No proclamation was made for that purpose, and therefore the only legal election which was had for District Judge was one to fill the vacancy *about to occur* by the expiration of Monson's term.

For the purposes of this action we must regard Monson as still on the Bench, no knowledge to the contrary having ever been lawfully communicated to the voters of his district.

My conclusions then are, that McKune (if elected at all) was elected for a term of six years, commencing the first of January next, and that he was entitled to a commission to that effect. Such a commission has been delivered to him.

It has been suggested by the other side that McKune's six years should commence to run from the time of his qualification. To that end he should have been elected to fill the vacancy caused by Monson's resignation. But such an election would, as I have shown, have been a special election, for which a proclamation was necessary.

It seems to me clear that the question of the *time* for which a judge is elected, is not affected by, nor does it affect, the question whether the election was at a general or a special election. The two propositions are wholly distinct, and are not dependent the one on the other.

In connection with this branch of the case, I respectfully refer the Court to my brief in the case of *Brodie v. Weller*, argued at this term.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., concurring.

The first question which is made is as to the right of the relator to the office he seeks, or to the commission as evidence of that right. The objection has been taken by the Attorney General that, conceding that the short term, thus described, might have been filled by election, if otherwise regularly had, yet there was no legal election in September, 1858, for a Judge for that term, because no proclamation was made of such election by the Governor. It is urged in reply, by the counsel

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of the relator, that an election for an office of this character, and held under the general law, does not depend, for its validity, upon any act of the Executive, but rests upon the constitutional right of the voters to select the incumbent, and upon the general statute prescribing the time, place and manner of the election. This precise question has never been decided in this State, though the counsel on both sides have cited cases (which we purpose reviewing) to maintain that, in principle, the question has been decided in favor of their respective views.

By statute (Wood's Digest, 375, art. 2116, sec. 5) it is made the duty of the Governor, at least thirty days before any general election, to issue his proclamation designating the offices to be filled at such election, and to transmit a copy thereof to the Board of Supervisors of each county of the State; and by the succeeding section, it is made the duty of the Board of Supervisors to give at least ten days' notice thereof, by posting, or causing to be posted up, at each place of holding elections, in their county, a copy of such proclamation, and to insert the same in some newspaper published in the county, if any be so published.

The statute having required that the proclamation of the Governor and notice by the Supervisors shall be made previous to the election, it would seem to devolve upon the relator to show very clearly that these acts were not necessary to the validity of his election. It may be a difficult matter to define with precision the limits between those acts prescribed by the sovereign authority which are directory — that is, which may be obeyed or not, without affecting the validity of an act, and those which do affect it. Complaint is often made, and, not without reason, that Courts have sometimes gone too far in practically setting aside or holding nugatory the positive provisions of the statutes; for it is obvious, that where statutes affix no penalty for non-observance, and it is held that the provisions of them do not affect the validity of the acts to which those provisions relate, it is nearly the same thing to hold the acts valid and to hold that these provisions are entirely inoperative. A brief review of the authorities cited by the counsel of the appellant will go far to show where the true line of distinction is between statutes directory in their character, and those, the provisions of which must be substantially followed, in order to impart

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validity to the acts to which they relate. In order to ascertain this fact, and determine the necessity of the notice of this election, and the effect of a want of it, we propose to examine these cases in their order. The first case cited in point of time is that of *Rex v. Loxdale* and four others, (1 Burrows, 445) in which it is said (p. 447) that there is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory. The precise time in many cases is not of the essence. The illustration of this rule is given in the case of *Rex v. Sparrow*, (2 Strange, 123) in which it was held, that though the Justices had been guilty of neglect in not appointing Overseers of the Poor within the time specified by the statute, yet that they might be compelled to discharge this duty at a subsequent time. In Smith's Commentaries on Statutory and Constitutional Construction (p. 792, sec. 679) the author, after citing and approving this doctrine, says: "A distinction in the application of the rule in the cases cited should be observed, that is, between cases where certain acts to be done are of the essence of the thing required to be done by the act, in which case it is imperative, and things which are not of the essence; in the latter case, it is merely directory; and this is one of the criterions by which to determine whether the requisition is imperative or merely directory." * * *

Lord Mansfield says: "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an Act of Parliament, and clauses merely *directory*. The *precise time* in many cases is not of the *essence*." This distinction prevailed in the case of the *Thames Manufacturing Company v. Lathrop*. In that case, a statute required the Assessors to return an abstract of their assessment lists on or before the first day of December in each year, and the question arose, whether an assessment was valid when the assessment was not returned until after the time specified in the act. The Court held that the general statute had been made for the assessment of taxes, by which Assessors were to be chosen, whose duty it was to receive lists of all the inhabitants, and having perfected them by adding property omitted, by valuation of the items, and by the requisite assessments, to return an abstract of the lists to the Town Clerk on or before the first of December in each year. The lists and valuation of the

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Town Clerk were directed to be submitted, when requested, to the inspection of every person liable to pay taxes. A Board of Review was constituted, to hear appeals from the doings of the Assessors, and having given not less than ten days' notice, they were to meet on or before the first Monday of January in each year, to determine the appeals made to them. The assessment list, as annually made and corrected, was the rule for the apportionment of taxes to individuals. From this view of the law it appeared to be a positive provision, that the lists should be returned to the office of the Town Clerk on or before the first of December in each year. This direction was imperative, and was alone alterable by the Legislature. The Court must take the law as they found it, and could not say that a return after the first of December was valid, unless they assumed the character of law-makers. The reason of this legislative provision was very apparent. It was for the general benefit of every inhabitant of the towns, that each might inspect the list of his estate, and if he believed injustice done him, that he might appeal for its correction to the Board of Review. A time for the return of the lists should be limited, the general convenience demanded it, and that it should be sufficiently early for universal inspection, and preparation for a future hearing before the Board of Review, was perfectly obvious. On this principle the Legislature appointed the first of December, as the ultimate period of the return. This branch of the law was imperative, and as unchangeable by the Courts as any other; and were it within their competency it would be as difficult to assign a period more reasonable. That the return should punctually be made was indispensable. A different principle would nullify the law, and produce the general inconvenience arising from an unlimited return. No person in such case could know when he might inspect his list; and if the return was late, no time either for reflection or preparation for a review could be had. If a Legislature, in a charter of incorporation, had authorized the laying of taxes upon lists returned to a public office at a specified time, the necessity of a strict observance of limitation would not admit of a question. The case before the Court was strictly analogous to the one supposed. The general law was an enabling act to all the towns; it had prescribed the subjects of taxation and the mode, and as there was no authority to

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tax, except what was conferred by the law, it must be strictly observed. It had been inquired, whether the returns of the abstract of the lists by the Town Clerk to the Controller must be by the first of March in each year, according to the provisions of the Act in question; and if not, whether the Legislature is precluded from laying taxes upon the assessment lists? Unquestionably, it is not. The case put and the one under discussion were in no respect analogous. The abstract assessment lists of the towns must be strictly returned to the Town Clerk, or there was no legal assessment. But if a Town Clerk does not return to the Controller an abstract of the assessment lists, pursuant to the provisions of the law, the list was not invalidated, but he was subjected to a penalty."

Striter v. Kelly, 7 Hill, 9, is cited, but that case only holds that where a statute declares that the Common Council should vote by ayes and noes, the provision on that subject in the charter of New York was merely directory. In that case, Judge Bronson dissented; and we are inclined to think had the best of the argument. In 11 Wendell, 605, *People ex rel. Smith v. Peck*, etc., the principle declared in head note is, that an election of trustees of a church is good, although the requirements of the statute in respect to the notice of such election have not been complied with, provided the election was fairly conducted, and there is no complaint of want of notice. But this note of the Reporter is broader than the decision of the Court; for Judge Savage says: "The Judge stated to the jury that the election was not necessarily void because the notice given by the trustees to the minister was less than *one month*, etc., and did not contain the names of the trustees whose seats became vacant, and was not announced for two successive Sabbaths, provided the election was fairly conducted, and all in fact had notice; but if the omissions were fraudulently made, or the election had thereby been prejudiced, then the omission should invalidate the election. All this I think is sound doctrine." In the *People v. Runkel*, (9 Johns. R. 158) the Court says: "We must give the statute a reasonable and liberal construction for the benefit of the churches. (See also, 6 Cowen, 23.) The object of the notice is, that the voters may be fully apprised of the election, and may attend and exercise their rights. There is no pretense in this case that every

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voter was not present, for they appear to have come from a distance; the time was well understood, and had been the same for many years. No evil resulted from the omission, if there was any; no fraud was imputed, and all parties attended and thereby admitted notice." *Rodelbaugh v. Sanks* (2 Watts, 9) merely holds that a section of the Act of Assembly of Pennsylvania, providing that marriages shall be solemnized before twelve witnesses, etc., is merely directory, and the pregnant reason is given by C. J. Gibson, "that if it were held to affect the contract, the effect would be to bastardize a vast majority of the children which have been born within the State for half a century." The last case cited is that of the *People v. Cowles*, reported in 3 Kernan, 350, and is really the only one cited by the appellant (except one in our own State, to which we will presently refer) which seems to bear with any directness upon the precise question before us. This case, therefore, will justify a more detailed examination than we have given the others. The question came before the Court of Appeals of New York on this state of facts: Robert H. Morris was elected Judge of the Supreme Court of New York, for eight years, from first of January, 1853; on the twenty-third of October, 1855, he died. A general election of Judges was held on the sixth of November, 1855. No notice was given by the Secretary of State of this election to fill the vacancy in Judge Morris' term — the laws of New York requiring that officer to give the notice; but the death of Morris occurred after notices given of the other elections and after the time given for making such notification. At the election, the relator was elected. The Governor, however, not regarding the election of relator, appointed defendant to the office. The Supreme Court of New York, at special term, decided in favor of the defendant; and afterwards, at a general term, modifying the judgment in an important particular, confirmed the judgment of the special term. The case was carried to the Court of Appeals, and that Court, by a majority — five to three — reversed the judgment. The opinion in the case in 3 Kernan was delivered by Johnson, J., and J. J. Denio, Comstock, Selden and Hubbard, concurred. Mr. Justice Wright delivered a dissenting opinion, in which Justices Mitchell and Johnson concurred. The stress of the opinion of the majority was on the peculiar features of the Constitution of the

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State; from which they deduced the opinion, by a process of reasoning which is almost impossible for us to comprehend, that when the office of a Justice of the Supreme Court becomes vacant before the expiration of his term of office, the vacancy is to be supplied by the electors of the Judicial District in which it exists, at the next general election of Judges, although the vacancy occur at so late a day that no notice is or can be given by the Secretary of State or other officer, pursuant to the statute, that a Justice is to be elected to fill the vacancy; and that when the incumbent, whose term of office would not have expired for several years, died on the twenty-third of October, and the electors of the district at the general election of Judges, on the ensuing sixth of November, elected a person to fill the vacancy, such election was valid, notwithstanding no notice was given by the Secretary of State that a Justice was to be elected to fill the vacancy at the election. It will be seen, by a careful perusal of the opinion, that this conclusion was induced by the peculiar structure of the Constitution of New York, and that it was not necessary to decide whether, in an ordinary case of vacancy occurring before the time of giving notice, by the Secretary of State, as required by the statute, a failure to give such notice would affect the validity of the election. But even if this judgment were otherwise fully in point, it is stripped of much, if not the whole of its authority, by the fact that it is at best, but the judgment of five Judges against three of the same tribunal, those three supported by a contrary ruling of the Supreme Court at a special term, and sustained substantially by the Supreme Court at a general term, after the subject had been thoroughly discussed and maturely considered. But as to the particular point in this case, the decision, if it be for the relator here, is mere *obiter*, and is not even noticed in the report of the case as a point decided. The dissenting opinion of Mr. Justice Wright on the point involved expresses so forcibly our conclusions, that we insert it as expressive of our own views: "It is not contended by the relator that he has any right to the office, unless his interpretation of the thirteenth section be the correct one. He reposes himself upon the ground that the Constitution contains a positive direction as to the times when vacancies shall be filled, and that it would be an infringement of the instrument to restrict the right of the elector, by legislative

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enactment, to a particular kind of vacancies, viz: such as had occurred twenty days before, or of which the Secretary of State, and other officers of the Government have actually notified the people. He takes the unqualified position that the section is a restriction upon legislative authority, and that no statute can be enacted which shall interfere with the constitutional privilege or right of the elector, when a vacancy occurs prior to the day fixed for voting for Judges throughout the State, to cast his ballot for a person to fill the vacancy. By his construction the election to fill the vacancy is one held, not pursuant to any statute, but an unregulated assemblage of the electors under a constitutional provision. It is urged that it is not strictly correct to say that the election to fill the vacancy is held under the Constitution, as the Legislature provides the machinery, and the Constitution only fixes the time. But is it true that anything is provided by statute? A popular election is being held for the choice of other officers, regulated and conducted according to law, but not to fill a vacancy in the judicial office. The elector may embrace the occasion to deposit his ballot designating a person to fill a vacancy, but not under any statutory provision. He acts not pursuant to law, but the Constitution. Thus to sustain the relator's position, we are driven to assume that the term 'election,' as used in the Constitution, means something else than an assembling of the electors to vote under and in pursuance of statute authority; and that a valid election may be held independent of, and indeed in restraint of legislative regulation. That all the elector has to do is to deposit his ballot at the time fixed for a 'general election of Judges,' even though there be no statute regulation, or no authority by law, and the 'election' contemplated by the Constitution is complete. In this case it is not pretended that the election was held under any statute. No notice was given that a vacancy existed, or that the electors were required to fill it. No provision was made by law for receiving or canvassing the votes cast to fill a vacancy in the judicial office, or for ascertaining the fact whether there had been any choice. Before the votes were canvassed, the relator took the constitutional oath, and claimed to be entitled to the office, which he might well do if the 'election' was one unregulated by law, and valid by the simple force of a constitutional provision. I had supposed that it was a prop-

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osition not to be controverted, that it is by virtue of statutes alone that all valid elections are held. It has never before been pretended that a person could make title to an office through the popular vote, unless such vote was cast in pursuance of legislative regulation and authority. All the efficacy given to the act of casting a ballot is derived from the law-making power, and through legal enactments; and indeed, the Legislature must provide for and regulate the conduct of an election, or there can be none. The convention found the subject of popular election instituted and regulated by law, and the framers of the Constitution are to be understood as speaking of, and referring to such an entity as then existed, or might afterwards exist, by force of statute regulation. It is not to be assumed that the 'general election of Judges' mentioned in the thirteenth section, is not that authorized by law, and held under and in pursuance of legislative enactments, but a meeting of the people to vote under the organic law itself; and without such assumption the right of the relator has no foundation. His argument is that the Constitution appoints the time for the people to meet and vote, and all that is required to constitute a valid election, within the meaning of the thirteenth section of the Judiciary article, is for the electors to cast their ballots. Nay, further, that any statute regulation practically preventing the filling of a vacancy at the time designated in the Constitution, is absolutely void. Though the convention of 1846 may have been justly charged with legislating, rather than erecting the frame work of government, I may be allowed to repel the imputation (having been myself a member of that convention) that they so far mistook the nature and purposes of a written Constitution, as to suppose that it might or could contain within itself the elements of active enforcement. They meant by the term 'election,' that institution created and existing by operation of law, and that alone, and which, without the exercise of legislative power, could have no efficiency. The relator must make title under and in pursuance of a statute, or not at all. He must have received a plurality of votes at an election held pursuant to law, or he has no title or claim to the office. It was at such an election the Constitution provided that vacancies should be filled, and at none other."

"But let it be conceded that the Constitution only fixes the time,

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and all other essentials to constitute an election, except giving notice, are left to be prescribed by the Legislature, and that it has the power, and the obligation rests on it to provide for conducting the election; still, would this be a valid election? It is to be observed that, by fixing the time, the Legislature are virtually restricted from declaring that it shall be an essential requisite to a valid election, that the electors shall have official notice that a vacancy exists. Nothing is left to the law-making power but to provide for receiving the ballots, canvassing the vote, and declaring the result. Is not notice to the electors that a vacancy exists and is to be filled, an essential characteristic, independent of any statute requirement, to a valid election? I think that it is."

"Notice to the electors lies at the foundation of any popular elective system. The elector cannot act through the ballot without notice that a vacancy exists to be filled. Necessity and sound policy demand that every elector shall have both the knowledge and the opportunity to enable him to exercise the elective right deliberately and intelligently. In our elective system, the duty of giving notice is devolved upon the Secretary of State. The Legislature has wisely provided that the notice shall be given by this officer, within a time and in a way calculated to give the fullest notice to the electors. It may be that, under this statute regulation, the omission to give the required notice of an election of a Judge for a regular term would or ought not to vitiate the election. The elector should be presumed to know the law, and consequently, at what period the regular term of the public officers to be voted for will expire, and be prepared to act accordingly. But there can be no such presumption when the election is to fill a vacancy. I believe that no case can be found, holding that notice to the electors of the existence of a vacancy, and calling on them to fill it, is not essential to give validity to the meeting of the electoral body to discharge the special duty. Certainly, it could rest on no principle or sound rule of governmental policy. In the nature of things, notice to the electors that a vacancy exists, and calling on him to fill it, is an essential characteristic of a popular election; and public policy and safety require that it should be given in such form as to reach every elector who has the duty to discharge. Notice, therefore, being an

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essential element of an election to fill a vacancy, whether we regard the election at which the relator claims to have received a plurality of votes held in pursuance of the Constitution or the law, it was equally invalid."

The case of the *People v. Brenham* (3 Cal. 477) is the authority chiefly relied on by the relator. It is not necessary to assail that case; for, as we shall show, the principle there announced does not militate against the respondent. But it is proper to remark that the force of this case is somewhat shaken by the fact that it was decided by a divided bench, and that the two Judges who concurred in the judgment agreed to it upon different grounds. It is not easy to support that decision, even limited and qualified as it has been in the subsequent case of the *People v. Porter*, (6 Cal. 26). The able argument of the respondent's counsel suggests, to say the least, some doubts of the correctness of the principles there laid down. But the utmost extent to which the Court go in that case is to hold that no proclamation or notice is necessary to give validity to an election when the term is fixed by law, and expires, by limitation, at a given period, and the office is to be filled by statute at the time prescribed by law. In such case, it is held, as seems to be conceded by Mr. Justice Wright, in the case before cited from 3 Kernan, that the people are charged with a knowledge of the law, and must be held to act in accordance with that knowledge. In such case, the election must be held in any event, and it is not in any way dependent upon any extrinsic or contingent event. Though, as will be seen, we do not approve of much of the reasoning from which our predecessors deduced this conclusion, as we shall have occasion hereafter to explain, yet we do not here question the propriety of *that judgment* upon the facts stated. In the *People v. Porter*, (6 Cal. 26) this same general doctrine came under review. That was the case of an election by the people of a Judge of the County Court, to fill a vacancy occurring by the resignation of the previous incumbent. No proclamation was made by the Governor. The Governor appointed Mr. Porter after this election. The present Chief Justice delivered the opinion, and after stating the facts, says: "This being the case, was the election of Mr. Leake, which occurred on the 5th of September, legal? The

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law provides that vacancies in certain offices shall be filled by election at the next general election after the vacancy occurs. To render such election valid, it is necessary that it shall be conducted in the manner prescribed by law. The law requires that the Governor shall make proclamation for thirty days prior to each general election, designating the offices to be filled at such election. The Supervisors of each county are required to give notice for at least ten days, by posting a copy of such proclamation at each place of holding the election in the county, and inserting the same in a newspaper, if one be published in the county. (See Statutes of 1855, page 160.)

"No such notice was or could have been given in this case, there not being thirty days intervening between the date of the letter of resignation and the day of election. The order published by the Supervisors of said county, being without authority of law, was a nullity. It is contended that the statute requiring proclamation to be made of the offices to be filled is merely directory, and that a failure to give such notice will not vitiate an election. The case of the People v. Brenham, (3 Cal. Rep. 491) is cited in support of this doctrine."

"The opinion in that case does not go to the extent claimed by counsel, and is not applicable to the case under consideration. I understand the decision to apply only to general elections, or elections to fill vacancies occasioned by the operation of law. The question involved was the validity of an election held under the charter of the city of San Francisco, to fill vacancies occasioned not by resignation, but by reason of the expiration of the term for which the incumbents were elected. The Court properly held, that the failure of the incumbent to give the required notice could not deprive the people of their right under the law to elect their officers. But it has nowhere been decided that such notice is not essential to the validity of all special elections. An election to fill a vacancy occasioned by the death or resignation of an officer is a special election, and the provision of our laws which requires such elections to be held at the same time and place with general elections does not change their character."

"It is essential to the proper exercise of the elective franchise that the voters should be informed of the offices in which vacancies have occurred, before each general election, in order that they may select fit and proper persons to perform the duties of such office."

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"The law gives notice of those offices which are vacant, by reason of the expiration of the term of the incumbent. The law also provides that the Governor of the State shall, by proclamation, give notice of such vacancies as are occasioned by death, resignation, or removal from office; and without this notice elections to fill such vacancies are invalid." It will be seen that the late Chief Justice dissented, for the reasons expressed in the case of Brenham. The inference would seem to be that he considered the doctrine of Porter's case as conflicting with those in Brenham's.

It is difficult to see the distinction in principle between this last case and that at bar. If Monson had not resigned, he would have been entitled to hold for this short term — that is, for the period intervening between the election and January, 1859. This period, indeed, was a portion of his term of six years, commencing from January 1st, 1853. There was, then, a vacancy for this period. This vacancy did not exist by operation of law, in the sense in which those words are used by the Court in the extracts just given. And therefore, within the doctrine of that case, it was necessary for the public notice required by the statute to be given. The argument that, as Botts was appointed to fill Monson's place, and as, by the Constitution, Botts' appointment could last only until the election, the vacancy left in the balance of the term, by operation of law, cannot be upheld. In the first place, it cannot be assumed that all the voters of the county necessarily knew that Monson had resigned and Botts had been appointed to succeed him. Even if the knowledge of the fact could be assumed in this particular case, it would make but little for the argument, for we are now discussing not an isolated case, but the *general principle*. The law acts by general rules, not by exceptional or particular instances, and whatever may be the merits or demerits of the given case, they must yield to the rule which is to govern *all* cases arising under the law. Thus, the very rule invoked here is that the people are presumed to know the law, and that it required an election to be held for this term in September, when it is quite evident that the people knew no such thing. But still, we must give effect to such general principles of presumption, against our very strong assurance that in particular instances they were not true as matter of fact. The

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very reason why a proclamation is ordered to be made, is because it is supposed that the people would not otherwise know the fact proclaimed. We cannot presume, as matter of law, that they did know; still less can we presume they knew that an election was legal and proper in the face of the Governor's proclamation, which impliedly asserted the contrary, by giving notice that an election would be held to fill many offices, among which this was not. And the facts in the record go to show that the people generally did not so understand or believe.

We have thus reviewed the authorities cited, and they certainly fail to show that the position of the relator is sustained by any authority directly to the point, and of controlling weight. And we are entitled to conclude, from the ability and research of the counsel, that they have not been cited, because none such exist. We have examined with care the authorities within our reach, and have not been more successful than the learned counsel. We think, however, that the examination we have made shows the truth of Mr. Justice Wright's observations, that no authority can be found which authentically holds (for the doctrine of 3 Kernan is mere *obiter*) that an election held without notice, to fill a vacancy, is valid. The case of *People v. Porter* is the other way; and while the following cases do not expressly hold that the notice is essential, yet they evidently go, more or less directly, upon the idea that it is. (9 N. H. R. 524; *Id.* 369; 23 Wendell, 9; 4 Pick. 257. See also, 8 Greenl. 365; 7 N.H.) While the principle which establishes the line of discrimination between acts directory and acts indispensable clearly indicates the correctness of the rule we have adopted—a rule supported by the clear and cogent reasoning of Mr. Justice Wright and those associates who agreed with him in the case of *Cowles*. Nor do we, as before intimated, see the force of the reasoning urged in favor of the contrary view. The argument *ab inconvenienti* is far from the most logical and satisfactory. It is easily answered, too, by corresponding evils on the other side of the proposition.

It is true, the Governor may prolong or increase his power by failing to make the proclamation. But this cannot be expected in these cases of vacancy, nor indeed, in any case. It is not to be supposed

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that the Executive will prove derelict to his duty, especially for so small an object. The same argument would deny all but a scanty portion of his power. Under the pardoning power, he might, by a system of universal pardons, practically abrogate the whole criminal law; indeed, he might introduce general anarchy by refusing to execute the laws. The Legislature may dissolve the Government by refusing to levy taxes or to make appropriations, but these possible abuses of power are not reasons for refusing to give or acknowledge it. The evils on the other side are more probable of occurrence, and scarcely less injurious in character. If we hold to the principle that, whenever a vacancy happens, an election may be valid without notice to the people, frauds may and will be committed. This case may not afford an illustration, but others would. Where would be the limits of the *principle*? for we must have some general rule. It would apply to districts of more than one county as well as smaller districts — to cases of vacancy in other offices as well as those of Judges — and to Judges of the Supreme Court as well as of districts and counties. If death or resignation happens the day before the election, and when the fact was unknown — possibly kept concealed by design — all that it would be necessary for a man to do, would be to get a few votes — it matters not how few — and he could get the office, not only *without* but *against* the will of the great body of the people. The establishment of the principle would beget a laxity in the giving of this public notice of elections which might keep the people, in many instances, in ignorance of the offices to be filled at the various elections; and all this is to be done because of a legal presumption of “knowledge by the people of law and facts,” which every man knows is not always possessed even by the best informed, of which this case is itself a sufficient illustration. We cannot hold as nugatory a plain statutory enactment upon reasons so unsatisfactory. We think we have shown that the definition given by the authorities of directory acts, namely, those which are not of the substance of the thing provided for, has no application to this statute; that, on the contrary, the means, and only sure and efficient means, of bringing to the people authentic knowledge of their electoral rights and duties, is of the very substance of the election at which they are to exercise them; and that, if we hold

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in cases of vacancies that the Act requiring this proclamation which gives this intelligence is merely directory, and therefore, to be followed or not at pleasure, we may, with the same propriety, set aside every provision of law regulating the time, place and manner of elections. We should thus hold that an election may be independent of legislative control, protection or regulation.

No censure is properly attributable to the Executive Department for its failure to insert this term in the proclamation; for the question as to the existence of this fraction of time as a period to be filled by popular election was a new, and by no means, a clear one, nor do we now decide that it did constitute such a term as to have called for this action.

This view being decisive of the relator's case, it is not necessary for us to pass upon the other questions raised in the case. Some of them arise in other cases before us, and will be disposed of when those causes shall be determined. Nor is it necessary to consider by what title the incumbent holds the office in question. It is sufficient that the relator has no title to it.

The judgment of the Twelfth District Court is affirmed.

FIELD, J.—I dissent.

WHITE v. MOSES *et al.*

In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action of ejectment to recover a lot of land. The defendants claimed title through one J. F. Limantour, who claimed to be the grantee under the Mexican government.

On the trial, one William H. Graham was called as a juror, and was challenged for cause, by the defendants. On examination, touching his competency as a juror, Graham testified that he was acquainted

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with the claim of title by Limantour. That he knew nothing of the facts of such title except from his reading of the newspapers; that he had formed and expressed an opinion in respect to the facts of such claim; that such opinion was decided, and would require testimony to remove it. Another juror, Rosenbaum, on his examination respecting his qualification, testified that he had formed an opinion adverse to the Limantour claim which would require testimony to remove; that he had always looked upon the claim as fraudulent, &c.

These persons were admitted by the Court as competent jurors: defendants excepted. Plaintiff had judgment, and defendants appealed.

J. P. Treadwell for Appellants.

William W. Crans, jr., for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

The jurors, Graham and Rosenbaum, having formed an opinion adverse to the validity of the title under which defendants claimed, were incompetent to sit in the case, and the acceptance of those jurors against the objection of defendants was error.

Judgment reversed and new trial ordered.

WHITE *et al.*, EXECUTORS OF OLIVER B. WHITE, v.
MOSES *et al.*

Under the system of practice in this State, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title to sue.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Plaintiffs, as executors of O. B. White, deceased, commenced an action of ejectment against defendants for seven-sixteenths of a cer-

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tain fifty vara lot in San Francisco. Defendants answered, denying generally the allegations of the complaint, and setting up title in J. F. Limantour.

A nonsuit was entered, on the ground that the plaintiffs had not established their character as executors, and afterwards, on the application of the plaintiffs, the judgment of nonsuit was vacated and a new trial granted. From this order defendants appealed.

J. P. Treadwell for Appellants.

Wm. W. Crane, jr., for Respondents.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — BALDWIN, J., concurring.

Under the pleadings of the case, no proof of the appointment of plaintiffs as executors was necessary. Under our system of practice, a general denial is equivalent to the general issue at common law, and it does not put in issue the plaintiff's title to sue. (See 5 Phil. Ev. 359; 15 Johns. 208.)

Judgment affirmed.

PEOPLE v. COMEDO.

Where there is no assignment of errors or statement of the points and authorities on which the appellant relies, the appeal will be dismissed.

APPEAL from the Court of Sessions of Los Angeles county.

R. H. Dimmick for Appellant.

E. Drown for Respondent.

TERRY, C. J., at the April Term, 1858, delivered the opinion of the Court — BURNETT, J., concurring.

In this case there is no assignment of errors or statement of the points and authorities on which the appellant relies; the appeal is therefore dismissed.

Dickinson v. Owen.

DICKINSON v. OWEN.

M, a married woman, had a sum of money left her by bequest during coverture; she and her husband joined in a power of attorney to O, authorising him to demand and receipt for the money. O received the money under said power. Some time after the receipt of the money by O, the husband of M died. M brought suit against O for the money; O set up as a defense: 1. That the money was collected for the husband, and a settlement and discharge since his death with his administrator. 2. Money advanced, from time to time, to the husband during his lifetime, with the knowledge of M. Held, that the money was the separate property of M, and when O received it, he received it as the trustee of M, and that it could not be charged with money advanced to the husband, nor could the settlement with the administrator have any effect on M's rights.

When a bailee disclaims his relation to the bailor he cannot claim the right to require a demand for the money before interest is charged against him.

APPEAL from the District Court of the Thirteenth Judicial District, County of Mariposa.

The plaintiff was entitled to a sum of money from the estate of her brother, Charles Mills, who died in Louisiana, leaving a will; and she, in order to get the money due, in connection with her husband, then living, made a power of attorney to the defendant in 1852, authorizing him to collect it from the representative of Mills' estate in New Orleans. The defendant collected the money. After the death of the husband of plaintiff, she demanded the money of the defendant, who did not pay it over. The defendant put in an answer, in which he averred that the money was collected for the husband, O. M. Dickinson, and that after the husband's death, the defendant settled with and obtained a discharge from the administrator of the latter; and further averring "that long anterior to the death of O. M. Dickinson, he, defendant, had from time to time, and at divers times and places, paid and advanced to said O. M. Dickinson large amounts of money, to wit, about the sum of \$2,500, and which said sums of money were paid to and within the knowledge of the said plaintiffs, as defendant verily believes, and were used in the support and maintenance of said O. M. Dickinson and the plaintiff."

This latter clause to the answer was demurred to, and the demurrer sustained. Defendant appealed.

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Shafters, Park and Heydenfeldt for Appellant.

1. Owen was the agent of Dickinson alone in collecting the money, because a married woman cannot appoint an attorney.

Story on Agency, sec. 6, and authorities there cited.

The rule in this State is the common law upon that subject — it has not been altered by statutes.

In *Rowe v. Kohle*, 4 Cal. 285, this Court says: "We have repeatedly held that our statute does not change the rule of the common law upon the relation of husband and wife, except in the particular cases expressly provided by the statute, and that a *femme covert* cannot contract under the laws of this State so as to render her liable in a suit at law." See also, *Simpers v. Sloan*, 5 Cal. 457; *Snyder v. Webb*, 3 Cal. 83.

It follows that Owen was in no wise in privity with the plaintiff. The husband has this right to the custody and control of the wife's separate estate. Wood's Dig., p. 488, sec. 6.

Therefore he had the right to collect the money due to the plaintiff from the brother's estate, and this he effectually accomplished, through the defendant as his agent; *Qui facit per alium, facit per se*. This made the defendant liable to the husband as his agent. The present case goes upon the idea of his liability to the plaintiff as her agent, whereas she was only entitled to seek redress out of the estate of the husband. The finding ought to have been for the defendant.

2. If the plaintiff was entitled to recover, she could not recover interest. The principal alone was her separate estate. The statute declares "the rents and profits of the separate estate of either husband or wife shall be deemed common property." Wood's Dig., p. 488, sec. 9.

3. If the point first taken is good, then it is evident the Court erred in sustaining the demurrer to the declaration, for if the defendant was only the agent of Dickinson (having no privity with plaintiff) then he had the right to settle with Dickinson or his administrator, and an allegation of such settlement was a good defense.

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John H. Saunders for Respondent.

The only defenses really interposed by the original answer in the Court below were, *first*, limitations — which has been abandoned — and *second*, that after the death of the husband of plaintiff, defendant had a settlement with his administrator, involving the item of the wife's claim in this action.

Plaintiff's demurrer to the latter defense was sustained, and rightly, because there can be no pretense that the administrator of the husband (who, in respect of the separate estate of the wife, is a mere trustee during coverture) would be entitled to the custody of the estate as against the wife surviving. During his life, it would have been his duty to keep the principal fund separate from his own, for the reason that it did not belong to him, and could not possibly be part of the general assets of his estate. The use of it, in his own private affairs, in such a way as to destroy the identity of the fund, would have been conversion. As long as it could be identified, she, being the owner, could during coverture, for improvidence of her husband, secure its preservation by the interposition of another trustee in the place of her husband. Wood's Digest, p. 488, sec. 8. And upon his demise, she, as the owner, would be entitled to its custody and control. See Wood's Digest, p. 488, sec. 6, providing for the management and control of the separate estate of the wife, by the husband, only during the continuance of the marriage.

Our system, derived from the Louisiana Code, and substantially the same, and in the particular we now consider, only differing from it in the husband and wife deriving, by inheritance from each other, a part of the separate estate, is very well illustrated upon this point by the case of *Robin et al. v. Castille*, 4 La. Rep., New Series, p. 187, in which the Court says: "When the wife dies during coverture, her heirs are seized of all the effects constituting her separate estate from the moment of her decease."

By the amended answer, the settlement with the administrator of the husband is reasserted, with the further defense that "long anterior to the death of the said O. M. Dickinson, he, the said defendant, had, from time to time, and at divers times and places, paid and advanced

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to said O. M. Dickinson large amounts of money, to wit: about the sum of \$2,500; and which said moneys were paid to, and within the knowledge of, said plaintiff, as defendant verily believes, and were used in the support and maintenance of said O. M. Dickinson and said plaintiff."

Plaintiff's demurrer to this defense was also sustained, and this is one of the alleged errors assigned by appellant, and the subject of the first point of his brief, because,

1st. Defendant, acting under a power from plaintiff and her husband, was the husband's agent, not hers, she being disabled by coverture from appointing an agent.

2d. The husband has the right to custody of wife's separate estate, and therefore, properly received the \$2,500 from defendant.

All of this reasoning goes upon the hypothesis that defendant did, *in fact*, pay over the trust fund to the husband in his lifetime, and yet the amended answer indicates, indeed asserts in terms, that all dealings between defendant and the husband were in private account between them, and had not the least reference to the specific fund in question.

The relative position of the parties to this fund is this: Defendant, upon receipt of this fund, held it in trust to permit the husband to use, but not alienate or encumber it during coverture, and upon his demise or dissolution of coverture, to the use of the wife absolutely.

If the husband had received it during his life he would have been substituted in the same trusts, and the wife must have succeeded to the possession and control of the fund immediately upon his death. Not receiving it, the original trust necessarily remains, and the wife is, of course, entitled to its possession and use, and to its recovery, by an action for money had and received, or bill in equity.

The privity entitling the wife to this action, arises not out of a technical relation to a deed, but out of her absolute ownership of the fund which defendant has, and unjustly refuses to pay her. It is the elementary privity of trustee and *cestui que trust*, which the law creates whenever one man has received money or property properly applicable to the use of another, without regard to the manner of its acquisition. See 2 Story's Eq., sec. 1196.

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Although the authorities cited by appellant, with many others, show that the wife cannot, during coverture, contract or render herself liable by the execution of a power, the same authorities show she may do what is necessary to possess herself of her separate estate. See Story on Agency, sec. 6.

Second. Appellants insist that even if plaintiff became entitled to receive from defendant the principal sum of \$2,500, she has no right to the interest accrued during the lifetime of the husband, he being entitled to that by our statute.

At common law, the husband had the personal privilege of entitling himself to his wife's choses in action, by reducing them into possession during the coverture. If he did not reduce them into possession, the wife surviving him was entitled, and not his personal representatives. See Blackstone, book 2, ch. 24.

Our law preserves the ultimate ownership to the wife, and compensates the husband for his administration of the separate property of the wife by the profits. It exempts the principal from the common law marital right, which before embraced principal and profits, but subjects its produce to its exercise. And the husband has no more *vested estate* or interest now, in the current profits of the wife's estate not reduced by him to possession, than before our statute he had in the principal.

And this upon the principle of the case cited by appellants, (*Rowe v. Hohle*, 4 Cal. 285) "That our statute does not change the rule of common law upon the relation of husband and wife, except in the particular cases expressly provided by the statute, etc."

BALDWIN, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

As the money was due the wife by bequest during the coverture, it was the separate property of the wife, (*Wood's Digest*, 487, art. 2,605) and this was, no doubt, known to the defendant; indeed, the face of the power very clearly indicates the facts. When he received the money, therefore, he received it as trustee of the wife. The title of the wife was in no way impaired by the mere mode which she adopted—through a power of attorney in which her husband joined—

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to collect the fund. The question does not arise as to the right of the husband to receive this money for the wife from the attorney; for the defense does not pretend that he did so receive it. We take the averment demurred to only to assert that the defendant had dealings with Dickinson, and had loaned or advanced him money; but it is not charged when this was—whether before or after the receipt of this money; nor that there was any *advance*—so to call it—of *this* money, or even on account of it. It merely amounts to an attempt to set off against this claim of the wife a claim against the husband. It is immaterial what Dickinson did with the money advanced him, under the circumstances; the wife's separate estate is not chargeable with it.

The property being that of the wife, of course no settlement with or discharge by the administrator of the deceased husband could have any effect upon her right.

The defendant having disclaimed the relation of bailee to the plaintiff, cannot claim the right of the bailee to require a demand for the money, before interest is charged against him.

Judgment affirmed.

HOCKSTACKER *et al.* v. LEVY *et al.*

Court cannot enjoin proceedings of other courts of coördinate jurisdiction. *Uhlfelder et al. v. Levy et al.* (9 Cal. 607) affirmed.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

Messick & Swesey for Appellants.

Reardon, Smith & Mitchell for Respondents.

BURNETT, J., at the April Term, 1858, delivered the opinion of the Court—TERRY, C. J., concurring.

The facts of this case are similar to those of the case of *Uhlfelder and others v. Levy* 9 Cal. 607, and the same disposition must be made of it.

Judgment affirmed.

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PEOPLE *ex rel.* SAMUEL H. BRODIE v. JOHN B. WELLER,
GOVERNOR.

A person duly elected Judge of the District Court of this State, is entitled to hold office for the period of six years.

Where an election for the office of District Judge was held by the qualified electors of such district at the general election in 1858, and the term of the present incumbent of that office does not expire until January, 1861: *Held*, that such election was unauthorized and the person elected is not entitled to a commission to such office.

The statute, so far as it affects the election of 1858, only applies to such offices as were to become vacant in January, 1860, and this is evident as well as by the terms of the act as the unreasonableness of supposing that the Legislature meant to authorize an election several years in advance of the time when the office was to be filled.

APPEAL from the District Court of the Fourth Judicial District,
County of San Francisco.

This was an application to the Court below for a peremptory writ of *mandamus*, to compel the defendant, as Governor of this State, to issue to the relator, Samuel H. Brodie, a commission as Judge of the District Court of the Twelfth Judicial District.

The facts upon which the application was based are as follows: The Twelfth District was created, by act of the Legislature, on the fifteenth day of May, 1854. On the twenty-sixth day of May, 1854, Edward Norton was appointed and commissioned by the Governor as Judge of the District Court for the Twelfth Judicial District. At the general election in September, 1854, he was elected Judge of that district, and was duly commissioned, and entered by virtue of his election and commission upon that office on the second day of January, 1855.

On the thirtieth day of July, 1858, the defendant, as Governor, issued his proclamation, as required by law, designating certain offices to be filled at the general election to be held on the first day of September, 1858; but the office of District Judge was not among the number so designated. The qualified electors of the Twelfth Judicial District, however, held an election to fill the office of District Judge of that district, and at such election the relator received the highest number of votes for that office. The County Clerk of San Francisco county subsequently issued to the relator a certificate of his election,

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and the relator applied to the Governor for a commission, which was declined, and he then applied to the District Court of the Fourth Judicial District for a *mandamus*. The Court below refused to order the issuance of a peremptory writ of *mandamus*, and the relator appealed to this Court.

G. F. & Wm. H. Sharp for Appellant.

The relator contends that the statute of 1853 (Wood's Dig. p. 150, art. 634) is constitutional, and that the relator, who was elected Judge of the Twelfth District Court in 1858, at the general election, is entitled to take and hold office from the first of January, 1859. The Constitution evidently contemplated the fixing of the time of the commencement of the term of the District Judges *en masse*, and we contend that even without legislation that instrument prescribes first of January, 1853, as the commencement of the term of the second class of Judges, and the first of January, 1859, as the commencement of the term of their successors. The statute of 1853 was passed in conformity with this constitutional provision.

Uniformity of election is what was aimed at by that instrument. The language of art. 6, sec. 5, is not that *each* of said Judges shall be elected at a general election, but "the Judges," as a class, "shall be elected at *the* general election, pointing to the one election for all the District Judges. To accomplish this uniformity, the first officers elected held for two years from the first of January next after their election, a period much shorter than that prescribed by the Constitution as the proper term of their successors. This was undoubtedly for the sake of uniformity. At the end of those two years the district would, to a certain extent, be arranged, and a point of time was fixed from which the terms of District Judges would thereafter run.

The plan contended for by the other side would produce disorder throughout the whole State, for if there is no uniform time for the beginning of terms of office, then each officer must hold the full period. It will not do to say that a Judge in one part of the State holds his office for six years, and that another, elected to fill a vacancy, can only hold for a residue of the term; we can see no just reason for drawing a distinction.

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If the Constitution has not provided uniformity throughout the whole State, it has not been provided for in any part of it.

It is a stretch of imagination to suppose that many of the incumbents will vacate their offices in the course of every year.

On the principle contended for, each successor would hold for the full term, and thus it is easy to perceive that before many years, the utmost confusion would be the consequence. It would require an Executive officer of extraordinary ability to keep himself informed as to when terms expire; elections would become an evil of no ordinary magnitude. 6 How. Miss. R. 604.

Again, by providing for a general election, it was meant that it should not only be general as to all officers whose terms had expired, but that it should be general, territorially, that is, *throughout the State*. The Constitution (art. 6, sec. 5) looked to the creation of new Judicial Districts, after the division of the State into Districts by the first Legislature. Can it be supposed that as to these new Districts there was to be no fixed *time* for the general election?

It seems clear that all District Judges hold in reference to the regular periodical elections prescribed for them as a class.

Smith v. Halfacre, 6 How. (Miss.) R. 583, a case exactly like this; opinion by Sharkey, C. J.

This has been the uniform understanding of the Legislature (Wood's Dig. 561, art. 2,882) as well as of the Bar.

Again, note the phraseology of the Constitution as to the *term* of District Judges, and it will be observed that the language used corroborates the idea already presented. The language is not that each shall hold his office, but that "they shall hold *their* office" for the term of six years, showing that reference is there had to the term of the Judges as a class merely. Having prescribed this uniformity, it was the intention of the Constitution that a District Judge elected for a newly created district, or elected to fill a vacancy, should not disturb this uniformity, but should hold only until the expiration of the time of the current term of all the District Judges; that in constitutional parlance, there is no such thing as the creation of a new district, but only the "*alteration*" of the old. Art. 6, sec. 5.

The Constitution of the United States, in reference to Senators

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from new States, and to the classification of Senators, (art. 1, sec. 3; art. 4, sec. 3) and the construction which has been placed upon it and uniformly acted on, furnishes an analogy to the present case. Senators are required to be elected for six years; the classification provided for only extended to the first session of the Senate. No provision is made as to Senators from States newly admitted, yet the rule has been uniformly applied to them; they hold from the fourth of March, no matter when elected, and for two, four or six years, with reference to the terms of the other Senators.

The same may be said of our Supreme Court Judges, under art. 6, sec. 3. The classification of Judges was in words applicable only to the first set of Judges; but their successors have held, and do now hold, with reference to that classification. See opinion of Murray, C. J., in case of *People v. Langdon*, 8 Cal. R. 11; Opinion of Judge Field in case of *People v. Whitman*, 10 Cal. 46.

The decisions which hold that where there is no *time* prescribed for the *commencement* of a term of office, the officer elected holds for the full term, irrespective of the time of its commencement, can have no application to this case, for the reason that our constitution does not look to, and prescribe the time for, the commencement of the term of Judges. This distinction should be borne in mind in considering the question raised here. (*People v. Coutant*, 11 Wend. R. 512, and cases there cited, are for this reason inapplicable. See opinion of *Maison, J.*)

II. If the statute is held to be unconstitutional as to the time when the relator will enter into office, it is void as to that part only; but the election is valid, it being in the power of the Legislature to fix the time for the general election throughout the State of all District Judges; and the party elected will enter as soon as the term of the incumbent expires. *Houston v. Royston*, 7 How. (Miss.) R. 552; *People ex rel. McMinn v. Haskell*, 5 Cal. R. 357.

Attorney-General for Respondent.

1st. The Legislature has the power at any time to create new judicial districts. The exercise of this power was not confined to the first

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Legislature. It is a necessary consequence proceeding from the power "to alter districts, from time to time, as the public good may require."

6 art. Constitution, sec. 5.

2d. The Legislature cannot change or shorten the term of an office where such term has been fixed by the Constitution. *People v. Mott*, 3d Cal., p. 502-504; *People v. Garey*, 6 Cowen, 642, affirmed in the Court of Errors, 9th Cowen, 640; 1st McCord, 151 (top); *Ibid.*, 154 and 155; *Selby v. Johnson*, Dallam (Texas), 597; *Ibid.*, 512, *Roman v. Moody*; *Ib.* 504, *Bradly v. McCrabb*.

3d. The term of office of District Judge is fixed by the Constitution at six years, and there is no provision for any shorter term. 6 art. Constitution, sec. 5; *People v. Mott*, 3 Cal.; and the authorities cited in the 4th subdivision of this brief.

4th. There is no prescribed period in the Constitution for the commencement or ending of the term of District Judges. The provision simply is, that when elected they shall hold their offices for six years. The plain meaning of this is, that *every* District Judge shall serve for the term or period of six years, without regard to the particular year in which he is elected; or whether any other Judge in the State is elected at the same time. This proposition is clearly sustained by numerous decisions made by the highest Courts of other States upon constitutional provisions like that of ours just quoted. *People v. Green*, 2d Wendell, 266; *People v. Coutant*, 11 Wend. 132 and 512; *Banton v. Wilson*, 4 Texas, 400; *Selby v. Johnson*, Dallam; *Ibid.*, *Roman v. Moody*; *Marshall v. Howard*, 5 Md. 431; *Hughes v. Buckingham*, 5 Sm. & Marshall, 632; *The People v. Green*, 2d. Wend. 266; *People v. Coutant*, 11 Wend. 132 and 512; *People v. Gary*, 6 Cowen, 642 and 651; *Ibid.*, 9 Cowen; *Powers v. Hurst*, 2 Hump. 24; *State v. Nibbling*, 6th Ohio (new series) p. 40.

5th. An office when once filled cannot be considered vacant until the term of service of the incumbent expires. A commission is only the evidence of the election or appointment to an office, and when issued to fill an office in which there is already an incumbent, it is simply a nullity. 1st McCord, cited before; 1st Alabama, 561; 2d Ala. 31; *Johnson v. Wilson*, 2 N. H.; *Marbury v. Madison*, 1st Cranch, 157.

6th. Relator claims that by virtue of his election he is entitled to a

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commission which will authorize him to enter into the office of District Judge of Twelfth District, at the expiration of the term of the present incumbent, even though that time should be on the first of January.

To this I cannot subscribe. I admit that it is competent for the Legislature to fix the time of election, and it may, perhaps, do so many years before the commencement of the term; but such must clearly appear to be the intention of the Legislature before the rule can be with safety and with fairness to the people applied to the particular case.

Relator was elected under a statute which prescribed that the election should take place in 1858, and the term commence in 1859; he was voted for with that understanding, and any material deviation from such understanding would operate as a fraud upon the rights of the people of his district. It will not, then, be safe or just to say that although the part of the act fixing the commencement of his term is void, yet that part providing for the election is operative, and the only effect is to postpone the time of his entering into the office. This is one of the cases where all parts of the Act are so peculiarly connected, and resting one upon the other, that to declare one part void is to so declare as to the whole.

The authorities cited by relator are not in point, when the facts of the cases so cited are compared with the facts in this case.

Heydenfeldt for Appellant.

Constitution of California, art. 6, sec. 5, Wood's Digest, 33; *Ib.* secs. 3 and 8, gives an analogy. Also, art. 1, sec. 3; art. 4, sec. 3, U. S. Const. as to Senators; art. 4, sec. 5, 6 and 7, St. Const., Hood, 30; Act of 1853, Wood, p. 150, art. 634, is legislative exposition of the Constitution as to vacancies. Art. 5, sec. 8. Pay is *pro tem.* Art. 6, sec. 15. The tenure of office does not depend upon the commission, but upon the provision of the act creating the office. Fisher *ads.* The State, 1 McCord, 233.

The first Judges not appointed to the succeeding general election but for two years, why should not the same will apply to all subsequently created districts. Suppose a district created by the second Legislature — how long would the Judge have held? *Smith v. Half-*

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acre, 6 How. 582; The People v. Langdon, 8 Cal. R. 12; The People v. Whitman, 10 Cal., Field's opinion; Cases from Dallam. Const. of Texas fixes no time of commencement for terms of Judges. Dangerfield v. Sec. of State, Dallam, 358.

In Bradley v. McCrabb, Dallam, 504, it was a contest for Clerk of the District Court; but the case shows that by the Constitution there was no provision for any time of commencement of the time of office, nor even a provision for a particular time of election.

In Roman v. Moody, Dallam, 512, the contest was in relation to County Clerk, which was created by statute.

No commencement of terms of office is specifically fixed, and the time of the Chief Justice of the counties, the Court say:

"It is simply provided that he shall hold his office for four years, and not that it shall commence and end on prescribed days," &c.

And in Selby v. Johnson, a contest for District Judge, (Dallam, 597) it is again shown that there is not fixed by the Court of Texas, any time of commencement of office, or particular time of election.

And the Court, after quoting from the Constitution the language of tenure, adds: "Nor are there other expressions and terms used, which by implication and construction, can modify the certain and plain intendment of the foregoing declaration."

In Banton v. Wilson, 4 Texas, 400, the only question raised by the record is, whether an election which was ordered, was a regular election, and all else decided in that case is mere *obiter dictum*. But this case (which was another contest for Clerk) also shows the fact that there is no fixed time in the Court of Texas for the commencement and termination of the office.

And in that case the Court says: "The statutes of 1846 did not prescribe any fixed period for election of county officers after the first election for that purpose in July, 1846."

In Hughes v. Buckingham, 5 Smedes and Marshall, 632, which is relied on by respondent, the case of Smith v. Halfacre is expressly affirmed, both opinions being by Judge Sharkey, and it pronounces that the incumbent has the right to a full term of office as fixed by law, where the statute does not prescribe the commencement or termination of the term.

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In the *People v. Green*, 2 Wend. 266, there was a contest for Sheriff. The Constitution of New York specifically provided for elections "once in every three years, and as often as vacancies shall happen," and the Governor may remove them at any time within the three years for which they shall be elected.

It is also shown, then, that the statute provides expressly in case of vacancies, for the new officer to hold during the constitutional term.

And it is very explicit that there is no time fixing the commencement and end of the term.

In *Contant v. The People, &c.*, 11 Wendell, 512, the decision is the same as in the last case from 2 Wendell, and the same reasons apply, and it is sustained in the opinion of the Chancellor by the debates in the Convention which framed the Constitution.

And this case is an authority for following a well matured legislative construction.

And it shows that a provision in the revised statutes pointing explicitly to a different result, was after a strong contest between the two houses, rejected, p. 517.

The case of the *People v. Garey*, 6 Cow. 642, has no relevancy to the subject matter under discussion.

In the case of the *State of Ohio v. Niebling*, 6 Ohio R., 40 (Citchfield) was a contest for Clerk.

The Court says: "Although the Constitution has fixed the periods for the commencement and termination of many of the officers, yet in regard to the Clerk of the Court, no invariable period of the year is prescribed."

And the Court decides the case in favor of the new term on the ground, that as regards other officers, the Constitution expressly provides for elections to fill the unexpired terms where vacancies occur.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The record in this case raises the simple question — for what period are District Judges elected under our Judiciary system? It will be seen that there had existed, prior to Judge Norton's incumbency, no term in the office of the Twelfth District Judge. That office was

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created by the Legislature, in May, 1854; so that the question so much discussed, as to the duration of the period of service of Judges elected before the expiration of six years from the date of the qualification of a predecessor, is not necessarily involved in this decision. The Constitution (art. 6, sec. 1) provides that "the judicial power shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace." Section 5 provides that "the State shall be divided by the first Legislature into a convenient number of districts, subject to such alteration, from time to time, as the public good may require; for each of which a District Judge shall be appointed by the joint vote of the Legislature at its first meeting, who shall hold his office for two years from the first day of January next after his election; after which, *said Judges* shall be elected by the qualified electors of their respective districts at the general election, and *shall* hold their office for the term of six years."

The phraseology of the third section (which relates to the Justices of the Supreme Court) is different from that of the fifth section, especially in this: That after providing for the first election of Justices of the latter Court by the Legislature, it directs "them to be so classified as that one shall go out of office every two years."

It is urged for the relator that the office of District Judge is divided into fixed terms, which are to be considered as distinct entities, independent of the person or number of persons who may fill such terms; that the reason of this was, that system and order may be maintained in elections; that it might be known by the officers and the people of the State when the offices of these Judges commenced and expired; and that therefore, the election to fill these offices should be held throughout the State on the same days. If there be any reason for a constitutional policy of this sort, we are unable to find in the words of the Constitution any indication of it. Certainly, no language is contained in that instrument which by reasonable inference justifies this construction. If the Convention meant to declare that all elections for District Judges should be held on the same day over the State, or that the individual Judges should only hold in certain cases fractions of terms, it would have been easy to say so in unequivocal language. But this is not said; on the contrary, the language is

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express: "*said Judges shall hold their offices for the term of six years.*" The construction given would require the section to read: "Provided, if a Judge be elected before the expiration of the period for which his predecessor was elected, then such Judge last elected shall only hold for the remainder of the term of his predecessor." The fact that the Legislature is directed to appoint the District Judges for the first two years, does not aid the construction; that provision was only for a temporary organization of the judicial system, until the people had time and were prepared to act.

Nor, if we were disposed to go beyond the words of the Constitution, to find a latent policy which is to control the language, do we see any such obvious reasons for this course as the counsel seems to imagine. For the importance of this principle of electoral uniformity is not very apparent. It is true, it might save some little trouble to the Executive Department to announce at stated intervals all the elections for Judges; but still, this would not dispense with the necessity of giving notice of elections for vacancies. This is, however, a small matter. Nor do we see how it is important to the citizens of Siskiyou that the election of Judges for the Los Angeles District should occur at the same time as that for their own. On the other hand, we think the policy was not to have frequent elections for judicial offices; but that the policy was to give to each District Judge elected a right to hold for six years, and thus to secure the independency of the Judiciary; and it is obvious that this reason applies to Judges whenever elected.

We do not, however, approve of that principle of constitutional construction, which seeks by vague surmises, or even probable conjecture, or general speculation of a policy not distinctly expressed, to control the express language of the instrument; since such a mode would not unfrequently change the instrument from what its framers made it, into what the Judges think it should have been. Chief Justice Marshall, in *Gibbons v. Ogden*, (9 Wheat. 1) speaking of the Federal Constitution, says "that the framers and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." "It is true, the spirit of the instrument must be observed; but this spirit is to be collected chiefly from the letter." (1 Story Com. 411; 4 Wheat. 122.) "If," says the

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Supreme Court of the United States, "the plain meaning of a provision, not contradicted by other provisions in the same instrument, is to be disregarded, because we believe the framers could not intend what they say, it must be one where the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

The case mainly relied on by the relator is that of *Smith v. Halfacre* (6 How. Miss. 601). This case evidently rests for support, if it can be maintained at all, upon the peculiar judicial system as fixed by the Constitution and laws of that State. This is evident from the subsequent case of *Hughes v. Buckingham* (5 S. & M. 648) where it is held that a Clerk of a High Court of Errors, whose office is created by statute for four years, but without any designation of the time of commencement, was entitled to the full period from his assumption of the office. The Court says: "The term of four years relates to the incumbent, not to the office. The office, or the interest in it, is not divided into periods of four years each. * * If the incumbent should choose to abandon or forfeit his interest, the term of his successor commences as soon as he may be designated by the Chancellor, and the law or the grant gives him the full term; not a remnant of what had been abandoned by his predecessor." "The case of *Smith v. Halfacre* (6 How. 582) decides the principle now involved. The great struggle in that case was to show that no period was fixed by the Constitution for the commencement of the Judge's term of office, and that he was therefore entitled to hold for the full period of four years from the time of his election. And it was fully conceded by the Court that this would have been the result of an omission to designate the commencement of the term. But we held that, on a fair construction, the Constitution did provide for the beginning and the end of the term." Now, the Constitution of this State does not fix the time of the commencement of the term of the District Judges — this may be fixed by the Legislature, and has been done by our statute. (See *The State v. Niebling*, 6 Ohio, 43.)

But if the case were in point, however great our respect for the Court deciding it, we should be constrained by the weight and number of opposing authorities, to disregard it. The principle which we have

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adopted is sanctioned by the following cases: 6 Ohio, *supra*, 5 S. & M. 648; *Banton v. Wilson*, 4 Texas, 400; *Shelby v. Johnson*, Dallah, 597; *Roman v. Moody*, *Ib.* 512; *Bradley v. McCrabb*, *Ib.* 512; *People v. Garey*, 6 Cowen, 442; S. C., 9 Cowen, 640; 1 McCord, 233; *People v. Green*, 2 Wend. 266; *Powers v. Hurst*, 2 Hump. 24; *Coutant v. People*, 11 Wend. 132; *Ib.* 512; *Marshall v. Harwood*, 5 Maryland, 431. The provisions, constitutional or statutory, construed in some of these cases, are identical with those we are construing, and they all maintain the same or an analogous principle. In 2 Hump. especially, the language of the Court is singularly applicable. Judge Green says: "To preserve uniformity in the appointment, at the same time, of officers of the same grade throughout the State, would be a matter of small moment and no practical utility. But if it were a matter of greater importance than it is supposed to be, it would be unattainable. New counties have been admitted, and will continue to be constituted; the organization of which, by the election of county officers, would necessarily mar the supposed beauty and harmony which would result from preserving the term of office entire," etc.

The only remaining question is, whether the relator is entitled to a commission for the office to commence in January, 1861, after the expiration of Judge Norton's term. The statute under which the relator claims, is in these words: (Wood's Dig. 150, art. 634, sec. 14) "The District Judges shall be chosen by the qualified electors of their respective districts, at the general election in the year 1858, and at the general election every six years thereafter, and shall enter upon their duties on the *first day of January subsequent to their election.*"

The statute, so far as it affects the election of 1858, only applies to such offices as were to become vacant in January, 1859, and this is evident as well by the terms of the Act as the unreasonableness of supposing that the Legislature meant to authorize an election several years in advance of the time when the office was to be filled.

Judgment affirmed.

FIELD, J.—I concur in the judgment.

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MANSON v. KOPPIKUS *et al.*

Ferris v. Coover (10 Cal. Rep. 589), affirmed.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

This was an action of ejectment to recover a lot of land in the City of Sacramento.

The facts and the points raised are the same as those in the case of Ferris v. Coover (10 Cal. Rep., p. 589). Plaintiff had judgment and defendant appealed.

C. A. Johnson for Appellant, refers to the briefs on file in the case of Ferris v. Coover.

Geo. Cadwalader for Respondent.

First. The error, as alleged by appellants, may be confined to the following propositions: That the grant in evidence did not convey an immediate interest in any land whatever, but that its validity depended upon subsequent events which never happened, and therefore title derived from it should not sustain ejectment.

Second. The grant does not cover the land in dispute.

The first point is well settled by the Supreme Court of the United States, in Fremont's case, where the Court decided that upon the delivery of the grant, the fee at once passed to the grantee, and that all the conditions contained therein were subsequent, and did not prohibit the vesting of the estate. This conclusion has been recognized by this Court in the various cases involving the title to the "*Las Mariposas*," and may be regarded as at rest.

In Gunn, Admr. v. Bates & McCarty, 6 Cal. R. 263, this Court determined in a case similar to one at bar, that where possession was had and retained of a portion of the land embraced within the limits of a Spanish grant, the grantee was thereby invested with sufficient title to sustain ejectment for the whole of the land, though by measurement the quantity of land embraced within the boundaries thereof

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exceeded the calls of the grant. This rule is undoubtedly correct, as any other would exclude the Mexican grantee from the right to recover a single acre, merely because the government of Mexico had failed to specifically designate the exact location of his grant, and define the surplus. The doctrine of the foregoing case is peculiarly applicable to the present one; the Court below finding as a fact, that Sutter, upon the receipt of his grant, went into possession of a portion of the tract granted and retained visibly and substantially down to the present period.

The grant in this case is entitled to a *liberal* and not a technical construction: in other words, the grantee is to have that which the Mexican Government intended that he should have. In 19 Howard, 363, the grant confirmed contained only the following words of description:

“A tract of land known by the name of the El Cahon, near the Mission of San Diego. The land of which grant is made is that which the map attached to the *expediente* expresses.”

Here there was a valid grant described altogether by reference to the map, the Court holding that the map was a portion of the grant itself; and so it will be noticed that in matters of description the map exercises a controlling force. Larkin's case, 18 Howard, U. S. R. 561.

Taking the map and grant together, we find a discrepancy as to the position of the southern boundary. The grant calls for 38° 49' 32", and the map shows the *Lindero* line to be several miles south of that parallel of latitude; consequently a latent ambiguity is created by the instrument itself. Now we hold that there is no proposition more firmly settled in law than that parol evidence is admissible to explain the contradiction reconciling the conflicting calls by ascertaining the intention of the parties. This rule is as old as the time of *Lord Bacon*.

The evidence introduced by respondent to explain the mistake or contradiction, was of the highest character. It proved the southern line to have been run some two miles south of Sutterville. Mr. Greenleaf, in his work on Evidence, section 301, observes that the highest regard is to be paid to natural boundaries; 2d. To lines actually run, and courses actually marked at the time of the grant; 3d. To courses

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and distances giving preference to one or the other according to circumstances. Evidence of long continued occupation, though beyond the given distance, is admissible.

See also 9 Cranch, 178; 2 Wheaton, 306; 17 Mass. 210.

In *Newsom v. Prior*, lessee, reported in 7 Wheaton, U. S., page 7, the question was as to the boundaries of a grant containing the following words of description:

“Five thousand acres of land lying on both sides of the two main forks of Duck Creek, beginning, &c., and running thence west 894 poles to a white-oak tree; south 894 poles to a stake crossing the river; thence east 894 poles to a stake; thence north 894 poles to the beginning.”

It being proved by a subsequent survey that the second line to cross the river, must be 1,222 poles long instead of eight hundred and ninety-four poles, as indicated by the grant, the question was disposed of by the Court as follows:

“The distance must be disregarded, and this line so extended as to cross the river, or in other words, the distance must be controlled by the call for the crossing the river; and though the effect of this is undoubtedly that the purchaser acquires more land than is expressed in his grant, and more than he paid for, yet Courts cannot now shake a principle so long settled and so generally acknowledged.”

Course and distance must yield to natural or fixed objects. *McCloy*, lessee *v. Galloway*, 3 Ohio, 282; *Jacob v. Ongen*, 14 Ohio, 529; 6 Mass. 131; 3 Pickering, 401; 9 Conn. 661; 4 Monroe, 32; 3 J. J. Marshall, 420; 2 Binney, 109; 6 Wheaton, 583.

If we are entitled to show the natural objects at the limits of the survey, all difficulty in the case ceases, for on the *Lindero* line we have the two *lagunas* or *lakes*, that come fully within the definition of *natural objects*. These lakes are both identified by the witnesses, and shown upon the map as touched by the *Lindero* line. Sutter testifies positively as to *Vioget's* running the south line at this point. This evidence in no sense contradicts the grant; it merely in effect dissolves the ambiguity created by the conflicting calls of the map and grant for the southern line, and gives the *grantee the thing granted*; not a shadow of authority exists going to deny the validity of such evidence.

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4 East, 327; 7 East, 99. If the words of the instrument be ambiguous, the Court will call in aid the acts done under it, as a clue to the intention of the parties. 8 Bingham, 181.

In this case, on the ground of mistake alone in the southern boundary of the grant, respondent's case can be supported. The evidence introduced shows the mistake not to have been in the survey, nor in the map thereof, but in the imaginary line of latitude, *the report of the survey*. Vioget says his instruments of observation were defective, and whatever mistake was made in one line, extended to the other. Thus we have the mistake shown as well as the cause thereof. But it is urged that Feather River is the true southern boundary of the land. This, however, is a forced construction and flat contradiction of the grant, map, natural objects and distance in the case, and will not be further noticed.

"It cannot be doubted that where a deed is indefinite, uncertain or ambiguous in the description of the boundaries of the land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a *latent ambiguity*, which has its origin in parol testimony, and must necessarily be solved in the same way. It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed." (8 Howard, 505.)

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

This case involves several of the questions which were considered and decided in *Ferris v. Coover*, 10 Cal. 589, and upon the authority of that case the judgment is affirmed.

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RUSSELL *et als.* v. CONWAY *et als.*

A Court of Equity, upon bill filed, will compel an equitable set-off, when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity.

The insolvency of the party against whom the set-off is claimed, is sufficient ground for the exercise of the jurisdiction of the Court of Equity.

So held, when the claim against the party praying for a set-off was not a personal claim, but a judgment *in rem* against property belonging to him, while his claim against the other party was on a judgment.

In such a case, where the prayer of the bill is that the judgment against the property of the plaintiff may be satisfied, upon his crediting the judgment obtained by him against the defendant in another Court, the application for set-off must be made in the Court in which the judgment adverse to the plaintiff was entered, that Court having control over that judgment, and the plaintiff having the power to credit or satisfy the judgment held by him against the defendant.

As to lien of attorney, see *en parte* Kyle (1 Cal. R. 331) and Mansfield v. Dorland, (2 A. 517).

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Plaintiffs aver that on the twenty-third of February, 1855, they instituted in the United States District Court for the Northern District of California, an action against the bark Elvira, belonging to defendants, to recover damages sustained by a collision of said bark and a certain other vessel called the Madonna, the property of plaintiffs.

That defendant Conway appeared and answered to such action, as owner of the Elvira, defendant Brooks acting as his attorney, and procured the release of the vessel by giving bond to abide the decision and judgment of the Court; that one of the sureties on the bond was, at the time of its execution, insolvent; that the other was in embarrassed circumstances, and became insolvent soon afterwards, and that the pecuniary circumstances of the sureties were at the time well known both to Conway and his attorney; that plaintiffs recovered judgment in the sum of \$1,640, and two hundred and eighty-six dollars costs; of which, owing to the insolvency of Conway and his sureties, they have been able to collect only the amount of twenty-five dollars.

That on the twenty-seventh day of February, 1858, defendant Conway commenced a suit in the Twelfth District Court for the County of San Francisco, against the bark Madonna, for damages arising out of

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the same collision, and caused the vessel to be seized by the Sheriff; that plaintiffs appeared and answered to the action, as the owners of the Madonna, and that defendants recovered a judgment against the vessel for the sum of \$1,226, and one hundred and twenty-two dollars costs, which judgment the Sheriff is proceeding to enforce, he having ample security in his possession.

That defendant Brooks claims to be the owner of the judgment, by virtue of an assignment from the defendant Conway; that this assignment was collusive, and intended to defraud plaintiffs and defeat the right to offset. Plaintiffs pray that the judgment of Conway against the Madonna may be satisfied, upon the entering a credit of the amount of it upon the judgment recovered by them in their action against the Elvira, which credit they offer to enter.

To this bill defendants demurred, on the ground —

1st. That the complaint does not state facts sufficient to entitle plaintiffs to the relief demanded.

2d. That the Court had no jurisdiction of the subject of the action.

The Court overruled the demurrer, and upon failure to answer, entered a decree for plaintiffs, and from this decree defendants appeal.

B. S. Brooks for Appellants.

I. We insist that the plaintiffs do not in their bill show any right to come into Court to set off these two judgments.

1. In the first place, *the plaintiffs do not show upon their part any sufficient interest in the subject of the controversy.* It appears that both judgments are *in rem* — the one against “the Elvira,” and the other against “the Madonna.” We are not seeking to enforce our judgment against the plaintiffs, but simply against “the bark Madonna,” which was long ago sold to Meiggs & Pray. The plaintiffs say that they, in their bill, show an interest; let us see if they do.

2d. It will be at once conceded that there is not any direct allegation in the bill that our judgment or execution are against *the plaintiffs or their property*; but this interest is sought to be inferred from the other allegations of the bill. This course is open to two objections: 1. That the plaintiffs’ case cannot be made out by inferences, but must be stated positively and distinctly; and 2d. There cannot be any such

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inferences legitimately drawn. It is contended that the bill shows either that the plaintiffs were owners, or that they were in some way bound to indemnify the owners against this claim. The very fact that the bill is open to this *double* construction shows its *insufficiency*. If it was true that as principal or as surety the plaintiffs might sustain such a bill, they must either allege that they are the principal debtors, or they must allege that they are surety. An allegation that they are either principal or surety, is not an allegation that they are the principal nor that they are the surety. It is impossible that the plaintiffs should be *both*, and if the bill is so drawn that neither one of these positions of the plaintiffs is clearly and distinctly alleged, but *either* may be *inferred*, then the bill is clearly demurrable.

3. But I do not see that there is *ANY allegation of interest*. In the commencement of the bill the plaintiffs recite that, in *February*, 1855, they filed a libel against the *Elvira* for a collision with the "*Madonna*," "the property of the plaintiffs." This is the only allegation of property in the "*Madonna*" (against which, it will be remembered, we seek *alone* to enforce our judgment) which is to be found in the bill; and I submit to the Court, that it does not amount to such an allegation. This is the "*inducement*" of the complaint. They are showing how they got their judgment, and they were intending to set forth, and did set forth, in fact, merely what were the principal allegations of the libel which they filed. That was the ground of that admiralty suit, that *our* ship ran into *their* ship. But if it should be construed as an allegation of property in the ship, it is an allegation of property in 1855, and not *now*. Plaintiffs' counsel argued, that if it was their property in 1855, the law *presumed* that it continued to be their property. Perhaps this is true in *evidence*, but not in *pleading*. He should allege in pleading that the ship is *now* their property, and then proof that they bought her in 1850 would support the allegation, unless we showed a change of property. They must allege an interest in the *Madonna now*. For if it does not appear that they have some interest in the property which we are seeking to subject to our execution, and *which alone we can* subject to our execution, what right have they to complain or to stop us?

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II. The plaintiffs fail to show any equitable reason for setting off these judgments.

It is scarcely necessary to argue before this Court, that setting off claims in equity is not by any means a matter of course. On the contrary, unless there are some equitable reasons irrespective of the mere existence of independent demands, they cannot be set off in equity. Story on Equity Jur., sec. 1435 to 1437; *Green v. Darling*, 5 Mason, 201; *Pierson v. Meary*, 3 A. K. Marsh. 6; *Hackett v. Counett*, 2 Eden, 73; *Robbins v. Halley*, 1 Munro, 134; *Markam v. Todd*, 2 J. Marsh. 365; *Allunt v. Winn*, 3 J. J. Marsh. 304; *Beall v. Squires*, 3 Munro, 375.

Our statute gives a party a right to set off certain claims at law or in equity, and it might well be argued that the subject was exhausted; that the Legislature had seen fit in its wisdom to declare the cases in which set-off should be allowed, and that to extend the relief or right beyond this would be a usurpation of the powers of the Legislature. It is a principle well settled, that equity in regard to set-offs, as in other respects, follows the law, and only interferes to carry out the intention of the statute by applying the same rule to cases which are within the letter. But when the statute has laid down certain broad, general principles, by which it describes and designates the classes of demands which ought to set off or compensate each other, it is going far beyond the province of a Court of Equity to apply this rule to cases totally distinct in principle. As Mr. J. Ashhurst says: "Where cases are new in *principle*, it is necessary to have recourse to legislative interference, but where the case is only new in the *instance*, the Courts can apply the recognized principle.

It appears by the allegations of the bill, that the owners of both vessels claimed damages for the collision—both obtained judgments. The plaintiffs, Russell & Co., tried their case first, and got judgment. Why did they proceed to the trial of Conway's case in the Twelfth District Court? They could have plead the prior adjudication in the United States District Court, and there is no question, and was then no question, that such a plea was a complete bar; but they chose to run their chance in that Court of trying the case over again, in order to obtain a personal judgment against Conway upon their counter claim. They

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tried it, both parties consenting, and the plaintiffs here got beat, and Conway obtained judgment *against them*.

Now was not this a waiver of the judgment in the United States District Court? Suppose the plaintiffs had obtained a judgment against Conway for a different amount in the Twelfth District Court: could they have enforced both judgments, or could they have elected? I think not. It seems to me that the plaintiffs, by consenting to try the matter over, completely waived their judgment in the United States District Court, and have no right to set it up, or plead it in any shape.

If the plaintiffs had filed this bill in the United States District Court where the larger judgment is, the case would have been different, for that Court would not have been estopped by the decision of another Court, and particularly not by the decision of a tribunal of a different or foreign jurisdiction; and it is well settled that the application must be made in the Court where the plaintiffs' judgment is. *Hicks v. Ross*, 11 Barb. S. C. R. 481.

This is not a case in which a Court of Equity would decree a set-off; but if it was, I do not understand that it is a *right*. It is a matter entirely in the discretion of the Court, and the plaintiffs had no vested interest in, or lien upon, the judgment. It is not a *right*, the enforcement of which they have a right to *demand*, but a relief which they pray from the consideration of the Court. *Davidson v. Gerghayer*, 3 Bibb, 250.

III. A point much debated in the Court below was the lien of the attorney Brooks (also the assignee) for his costs. The Court below was inclined to allow it to the extent of disbursements, if it should appear that these were made by the attorney, but held that *prima facie*, these were made by the party. But I think the lien of the attorney in this State should be held to be much more extensive. In England, and in those States where there is a rate of counsel and attorney's fees, which is fixed by law, and which are recovered as part of the judgment, there is some reason in limiting the attorney's lien to that sum. But in this State there is no sum recovered for attorney and counsel fees. It is left entirely to agreement between attorney and client what they shall be, and the amount of the lien is not, therefore, limited by law. It therefore exists to the whole extent of the attorney's claim, or it does not exist at all.

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Whitcomb, Pringle & Felton for Respondents.

I. The books are full of cases where one judgment is set off against another on motion; but where the claim of a third party is interposed, the remedy by motion is insufficient, and a bill of equity is necessary to dispose of the rights of all parties. Hence the jurisdiction in this case. *Simpson v. Hart*, 14 Johns. 74; *Gay v. Gay*, 10 Paige, 369; *Barber v. Spencer*, 11 Paige, 517.

II. The appellants contend that the complaint does not show any sufficient interest on the part of the plaintiffs in the subject of the suit, because it does not appear with sufficient certainty whether the plaintiffs are the owners of the *Madonna*, the bark against which the judgment was obtained. But it is clear that the allegations of the complaint admit of no other construction than that the suit of Conway was brought against the bark of the plaintiffs, and that by virtue of that suit they are bound by their property to the payment of the judgment. The complaint avers property in the *Madonna* on the twenty-third of February, 1855; suit brought against said bark on the twenty-seventh of February, 1855; and that the present plaintiffs came in and claimed said bark and defended the action; and afterwards, that "they are unable to collect their judgment against Conway by reason of his insolvency and that of his bondsmen, while they are bound for payment of his judgment." The natural and only meaning and effect of these averments taken together is, that the bark *Madonna* was the property of these plaintiffs when the claim of damage for the collision attached to her. *After that it is quite immaterial whether she was sold or not*, for under the decision of this Court, in the case of *Meiggs & Pray v. Scannell*, no sale could divest the lien; nothing was transferable except the surplus beyond the judgment.

The case presents all that is essential to the set-off of a Court of Equity. It is true, there is not identity in name, because one judgment is against the bark *Madonna* and the other judgment is against Conway and his sureties. But the parties in both cases are substantially the same, identical in substance and in truth. The Courts have always disregarded mere names in the matter of parties to a suit. In *Barrett v. Barrett*, 8 Pick. 341, a judgment in favor of the Judge of

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Probate in a suit upon a probate bond brought in his name for the benefit of a legatee against an executor and his sureties, was set off against a judgment recovered by the executor in his individual capacity against the legatee. So it was held in *Driggs v. Rockwell*, 11 Wend. 504, that a party had a right to set off a demand against the real plaintiff for whose benefit the suit was brought, although he was not the nominal plaintiff on record. See also, cases cited in 8 Pick.

Every judgment against the property of a party is really a judgment against him under our system; except in cases of fraud, a judgment has no reach beyond the property of a party, it proceeds against his lands or goods; and this judgment which is against his vessel, his property, is substantially and actually a judgment against him. *It binds him by his property.*

When the counsel for the appellants objects to the set-off for want of mutuality, he is confounded by terms. All that a Court of Equity requires in decreeing a set-off is to be assured of the substantial identity of the parties whose rights are extinguished the one by the other, and their interest in the claims that are set off. In this case an absolute mutuality would exist as soon as it was ascertained that there is an *equivalent* in the remedy on both sides.

III. The Court below was the proper tribunal. The party should proceed in the Court where the judgment against him is obtained. The reason and propriety of this is obvious. *That* judgment is the one which he is seeking to control. He comes into Court with an offer to satisfy his own judgment, as the condition of the relief he demands against the other. His remedy is sought in the Court whose judgment he wishes to affect by the suit. The other judgment is under his control, and he is ready and offers to enter a credit upon it, as a plaintiff would offer a deed to be cancelled, or a sum of money to be paid for specific performance, or any condition within his power to be performed, dependent upon the decree of the Court granting or refusing his prayer. See *Cook v. Smith*, 7 Hill, 186. See also, *Ross v. Hicks*, 11 Barb. S. C. R., p. 481. The counsel for the appellants has apparently been misled by the latter case. He cites it in his brief to sustain a doctrine quite opposite to what is the real doctrine of the case.

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IV. As to the equitable grounds upon which the plaintiffs rely for a set-off, the two judgments arise out of the same subject matter and the same controversy. The defendant, Conway, has avoided the payment of the decree against him by giving straw bondsmen, and by reason of such fraudulent action the judgment held by these plaintiffs is worthless, whilst that against them is good. Surely it would be difficult to present a stronger case to a Court of Equity. The misfortune of the plaintiffs' position is, that their bark was held by the process of the State Court, while in the Court of Admiralty they could not prevent the defendant, Conway, from liberating his vessel by substitutive bondsmen of his own choice. If, as the appellants say, a set-off is in the discretion of a Court of Equity, there never was a juster occasion for the exercise of that discretion.

Nor is there any more force in the objection of defendants, that the plaintiffs have waived their decree in admiralty by not pleading it in bar of the action in the Twelfth District Court, thereby assenting to another trial. Indeed, such a position can hardly be gravely advanced. It is asserting, in other words, that the plaintiffs have lost their decree by not interposing it as a defense to the other action; that their decree has thereby become satisfied, or abandoned, or extinguished by some mysterious process. The truth is, all that the plaintiffs have lost is the opportunity of *defeating* the first action, and now they are obliged to come and satisfy the judgment obtained in it. If they had pleaded their decree in admiralty *juris darrein continuance*, which was the only way they could have pleaded it, but which they were not obliged to do, they might have prevented a recovery against them and thus restrained the whole amount of their decree to make what they could of it. Now they are forced to admit the validity of the judgment against them and to pay the amount by a deduction from the amount of their decree.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

In support of his first ground of demurrer, appellant contends that the complaint does not show plaintiffs' interest in the subject of the controversy — the judgments being *in rem*, one against the Madonna,

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and the other against the Elvira (the defendants having no personal judgment against the plaintiffs) — and that it does not sufficiently appear that the Madonna is the property of plaintiffs, or that defendants are seeking to enforce their judgment against plaintiffs.

The argument in support of this position is based on a supposed transfer of the Madonna by plaintiffs to third parties, and a replevin suit instituted by those parties to recover the vessel from the hands of the Sheriff, which facts nowhere appear in the record of this cause, and therefore, are not matters for our consideration.

The complaint shows that the Madonna was, in February, 1855, the property of plaintiffs; that they appeared and defended the suit against the vessel as owners, and there is nothing in the record to raise a presumption that they are not now the owners of it. The complaint shows a judgment binding on plaintiffs' property, and which they must satisfy in order to release this property. This is, we think, a sufficient showing of interest in the subject.

It is also contended that plaintiffs have not shown any equitable reason for setting off these judgments. But we think it would be difficult to find a case addressing itself more strongly to the consideration of a Court of Equity. The bill charges, and the demurrer admits, that the parties each recovered a judgment *in rem* against the property of the other; that defendant, by giving a bond with sureties which he knew to be worthless, deprived plaintiffs of their lien on the property, against which he recovered judgment; that defendant, as well as the sureties on his bond, are insolvent; and that a fraudulent assignment of the judgment had been executed for the purpose of defeating plaintiffs' right to set off their decree against it. Under these circumstances it becomes the imperative duty of a Court of Equity to interfere to prevent the consummation of a fraud.

In the case of *Simson v. Hart*, (14 John. 74) the facts of which are similar to those contained in this record, the Court says: "Nothing could be more unjust than to leave to the respondent the power of collecting his judgment of the appellant, against which, from the insolvent condition of the respondent and the embarrassed state of his father, the appellant could not indemnify himself by collecting any part of his judgment from them; and although it is difficult to settle

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precisely the extent of the jurisdiction of the Court of Chancery, one of its acknowledged and most salutary attributes consists in the power to put a stop to proceedings injurious or unconscientious. I have no hesitation in saying, that chancery had original and rightful jurisdiction of the suit, and was fully authorized, by a series of adjudged cases, in issuing a perpetual injunction against the respondent's suing out or executing an injunction on his judgment, upon the appellant's entering satisfaction for so much as the respondent's judgment amounted to, on his judgment; or, which would have produced the same result, decreeing that the respondent should acknowledge satisfaction of record upon the like terms."

There is no force in the objection that the judgments are not in the same right. It is well settled that although the demands, as being joint and several, are not, strictly speaking, due in the same right, yet if the legal or equitable liabilities or claims of many become vested in, or may be urged against one, they may be set off against separate demands, and *vice versa*.

In *Gay v. Gay*, (10 Paige, 376) the Chancellor held: "If an equitable right of set-off exists, while the parties have mutual demands against each other, because the debt due to the party claiming the set-off is so situated that it is impossible for him to obtain satisfaction of such debt by an ordinary suit at law, or in equity, to recover the same, this Court, upon a bill filed, will compel an equitable set-off of one debt against the other. And the insolvency of the party against whom the set-off is claimed is a sufficient ground for the exercise of the jurisdiction of the Court of Chancery, in allowing a set-off in cases not provided for by the statute, although the demands on both sides are not liquidated by judgment or decree, so as to authorize a set-off upon a summary application, by motion. (See *Lindsey v. Jackson*, 2 Paige Rep. 581, and cases there referred to.) And where there are cross demands between two parties, of such a nature that if both were recoverable at law they would be the subjects of legal offset, then if either of the demands is matter of equitable jurisdiction only, the set-off may be enforced in equity." (Clark v. Cort, 1 Craig & Phil. Rep. 154. See, also, *Bare v. Spencer*, 11 *Ib.* 518.)

Appellant objects that the plaintiffs failed to set up their judgment

recovered in the Federal Court, *puis darrein continuance* in bar of defendants' action, and insists that, by failing to do so, they waived their rights under the judgment. It is difficult to perceive in what manner appellants were prejudiced by the neglect complained of, and we know of no rule by which such neglect can amount to anything more than a waiver of the right to insist on their judgment as at bar. It certainly cannot affect the validity of the judgment, or plaintiffs' right to set it up in another proceeding.

The objection that the right to an equitable set-off has been lost by laches of the plaintiffs, and by their attempts to defeat defendants' execution, is supported by facts which appear only in the brief of appellant, and not in the record.

The objection that the judgment was assigned before filing this bill is answered by the fact that upon the record the assignment is admitted to have been fraudulent, and certainly the defendants can claim nothing in a Court of Equity by reason of such an assignment.

This disposes of the objections to the equity of the bill. The demurrer to the jurisdiction of the Court is equally without merit. The plaintiffs' application was made to the Court having control of the judgment against them, which they desired to have cancelled and satisfied. The judgment in the Federal Court was under their control, and they could themselves direct as to its disposition, while the judgment against them could only be controlled by the Court in which it was rendered.

"Where judgments obtained in different Courts are to be set off, the moving party must go into the Court in which the judgment *against* himself was recovered." (Cook v. Smith, 7 Hill, 186; Ross v. Hicks, 11 Barb., S. C. 481.)

The only remaining question raised by the appellant is as to the lien of the attorney for his costs, which question was settled by this Court in *ex parte* Kyle (1 Cal. R., 331) and Mansfield v. Dorland (2 Ib. 507) and we have no desire to disturb those decisions.

Judgment affirmed.

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WEIMER v. LOWERY *et als.*

In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in their answer, among other things, the following: "That said tract of land is situated in the heart of the mineral regions of said State, and is a part of the public domain belonging to the government of the United States, and that said government has never granted or conveyed the same, or any part thereof to the said plaintiff." "They further say that their said ditch was constructed in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the South Fork of the American river from a point about five miles above said land to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the same is fourteen miles in length, and was constructed for the purposes aforesaid at a cost to said defendants of about \$20,000;" which allegations were stricken out, on motion of plaintiff's attorney: *Held*, that they were properly stricken out, as irrelevant; for, if true, they constituted no defense to the action.

The statute making possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners, has legalized what would otherwise be a trespass, and the act cannot be extended by implication to a class of cases not especially provided for.

A person has no right to construct a ditch through the inclosure of another without his consent.

A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed, recorded in the County Recorder's office a year before the trial, and the record of judgment in the same Court in which the cause was tried.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action under the 249th section of the Practice Act.

Complainant alleges that he is the owner and in possession of a lot of ground in Coloma, on which he has a family residence and cultivates a garden and orchard; that defendants, against his will, had dug a ditch across a portion of the lot for the purpose of conveying water; that by the cutting of this ditch and throwing the earth from it over a portion of his lot, it was rendered unfit for cultivation; that his property is injuriously affected, and his use of it obstructed by the ditch of defendants. He therefore asks that it be abated as a nuisance.

Defendants' answer denies the ownership of the plaintiff; upon information and belief, denies that plaintiff had expressly forbid the construction of the ditch; but admits that he requested them to take it across the lot at a different point. They deny that the land is inju-

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riously affected by the ditch; but aver that it is benefited by it. Defendants also allege that the land in question was situated in the mining region; was the property of the United States, and that their ditch was constructed in 1855, for the purpose of conveying water to be used for mining purposes from the American river to gold mines in the neighborhood of the premises; was fourteen miles in length, and had cost \$20,000.

The allegations were, on motion, stricken out by the Court, as irrelevant; the cause was submitted to a jury, who found that plaintiff was the owner, and in possession of the premises at the time the ditch was constructed; that it was cut on his land without his consent, and that the ditch injuriously affected the lot, and interfered with its comfortable enjoyment by plaintiff.

Upon this verdict a judgment was rendered, requiring the nuisance to be abated. Defendants moved for a new trial, which was overruled, and appeal taken.

Sanderson & Hewes, for Appellants.

1st. The Court below erred in striking out that portion of the answer which alleges that the lot claimed by the respondent, and upon which the pretended nuisance was created by appellants, was in the heart of the mineral region, and was public land, and had never been conveyed by the government to respondent or any of his grantors.

2d. The Court below erred in striking out that portion of the answer which alleges that appellants' ditch was dug in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the South Fork of the American river from a point about five miles above respondent's lot to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the ditch is fourteen miles long, and was constructed at a cost of \$20,000.

3d. The only facts upon which the judgment is based are found in the special verdict, which is as follows:

"We, the jury, find:

"First — That the plaintiff was the owner and in possession of the

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lot of land described in the complaint at the time defendants' ditch was dug, and is still the owner.

"*Second* — That such ditch was dug through said lot by defendants, and without the consent of plaintiff.

"*Third* — And that said ditch does interfere with the comfortable enjoyment of said lot, and injuriously affects said lot."

These facts are insufficient to sustain the judgment of the Court below, directing the abatement of appellants' ditch.

4th. The Court below erred in refusing a new trial, because the statement and affidavits, the deed from Gordon to Weimer, (which action was brought to enforce a vendor's lien) all show that the respondent was not the owner of the lot at the time the ditch was dug.

As to first point. The action of the Court below in striking out those parts of the answer specified in the first and second points above set forth, can only be sustained upon the ground that they are sham or frivolous. A sham answer and defense is one that is false in fact, and not pleaded in good faith. "A frivolous answer is one that shows no defense, conceding all that it alleges to be true." (*Brown v. Gimsan*, 1 Code Rep., New Series, 1856.) It is not contended that the portions stricken out of the answer in this case come within the definition of a sham answer given above; but it is contended that they come within that of a frivolous answer, and therefore we shall confine our attention to the latter question.

This action grows out of an alleged nuisance. In such actions damages may be recovered, or the nuisance abated, or both may be done. (Practice Act, sec. 249.) So far as the abatement of the nuisance is concerned, it is a chancery action. "The action may be enjoined or abated." This leaves it to the discretion of the Court; and whether the Court will do either or not depends entirely upon the equity of the case. (As to its being in the discretion, see *Bemis v. Clark*, 11 Pick. 452, where a similar statute is construed.)

For the purpose of enabling the Court to exercise its discretion understandingly and equitably, it was proper to plead the matters in question; for if the plaintiff sustained but trifling injury from the alleged nuisance, which could be readily compensated in damages, and an abatement of the nuisance would operate to the irreparable or great

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injury of the defendants, equity requires that the plaintiff should be content with his damages, and the Court should exercise its discretion accordingly. Hence, the fact that the land was public land, and that the works of defendants were of great value and importance, were properly pleaded, for the purpose of enabling the Court to render such a judgment as equity between the parties should dictate. The plea of public land was proper, for the reason that, if the ditch was dug prior to plaintiff's title, he took it as he found it, and subject to all rights antecedently acquired. *Crandall v. Woods*, 8 Cal. Rep. 136.

The Court below has, however, acted upon the hypothesis that the fact of nuisance being determined, it followed of course, as a matter of law, that the nuisance must be abated, regardless of consequences. In this the Court was mistaken, as we shall endeavor to show hereafter, and consequently erroneously struck out those parts of the answer in question.

As to the second point, to wit: insufficiency of the facts found to sustain the decree. The facts are, that plaintiff was the owner at the time the ditch was dug, and is still; that the ditch was dug *without* his consent, and that it injuriously affects the lot, &c. No damages are found, notwithstanding they are prayed for in the complaint. The jury do not find that, at the time the ditch was dug, the plaintiff forbade the defendants from digging it, but that they dug it *without* his consent. What is the meaning of the words, "without his consent?" Does it mean that he forbade them? Most certainly not; the words certainly convey no such idea. The meaning is simply that the defendants dug the ditch without first obtaining the plaintiff's permission, or that he gave no *express consent*. The most latitudinous interpretation of the words cannot assign them any other meaning. If we are correct in our understanding of the verdict, the plaintiff occupies the position of standing silent, while the defendants were engaged in constructing the ditch, and is now estopped. Having stood silent, and suffered the defendants to expend their labor and money without objecting, he cannot now disturb their enjoyment of it. 6 Adol. & Ell. R. 469; 9 B. & C. R. 586; 3 B. & Ad. R. 318, note A; 3 Johns Ch. Rep. 116.

But concede, for the sake of the argument, that the true meaning

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of the verdict is that the respondent forbade the appellants to dig the ditch; even then we say that the facts do not sustain the judgment. In order to show himself entitled to an abatement of the ditch, the plaintiff must show it to be such a nuisance as a Court of Equity would enjoin; he must show such an injury as cannot be compensated in damages. He has entirely failed to show such a case. For the two years during which this pretended nuisance has existed, he has claimed only three hundred dollars damages; and the jury, upon his own showing, refused him any damages. The injury, upon the plaintiff's own showing, and according to the verdict, is of the most trifling character. Courts of Equity will not interfere, unless the trespass produces irreparable injury or great mischief. It is not every technical nuisance that a Court of Equity will abate; but where the injury is trifling, and can be fully compensated in damages, it will leave the party to his judgment at law for damages; and more especially as in this case, where an abatement would result in a great and irreparable injury to the opposite party. *Beamis v. Clark*, 11 Pick. 452.

"When an injury will admit of a pecuniary compensation, a Court of Equity will never interpose." *Ingraham v. Dumell*, 5 Metcalf Rep. 118.

As to the fourth point, to wit: the Court erred in refusing a new trial. The judgment roll in *Gordon v. Weimer* shows that that action was brought to foreclose a vendor's lien. The present plaintiff allowed judgment by default in that case. This, taken in connection with the conveyance from Gordon, shows that the plaintiff was not the owner of the lot at the time the ditch was dug; if so, he could not maintain the action until after he had formally notified the defendants to abate the nuisance. *Lupton v. McLincoln*, 1 Stew. 133.

Thos. H. Williams for Respondent.

Our statute prescribes that an answer, among other things, may contain "any new matter *constituting a defense* to the action." *Wood's Digest*, page 173, sec. 46.

And provides that "irrelevant and redundant matter contained in a pleading may upon motion be stricken out." Page 174, sec. 57.

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And defines a material allegation to be "one essential to the claim or *defense*, and which could not be stricken out without leaving the pleading insufficient."

Irrelevant matter and redundant matter is such, which, if taken as true, does not constitute a cause of action or a *defense* to the action.

This Court has again and again decided that a defendant in an action respecting land, would not be permitted to set up outstanding title in another, or in the government, and that as between individuals, possession should be held "*prima facie*" evidence of title; then clearly the Court below was correct in striking out the allegation that the land belonged to the government, and that the government had not conveyed to plaintiff, because, if true, the facts stated constituted no defense.

The same may be said in regard to the other matter stricken out, for this Court has often decided that a trespasser upon the rights of another, who is digging a ditch, cannot justify that he intends the water for mining purposes; and the value of his ditch is immaterial, as the dollars and cents in question cannot affect the rights of the parties. *Fitzgerald v. Urton*, 5 Cal. 308; *Tartar v. Spring Creek Water and Mining Co.* 5 Cal. 395; and *Burdge v. Underwood*, 6 Cal. 45.

I invite special attention to the last case cited, as it is more directly in point than cases are usually found.

The cause of action, the judgment sought, the facts in the case, and the judgment rendered, agree precisely with this case, with this exception—the Court there finds one hundred and fourteen dollars damages, the cost of filling the ditch, while in this case the judgment requires the defendants to fill it at their own cost, or if they fail to do so, the Sheriff shall fill it at defendant's cost, which will amount to a greater sum than the one hundred and fourteen dollars in the other case.

I might here rest the case, but as counsel for appellants have seen fit to encumber the record with other questions, it may not be improper to briefly notice some of them.

They say "that the plea of public land was proper, because if the ditch was dug before plaintiff took up the land, he took it as he found it, subject to all rights, &c."

This is a fair specimen of the defense, and can be answered in two ways:

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1st. If defendants dug the ditch before plaintiff's location of the land, they should have positively and unequivocally averred the same, and not reach it by saying that the land *belonged* to the government.

2d. The complaint charges that plaintiff became the owner and possessor of the land in 1852, and that he was in possession when defendants commenced digging their ditch in 1855; and defendants do not deny either allegation — on the contrary, the answer admits the possession.

Appellants' counsel quibble as to whether the jury meant that plaintiff forbade the defendants entry upon his lot; but conclude at length that the question is immaterial.

The verdict must be taken in connection with the pleadings, and it will be found that the only issue made upon this branch of the case was, whether defendants entered against the will of plaintiff; and upon that point the jury find for plaintiff. It will be observed that the denial of defendants is evasive, and that they do not even notice the allegation which charges that plaintiff has frequently requested a removal of their works, and that the ditch be filled.

But they say that plaintiff stood by — saw their work going on without forbidding it — thereby tacitly consenting to the trespass.

To which there are two answers:

1st. The entry by defendants was "*prima facie*" a trespass, and *they* must show consent, either express or implied, in defense. They fail to charge the same in the answer, to prove it or to show it by the verdict.

2d. The jury find generally the entry against the *consent* of plaintiff, which according to strict language includes both express and implied consent, and the presumption is, that they intended their language to be understood in its ordinary acceptation.

Appellants contend, however, that conceding this a nuisance, still it is not such a one as should be enjoined or abated.

Upon this subject I understand the following to be the correct rules of law:

1st. That every trespass or injury, however slight, is the subject of an action.

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2d. That an injury which would merely entitle the party to nominal damages is not such as would authorize an injunction or abatement.

3d. That where the injury is more than nominal, and interferes with comfortable enjoyment of property, Courts of Equity will interpose and prevent its continuance.

Having discussed this subject at some length in the case of *Harvey et al. v. Chilton et al.*, tried at this term, I shall forbear extending my remarks at this time, but respectfully refer the Court to that case, and the authorities there cited, both by the counsel on the other side and myself.

In this case, the jury returned a verdict finding, in the language of the Act, that the ditch complained of does injuriously affect plaintiff's lot, and interferes with his comfortable enjoyment of it. And having so found, it was then in the discretion of the Court to abate the nuisance; and I presume this Court will not say that such discretion was improperly used.

The complaint describes the character of the ditch, and shows its effects upon the land, and the answer does not controvert such description, from which it appears that a strip of plaintiff's lot, from one side to the other, and from four feet to ten or twelve wide, is rendered unfit for use so long as the ditch may remain on it, and necessarily it is inconvenient to pass over the ditch, which can only be done by small bridges, to cultivate the northern part of the lot.

Again calling attention to the case of *Burge v. Underwood* cited, I leave the case with a suggestion or two, in reference to the motion for new trial.

This motion is made upon the ground of newly discovered evidence, to wit: that Weimer was not the owner of the land upon which the nuisance was created.

The answers to this motion are more numerous than necessary to state, and I will therefore only give:

1st. The affidavit is made only by one defendant, when there were many, and does not pretend that the newly discovered testimony was unknown to his co-defendants. It is true, he says that he had the chief defense of the case, and I presume that his co-defendants did the small work.

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2d. The deed and record which he exhibits shows that the deed from Gordon to Weimer was executed and filed in the County Recorder's office nearly one year before the commencement of this action, and the suit of Gordon v. Weimer had been terminated before this was commenced. How, under the circumstances, attorneys could have induced their client to swear that he by "due diligence" could not have discovered the evidence before trial, I cannot understand.

3d. Weimer shows by his answer that, in fact, the land was his long before the deed was executed, the latter being withheld until the purchase money should be paid.

4th. Possession is sufficient to maintain the action against a *continuance* of the nuisance.

5th. The application should show that the evidence is *new, material, not cumulative*; has been discovered since the trial, and could not have been, by due diligence, discovered before trial, and will not be granted if the facts stated are fully controverted by counter affidavits. Bartlett v. Hogden, 3 Cal. 55; Brooks v. Lyon, (*Ibid.*) 113; Burritt v. Gibson, (*Ibid.*) 396.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

The assignments of error are, *first*, in striking out part of defendants' answer; *second*, that the verdict of a jury did not warrant the judgment; and *third*, refusal of the Court to grant a new trial on the ground of newly discovered evidence.

The first point is not well taken. It has never been held that a trespasser upon lands in the possession of another can justify his acts by setting up an outstanding title, in which he has no privity. Nor has it ever been decided that the fact that a party is engaged in the construction of a work requiring a large pecuniary expenditure, will justify a trespass on private property. The allegations were properly stricken out as irrelevant — because, if true, they constituted no defense to the action.

The second point is answered by the decision of this Court in Burge v. Underwood, (6 Cal. 45) the findings of which are entirely analogous to the special verdict in this case.

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The third objection is that the Court erred in refusing a new trial, on the ground of newly discovered evidence. The evidence set out in the affidavit consisted of a deed, which had been recorded in the County Recorder's office more than twelve months prior to the trial, and the record of a judgment in the same Court in which the cause was tried; and we are not able to perceive why this evidence could not as well have been discovered before the trial, by the exercise of the slightest degree of diligence.

Judgment affirmed.

STOCKTON, SHERIFF OF SHASTA COUNTY v. COUNTY OF
SHASTA. SAME v. SAME.

A Sheriff cannot maintain an action against a county for compensation for "taking care of the Court House, and keeping and guarding the Jail of the county during his incumbency of the office of Sheriff." The law fixes his compensation for the performance of such official duty.

APPEAL from the District Court of the Ninth Judicial District,
County of Shasta.

These two actions were instituted by the plaintiff to recover of the County of Shasta compensation for taking care of the Court House, and keeping and guarding the Jail of the county, while plaintiff was acting as Sheriff of said county. Plaintiff had judgment in the Court below, and the defendant appealed to this Court.

Attorney-General for Appellant.

Garter & Hinkley for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

These were actions instituted by plaintiff to recover of Shasta county compensation for "taking care of the Court House, and keep-

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ing and guarding the Jail of the county, during his incumbency of the office of Sheriff."

In our opinion there is no warrant or authority in law for such a charge, and the Board of Supervisors properly rejected the account.

The Sheriff, by virtue of his office, is charged with the custody of all persons arrested on civil or criminal process, and is responsible for their safe keeping; for these services he is, in the case of criminals, to receive a compensation, to be fixed by the Supervisors of the county, and paid out of the public funds, and in the case of persons confined on civil process, to be paid by the person at whose instance the process was issued. In order to perform this duty, it is necessary that he should have a secure place in which to detain persons committed to his charge. Therefore the statute provides that the "County Jail shall be kept by the Sheriff and used as a prison" for the detention of such persons as are placed in his custody.

He is also required to "keep an office at the county seat of his county" for transaction of other business connected with his station, and would have the same right to demand compensation from the county for guarding and taking care of this office as of the Jail.

The law fixes the compensation of officers for the performance of these official duties, and it also provides that no fees shall be charged for any other services than those mentioned. (Wood's Dig., p. 453.)

Judgment reversed.

HARVEY *et al.* v. CHILTON.

Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill, which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.

The allowance of costs rests in the discretion of the Court of original jurisdiction.

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APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action to abate a nuisance.

The complaint alleges, that plaintiffs are owners of a certain mining claim situated in the bed of the North Fork of the Cosumnes River, about sixty rods above a certain dam across said stream, belonging to defendant; and that they are also the owners of a certain other mining claim situated on the left bank of said stream, and adjacent to the first mentioned claim. That a part of said plaintiffs are the owners of a certain quartz lode situated upon the left bank of said stream, about three hundred yards above the dam of defendant. The said river claim can only be worked by taking water from said stream at some point above the same, by means of a ditch, and using the same with machinery for the purpose of draining said claim. That said bank claim can only be worked by water taken as aforesaid, with a fall from said claim sufficient to carry the tailings into said stream. That said quartz lode can only be worked by a mill situated at a certain point at the south end of said lode, the same to be run by water power obtained by means of a ditch as aforesaid. That for the purpose of obtaining water for the several objects above named, the plaintiffs, in March, 1857, commenced digging a ditch from a point about one and a-half miles above said claims, and had about a mile of the same completed at the time of the grievances hereinafter complained of. Plaintiffs further say, that all of the aforesaid operations could have been successfully carried on by them as before stated, had the defendant allowed his said dam to remain of the same height as when they were first undertaken. In June, 1857, the defendant commenced to build his dam higher than the same originally, by about two feet and a-half, and by so doing has, and will continue to back water upon said claim in the bed of said stream, so as greatly, if not entirely to impede the working of the same; and has and will continue to back said water opposite of said bank claim, so as to deprive said plaintiffs of a fall sufficient to carry off the tailings from said bank claim, and thus greatly impede, if not entirely prevent the plaintiffs from working said bank claim. Plaintiffs further say, that said increase of the height of said dam,

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does and will cause the water to flow back so as to destroy the mill power of the plaintiffs, intended to be used by them in crushing their said quartz, for they say they cannot run said mill with a less fall than fifteen feet, which fall the previous height of said dam enabled them to secure, by means of their said ditch, and that their mill privilege will be entirely destroyed, etc. The complaint concludes with a prayer that a decree be made requiring the defendant to remove the addition to said dam.

The defendant demurred to this complaint on the ground that it did not contain facts sufficient to constitute a cause of action. The Court below sustained the demurrer, and gave judgment for defendant for full costs, including jury fee. Plaintiff moved to retax costs, which was denied, and he appealed to this Court.

Sanderson & Newell for Appellants.

Does the raising of his dam by defendant, operate as a nuisance to the property and rights of the plaintiffs?

For the purposes of this action, the plaintiffs must be regarded as the actual owners in fee of the bed and banks of the stream, and the owners of a mill site upon which they had already taken measures, by digging a ditch, to erect a mill. (*Merced Mining Co. v. Fremont*, 7 Cal. 130.) The defendant then could not do any act which would operate as a nuisance to the plaintiff, in obedience to the rule of the common law, "*sic utere tuo ut alienum non laedas*."

In this case irreparable injury is the direct result of defendant's act, for it entirely prevents the use and employment by plaintiffs of their property. It is such a material injury to property as a Court of Equity will prevent. (*Winstanley v. Lee*, 2 Swanst. R. 335; *Attorney General v. Nichol*, 18 Ves. 343; *Cherrington v. Abney*, 2 Vern. 646; *Nutbrown v. Thornton*, 10 Ves. 163; *Mohawk & Hudson Railroad Co. v. Artcher*, 6 Paige, 83.)

The bare flooding of plaintiffs' claims is sufficient to warrant the relief. (*Repka v. Sergeant*, 7 W. & S. 1; *Pastorious v. Fisher*, 1 R. 27; *Ramsey et al. v. Chandler et al.*, 3 Cal. 90; *Remis v. Clark*, 11 Pick. 452.)

"Where parties have located a mining claim upon the banks of a stream, and are using the bed of the stream for the purpose of working

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their claim, any subsequent erection or dam which will turn the water and hinder their work, is an encroachment upon the rights of said parties." (*Sims v. Smith*, 7 Cal. R. 148.)

This cause having been tried upon demurrer, the Court improperly taxed jury fee and witnesses' fees against plaintiffs.

The costs, to say the least, were in the discretion of the Court, and he ought not to have taxed them all against plaintiffs. (*Practice Act*, sections 495, 497, 498.)

Thos. H. Williams for Respondent.

The first ground appellants (plaintiffs below) maintain, that the complaint does state facts sufficient to constitute a cause of action, and that the facts so stated warrant the relief sought.

The Court will observe by an examination of the complaint, that immediate or *present* injury is not complained of, but when plaintiffs get the remaining third of their ditch completed, and get ready to build a quartz mill, and make the other necessary arrangements, by turning the river, &c., to work the "river bed claim," and also to work the "bank claim," *then* they expect to be injured, and have no doubt but that their said works will be impeded.

I maintain that one who locates a piece of ground for *mining* purposes only, owns it to the extent of the *right* to mine, and no further, which *right* and the free exercise of it, no one can lawfully interfere with. Any other doctrine would be destructive of some of the most important interests of our mining country.

Appellants cite as authority the case of the Merced Mining Co. v. Fremont, 7 Cal. R. 130, of this Court; but I think that decision rather favors my view of the question.

Judge Burnett uses this language: "If a party leases from another a tract of land for agricultural purposes, upon which there is a mine, any irreparable injury to the mine would not affect *his* estate, but the injury would be to the estate of the landlord, and the remedy in respect to that injury must be sought by the latter. But where the lease is of a *mine*, the case is entirely different. The injury in that case is to the estate of the tenant, and *he* is the proper party to sue."

Showing clearly that the inquiry must be whether an injury has

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been done, or is about to be done, the particular *interest* or *right* of the complainant.

Nuisance means literally, annoyance; in law it signifies, according to Blackstone, "anything that worketh hurt, inconvenience, or damage."

A private nuisance is "anything done to the hurt or annoyance of the lands, tenements or hereditaments of another." 3 Black. Com. 215.

And our statute declares that "anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, is a nuisance, and the subject of an action." Wood's Dig., p. 200, art. 983.

Now, do the facts set forth in the complaint show that defendants have *injured* the *rights* or *interest* of the plaintiffs, or have obstructed the *free use* of their property; or any other *use* which they have ever attempted to make of it?

They cannot say that flowing the water back injured the ground or land, as it seems never to have been in any other condition than covered by water. And they cannot charge that the gold will rust or otherwise injure. Then, if they are unable to aver *injury* to their right, they must fall back upon the sole proposition, that we interfere with the *free use and enjoyment* of it; but that they cannot do, for according to their showing they are not prepared to use it — are not in a condition to do so, and may never be.

In this connection, I will quote from some authorities bearing upon the question under consideration.

In Van Bergen v. Van Bergen, 3 Johns. Ch. R., p. 27, we find the following: "The cases in which chancery has interfered by injunction to prevent or remove a nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a *right*, which the other party had long previously enjoyed."

"It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this Court."

"An act in its consequences slightly injurious will not support the action." Palmer v. Mulligan, 3 Caine's R., p. 312.

"It is well established, that it is not every violation of the rights

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of another which may be ranked under the general head of nuisance, which will authorize the interposition of the equitable powers of this Court; such interposition rests upon the principle of a clear and certain right to the enjoyment of the subject in question, and it must also be a case of *strong* and *imperious* necessity, or the right must have been previously established at law." *Olmstead v. Loomis*, 6 Barbour, 160, and cases there cited; *Angell on Water Courses*, sec. 412.

The authorities cited by the other side are entitled to but little weight.

In *Wynstanley v. Lee*, 2 Swanst., the Court refused the injunction.

Mohawk & Hudson R. R. Co. v. Arthur, 6 Paige, does not belong to this class of cases.

Cherrington v. Abney, 2 Vern. 646. There is no such case.

Remis v. Clark, 11 Pick. 452, is more favorable to mine than the other side.

Nutbrown v. Thornton, 10 Ves. 163, was an action to restrain distress by a landlord against his tenant, and has no application.

Pastorious v. Fisher, 1 R. 27, and *Rissha v. Sergeant*, 7 W. & S. 1, merely establish or assert the doctrine that nominal damages may be obtained for an *injury*, however insignificant.

The two cases cited by counsel proceed upon the hypothesis that the plaintiff was the absolute owner of the land for all purposes, and therefore any flooding would be an injury or trespass.

Attorney General v. Nichol, 16 Ver. 342, sustains the doctrine for which I contend; and is so construed by the Court in *Van Bergen v. Van Bergen*, 3 Johns. Ch. R., p. 27.

Ramsey et al. v. Chandler et al., 3 Cal. 90, does not help their cause. In that case the injury was direct, immediate and present. The plaintiffs had turned the river and were "proceeding to take out large quantities of gold" when defendants flooded them.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

In this case we think the demurrer was properly sustained.

The complaint shows no injury which has been occasioned to

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plaintiff by the act complained of. It does not appear that plaintiff had ever commenced to work the claims owned by him, or that the claims are at all injured or likely to suffer damage from the defendant's dam. We think the action is premature. If after the plaintiff has completed the improvements he has projected, and is prepared to prosecute his enterprise, he is hindered or obstructed by defendant, the law will afford him a remedy.

The question as to the allowance of costs rests in the discretion of the Court below, and we think there has not in this case been such an abuse of discretion as would warrant our interference.

Judgment affirmed.

ROGERS, PUBLIC ADMINISTRATOR, v. HOBERLEIN.

A Public Administrator, having administration of an estate, continues such administration after the expiration of his term of office, and until his authority is directly set aside or indirectly revoked by another appointment.

To vest the incoming administrator with title to the estate, there must be a grant of administration to him; the mere handing over the papers by the old administrator to the new is not sufficient.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This was an action in the name of the plaintiff, as Public Administrator of the County of San Francisco, to recover from the defendant certain rents due by virtue of a lease from Samuel Flower, former Public Administrator of said county, and as such in charge of the estate of Auguste Deck, deceased.

In December, 1855, the Probate Court of the City and County of San Francisco, by a simple order, and without the presentation of a petition, directed letters of administration to issue to Samuel Flower, the then Public Administrator of that county, upon the estate of A. Deck, deceased. Flower's term of office expired in November, 1856, and he was succeeded by the plaintiff. Flower delivered to the plaintiff, as his successor, all the papers and property of said estate, but no

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order of the Probate Court of that county was made directing letters to issue to said plaintiff, nor did they ever issue.

The question presented by the record is, whether a Public Administrator, having administration upon an estate, continues such administration after the expiration of his term of office, or whether the administration follows the office into the hands of the succeeding incumbent, who may sue without obtaining a grant of administration on the particular estate.

Plaintiff had judgment in the Court below, and the defendant appealed.

Heydenfeldt for Appellant.

1. The first assignment of error is, that the declaration is insufficient to support the judgment.

The suit is upon a lease made between defendant and Samuel Flower, as Administrator of Deck.

The contract is either personal to Flower, or in his representative capacity. In either case, there is no right in the plaintiff to recover.

If "personal," then the case shows no assignment by Flower to the plaintiff.

If representative, then it is insisted that Flower is still Administrator of Deck, and plaintiff is not.

Plaintiff has not taken out letters of administration, nor had any grant of administration by order of the Probate Court.

Flower has never been removed, nor had his letters revoked, nor has he resigned.

In *Beckett v. Selover*, 7 Cal. 215, this Court held that letters of administration, or an order of the Probate Court appointing an Administrator, was essential; and so *Williams on Executors*, and all the authorities, hold that letters are the title of the Administrator to the estate, without which he has no right.

In creating the office of Public Administrator, the law intended only to add one more to a class to whom letters were to be granted.

See *Wood's Digest*, p. 396, art. 2250, where the law declares — "*Administration shall be granted*," &c., and where the Public Administrator is the eighth in a classification containing ten classes. Imme-

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diately preceding this section is given the form of letters of administration.

It is insisted, upon a proper construction of this statute, that the Public Administrator does not hold the administration of estates by virtue of his office, but by virtue of his letters of administration.

He obtains the letters by virtue of his office, as being one of a class entitled to administer; but having once obtained letters, he holds like any other Administrator, by virtue of his letters, and is entitled to continue in the administration until the estate is closed up, independent of his tenure of office as Public Administrator.

Among the classes entitled to administer is "ninth; creditors." Now if letters be granted to a creditor, and he immediately pays his own debt and thus ceases to be a creditor, does he lose his right to administer; and could another creditor come in and demand a revocation of his letters, and an issue of letters to himself?

And yet this would be strictly analogous to the claim set up here, that the expiration of the office of Public Administrator takes away from the late incumbent the right to administer by virtue of his letters.

Such was certainly not the intention of the Legislature. Two different Acts show what was the legislative exposition.

The Act of March 8, 1851, a special Act for San Francisco county, provides for an immediate election, and that after the election the *PRESENT incumbent* should hand over everything to his successor.

The Act of April 15, 1851, provides for similar elections throughout the State, and again directs "the *present* incumbents shall turn over, etc., to their successors."

Nothing can be clearer than the inference, that without the provisions above cited, the incumbents would have held, by virtue of their letters, even after their terms expired; and it may possibly admit of question whether their rights were not of such a character that the Legislature could not direct them.

If, as is contended here, administration exists in the plaintiff, then we have the anomalous proposition that it exists in two persons by totally different titles, originating at different times; for if Flower was administrator, he was not so by virtue of his office, but by virtue of an order of the Probate Court.

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Even then, if his office ceased, his powers under the order did not cease, and his letters have not been revoked. The grant of letters is to Flower, not to the Public Administrator, and although he is called Public Administrator, this is only *descriptio personæ*.

His letters granted to him by name cannot enure to his successor in office. It is his evidence of title, and cannot be evidence of title in another; it is a personal trust, and must remain so until revoked or resigned.

Daniel Rogers for Respondent.

The Public Administrator is a public officer of the particular county for which he may be elected.

It is necessary to examine briefly the different Acts of the Legislature in relation to this office, in order to find out the laws applicable to it now, and what are the duties and powers defined by them.

In the law of 1850, in relation to the estates of deceased persons, in chapter 14, section 304, the appointment of a Public Administrator was invested in the Probate Court of each county. This appointment was made by a mere entry upon its minutes.

By this law it is evident that there was no intention to invest him with the ordinary powers of an administrator of a particular estate, because his duties are particularly defined, which were — the *preservation* of estates in particular instances, and the collection of the assets.

By virtue of his office he could not receive general letters, because he was not named in section 52 as one to whom letters could issue. Under this law, the Public Administrator took charge of some estates and held them for their mere preservation, in his official capacity; and hence, upon the expiration of his term of office, his duties and powers ceased and devolved upon his successor. March 8th, 1851, by a special law applicable only to the County of San Francisco, this office was made elective, and it was made the duty of the (then) present Administrator to deliver over to his successor all papers, assets, etc. This was supplied by that of April 15th, 1851, making the office elective in each of the counties. This law retained the section requiring the *present* Administrator to deliver over to his successor the property of the estates. The general law of 1850 was repealed by that

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passed May 1st, 1851. In section 52 of this law, the Public Administrator is named as one who is entitled to receive general letters of administration on particular estates; but that section (310) in the law of 1850, defining the duties of the Public Administrator, is omitted. Many of the sections of the law of April 15th, 1851, in relation to the Public Administrator, have been amended, and are repealed; but sections 6 and 7 remain.

It is difficult to account for the presence in section 6 of this law of the word "*present*," except as arising from bad legislation; because it is only by virtue of this section that it was made incumbent upon the Public Administrator to deliver to his successor anything pertaining to the estates held by him. Has this section expired by its own limitation, or is it still in force? If the section is to receive a strict construction, it has undoubtedly executed itself, because the word "*present*" can only be construed as referring to the Public Administrator then holding the office; but if, on the other hand, this Court construes the word as surplusage, and that it was the intention of the law-makers to retain the section, it may not then be difficult to solve the question involved in this case.

The only sections particularly defining the duties of the Public Administrator are sections 88, 304 and 305. It seems he holds the estates committed to his charge by virtue of these sections simply as a special Administrator. Under section 52, he receives letters of administration because he is the Public Administrator — not because of any connection with the particular estate; and upon the expiration of his official term, his duties and powers as a public officer cease, and the further execution of the trust devolves on his successor in office.

If the Administrator is a public officer, giving bond and taking an official oath, why is there not on the expiration of this office a termination of his duties and powers? There is no law particularly applicable to him whereby he is exempted.

With all public officers, their public functions cease with the expiration of their office, with but one exception, that of the Sheriff; and in his case there is an express provision of law.

If then, there is no provision of law continuing his connection with the administration of a trust after the expiration of his official term,

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there is, by mere operation of law, not only a change of administration but a legal transfer of his letters, and all assets in his possession.

Wm. W. Crane for Respondent.

I. The various provisions of the statute all indicate that *an office* was created, with distinct duties attendant upon it. If the proposition of the appellant be true, the Legislature would merely have enacted that a Public Administrator shall be elected in each county, prescribing his term; then the general statutes relative to the estates of deceased persons would point out his class, and regulate all his duties; but it goes further, and creates an office as distinct and necessary to the functions of government as that of District Attorney, County Treasurer and others.

If the duties of the Public Administrator appertain to *an office*, as contended for, then we submit that the general rule governing the rights and duties of incumbents in office must prevail in this as in other cases, *viz.*: that as to the incumbent *personally*, they are dependent upon his tenure of office, commencing and ending with it.

The separation of the incumbent from office is recognized in the case of *The People v. Langden*, 8 Cal. 1.

The condition of his bond is, that he will account for and pay over all moneys and property that may come into his hands, "*as such Public Administrator.*" Now, if after he ceases to be Public Administrator and becomes a private one, he receives money due the estate and misapplies it, his sureties would not be liable.

II. The appellant urges that the Public Administrator did not hold the estate of Deck by virtue of his office, but by virtue of the letters granted to him. This is not altogether true. It is too broadly stated. He is entitled to hold both by virtue of his office and the letters. He could not demand the letters unless he was Public Administrator, nor could he hold the estate unless in the first instance acquired by letters.

The case of *Beckett v. Selover* merely decides that there must be a judicial grant of administration in each case, *in the first instance*; but it does not decide that the Public Administrator thereby becomes invested with a personal title which continues until the estate is closed. The granting of letters is only a statutory mode of bringing the estate

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within the control of the office; and whoever at the time is the incumbent performs the duties of the office. Most of the State and County officers take property into their possession by means of certain legal forms: for instance, the mode in which County Treasurers acquire school moneys from the State. (Laws of 1855, p. 230.)

The office always continues, though the incumbent may be different. If the title of a succeeding Public Administrator is questioned, he is only obliged to exhibit the grant of letters to his predecessors and his own commission to make out a *prima facie* case.

The learned counsel for the appellant says in his brief: "Now if letters be granted to a creditor, and he immediately pays his own debt and thus ceases to be a creditor, does he lose his right to administer, and could another creditor come in and demand a revocation of his letters, and an issuance of letters to himself? and yet this would be strictly analogous to the claim set up here."

In the first place, all the persons authorized by the statute to receive letters except the Public Administrator, are so authorized because of a *personal* connection with or interest in the estate.

Secondly. Under our statutory system, a creditor cannot pay his debt until the estate is wound up, and a decree of distribution entered; and the contingency suggested could not arise.

III. It is urged that the administration does not pass to the successor in office because of the *absence* of an express provision to that effect.

If the theory urged above be correct, *viz*: that all property, papers, money, etc., attend the office and not the incumbent, then no enactment is necessary; such seems to have been the Legislative understanding. It will be seen that no such provision is made in reference to the County Clerks, (Wood's Digest, p. 88) District Attorney, (p. 64) Coroner, (p. 112) Assessor, (p. 55) Treasurer, (p. 712) Clerk of Supreme Court, nor Superintendent of Public Instruction.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This case comes here upon a single point made by an agreed state of facts; this is whether the Public Administrator of San Francisco

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County, having administered upon an estate, continues such administration after the expiration of his term of office, or whether the administration follows the office into the hands of the succeeding incumbent, who may sue without obtaining a grant of administration on the particular estate. This question depends upon the construction of our statutes. The first Act upon the subject of Public Administrators was passed in 1850. (Acts of 1850, p. 403, ch. 14, section 304.) This Act provided that the Probate Court might, by an order entered on its minutes, appoint a Public Administrator for the County, who should hold office for one year, and until his successor was qualified. This Act defines the rights and duties of this class of public officers. Section 312 provides that, if at any time, letters testamentary or of administration be regularly granted on such estate to any other person, the Public Administrator shall, under the order of the Probate Court, account for, pay and deliver to the Executor or Administrator thus appointed, all the money, property, debts, papers, or other estate of the person deceased. Section 317 provides that the Probate Court may at any time order the Public Administrator to account for, and deliver all the money and property of any estate in his hands to the heirs or to the Executor or Administrator regularly appointed.

It will be observed that nothing is said in this statute—which is the basis of all the legislation on the subject—about the handing over of papers, etc., to the succeeding Public Administrator.

The next Act is that of April, 1851. (Acts of 1851, p. 206.) The first section of this Act provides that there shall be elected in and for each of the organized counties in this State a Public Administrator, who shall continue in office until his successor is qualified. By section 6 it is provided that it shall be the duty of *the present Public Administrators* each to account for, pay over and deliver to his successor, within twenty days after he shall have been qualified, all moneys, property, etc., which may have come into his possession as such Administrator, or be held by him by virtue of his office. Section 7 prescribes a penalty for non-compliance with section 6, against those *now holding the office*. Section 305 of Act of May 1st, 1851, (Acts of 1851, p. 418) provides that the Public Administrator shall make a perfect inventory of all such estate taken into his possession, and

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administer and account for the same as near as circumstances will permit, according to the law prescribing the duties of administration, subject to the control and direction of the Probate Court.

Section 52 of the general Act concerning estates of deceased persons (Acts of 1851, p. 434) prescribes the persons to whom administration shall be entitled in their order. 1st. To the surviving husband or wife. * * 8th. To the Public Administrator. 9th. Creditors. 10th. Any person or persons legally competent. Art. 2349, section 281 (Wood's Dig. 419) provides for the removal of any Executor or Administrator, etc.

In *Beckett v. Selover*, (7 Cal. 216) this Court held that the Public Administrator is not entitled to administer upon every estate, and there must be a judicial grant of administration to him in each particular case, of which his official commission is not proof; and he must show the grant of administration like every other Administrator.

It will be seen, from this review of the statutes, that it is nowhere provided that the Public Administrator shall hand over to the succeeding incumbent of the office the papers, or that the latter succeeds to the unfinished business of estates. By virtue of his office, it is true he is entitled to a grant of administration, as by virtue of his debt a creditor is entitled, but it does not follow from this that the grant is limited in time or by the existence of this relation. The statutes seem *ex industria* to exclude this idea. In one provision, the duty is imposed expressly, under a penalty, upon the then existing Public Administrators, to hand over the papers, etc.; and by other sections it is incumbent upon them to deliver the property, etc., to the Administrator regularly appointed.

It may have been the intention of the Legislature to confine the entire administration of an estate, once granted to a Public Administrator, to the person to whom the letters are granted; since it might lead to great confusion, and expense, and trouble, in shifting the administration to as many different hands as there should be Public Administrators. In this case a grant of administration was made to Flower, former Public Administrator; and no grant was made to Rogers, the plaintiff here. This was necessary, as held in *Beckett v. Selover*, to give him any title to the estate. The mere handing over the papers by Flower to him did not vest him with the title to sue in this case.

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The main argument urged by the respondent against this view is, that as these powers and duties of the Public Administrator exist by virtue of his office, they must necessarily expire with the office. But this depends upon the nature of the office, and upon the Act creating it. At common law, a Sheriff was, after the expiration of his term, from a principle of convenience, considered in some respects as an officer; he could finish some kinds of business which he had begun. And so it has been held in other States, that an Executor or Administrator, after his resignation or removal, is to be treated, for purposes of settlement, remedies, etc., as Administrators in office. We do not see that estates would not be as safe in the hands of the first incumbent, as in those of his successor; while many considerations of convenience and expedition in the settlement of estates are involved in the continuing of the management of them in the hands to which they were first committed. At least, it would seem to be clear that the grant of administration must continue the authority and power of the grantee until it is directly set aside, or indirectly revoked by another appointment.

Upon the agreed facts, therefore, we think the law is for the defendant.

Judgment reversed.

SAYRE *v.* SMITH *et al.*

Where there are no assignment of errors, the appeal will be dismissed.

APPEAL from the County Court of Yuba County.

W. P. Wilkins for Appellant.

L. F. Aud for Respondent.

TERRY, C. J., at the April Term, 1858, delivered the opinion of the Court—BURNETT, J., concurring.

Appeal dismissed for want of assignment of errors.

County of El Dorado v. Reed.

**COUNTY OF EL DORADO v. REED, COUNTY TREASURER, AND
HIS SURETIES.**

The Board of Supervisors of a County cannot settle with the County Treasurer at a special meeting of such Board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted.

In order to give the amplest opportunity to the District Attorney, or citizens who desire to do so, to contest the allowance of improper demands against the Public Treasury, the business of the Supervisors is required to be transacted at the regular meetings required by law; or if at special meetings, public notice must be given of the business to be so transacted; and unless such notice be given, the acts of the Supervisors are a nullity.

**APPEAL from the District Court of the Eleventh Judicial District,
County of El Dorado.**

The facts sufficiently appear in the opinion of the Court.

Sanderson & Newell for Appellants.

We insist that the Court erred in this case, by reviewing the action of the Board of Supervisors.

1st. Because the law clothed them with power to settle with the Treasurer, audit his accounts, and make him his proper allowances. That the exercise of that power was a judicial act, and an error committed by them in its exercise could not be enquired into collaterally Wood's Digest, p. 694, sec. 9.

2d. The only case in which the acts of Supervisors could be questioned collaterally, is where the record discloses that they acted without jurisdiction. In this case their record discloses no such fact, because they are authorized to audit and ascertain the state of accounts between the Treasurer and the County, and in this instance were in the exercise of that power, and part of their allowances are admitted to be legal charges.

3d. The action of the Board is in the nature of a judgment, and like a judgment, when questioned collaterally, must be respected as a whole, or disregarded entirely (being a nullity). In this case their action cannot be treated as a nullity, nor did the Court so treat it, for he credits Reed with all the allowances but one. *People v. Sup. of El Dorado Co.*, 8 Cal. 53.

County of El Dorado v. Reed.

4th. The Court erred in thus reviewing collaterally these allowances, allowing some and disregarding others of them; he should have admitted the settlement as a whole, or disregarded it entirely.

5th. An erroneous action of the Board, where they have jurisdiction, cannot be reviewed collaterally, but the error must be corrected by a writ of *certiorari*: until so corrected it is conclusive. 2 Sandford, 472; 8 Cal. 58.

6th. In making the final settlement of the Treasurer, the Auditor is clothed with no judicial functions, but must be governed by the allowances of the Board; to give him additional power would be to make him an appellate judicial tribunal to review their proceedings at discretion.

Brumfield and Attorney-General for Respondent.

Cited Wood's Digest, 693, sec. 5, also pp. 694, 714, 65; 5 Gilman's Rep. 232; 3 Scam. Rep. 357; Wood's Digest, 696.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This was an action on the official bond of a County Treasurer.

The defense relied on is a settlement with the Board of Supervisors, at which settlement certain allowances were made to the Treasurer, leaving a balance due the county of seventy-three dollars, which was paid by Reed to his successor in office.

It appears that this settlement and allowance was made by the Supervisors at a special meeting, called for the transaction of other business; and that the settlement of the Treasurer's accounts was not specified in the order calling the meeting, as part of the business to be performed.

Section 5th of the Act "concerning Supervisors (Wood's Digest, 693) provides that when a special meeting of the Board of Supervisors is required, the order calling such meeting shall be entered in the records of the Board, etc. * * The order shall specify the business to be performed, *and no other shall be transacted at such special meeting.*"

The reason of the prohibition contained in this section is fully

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explained by the Act of May 12th, 1853, (Wood's Digest, 65) which provides that the District Attorney, when not engaged in the other Courts as criminal prosecutor, shall attend the sittings of the Board of Supervisors, "when engaged in auditing accounts and claims brought against the county, and in all cases oppose such accounts or claims as he may deem illegal, unjust, or extortionate;" and the 21st section of the Supervisors' Act, (Wood's Digest, 696) which authorizes any person being a citizen and a tax-payer of the county, "to appear before the Board of Supervisors, and oppose the allowance of any claim or demand made against the county."

In order to give the amplest opportunity to the District Attorney, or citizens who desire to do so, to contest the allowance of improper demands against the Public Treasury, the business of the Supervisors is required to be transacted at the regular meetings provided by law; or if at special meetings, public notice must be given of the business to be so transacted, and unless such notice be given, the acts of the Supervisors are a nullity.

Judgment affirmed.

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Where the statement on motion for a new trial is not filed within the time prescribed by law, this Court will only look to the judgment roll.

APPEAL from the District Court of the Seventh Judicial District, County of Solano.

Whitman & Wells for Appellant.

John Curry for Respondent.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

In this case the statement on motion for a new trial was not filed within the time prescribed by law, and our investigation must be confined to the judgment roll, which, being regular on its face, the judgment is affirmed.

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ROSE v. DAVIS *et al.*

Where a party takes possession of a part of a tract of land under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed.

A decree of confirmation of a grant by the United States Land Commission and the United States District Court, cannot be impeached in an action of ejectment between a party claiming under the grant and a third party.

Possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff.

A party purchasing land cannot acquire, by such purchase, any greater right than his grantor possessed, and where such grantor entered upon the premises under a contract for lease, he is subject to the same estoppel as a tenant.

The rule of estoppel, which prevents a tenant from disputing his landlord's title, extends to all persons who enter upon premises under a contract for a lease, and to all persons who by purchase, fraud or otherwise, obtain possession from such tenant.

A private survey is no legal evidence of the facts it purports to contain, since, if it were, any man might recover the land of another, by including it in his own boundaries.

When a private survey is admitted as a diagram, but not as evidence, the Court should clearly explain to the jury the precise purpose and effect of its admission.

The survey or map of the United States Surveyor of a grant, is inadmissible as evidence to establish boundaries, without proof of the orders or authority under which he acted.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

This was an action of ejectment to recover a tract of land in Yuba County. Plaintiff claimed by title deraigned from the grant of one Sutter, and his possession under it. Trial by jury on complaint and answer, putting in issue title and possession. There was a dispute as to whether the *locus in quo* was within the boundaries of the Sutter grant, and of the land conveyed to plaintiff, which was part of the Sutter grant. In order to make out his case, the plaintiff offered in evidence the map of J. W. Higgins, of a survey of a tract of land called the Linda tract, it being a private survey made under the orders of the claimants of the Linda tract for the purpose of showing that the land in dispute was embraced in said survey of said Higgins; and also offered a map made by one Von Schmidt, claiming to be a deputy surveyor of the United States, for the purpose of showing what was claimed to be the eastern line of the grant, before referred to, from the Mexican Government to John A. Sutter; and to the

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introduction of each of said maps counsel for defendants made the following exceptions: 1. That the map of Higgins was a private survey. 2. That there was no proof that it was made by consent of the defendants, or any of their grantors, or upon notice to them, or any of the grantors, or by order of the Court.

The Von Schmidt map was objected to as inadmissible: 1. Because no law of the United States, or order of a Court of competent jurisdiction within the United States, or any order or instruction of any Department at Washington, connected with the business of the United States for this State, or any other order, instruction or authority whatever, of either the Federal Government or the State Government, or any other instruction or authority was shown, authorizing the said survey or map to be made, or to be used in evidence in any Court of Justice of the State of California. 2. That no notice upon the defendants or grantors was shown before the making of the said survey as to the same, and no consent of the defendants was shown, or their grantors, to the making of said survey.

The Court ruled that the Higgins survey and map might go in evidence as a diagram, and the said Von Schmidt's map and survey be admitted as evidence.

After the close of the testimony, the Court, at the request of the plaintiff, gave the jury the following instructions:

1st. That if the jury believe the land claimed by the plaintiff is embraced in the boundaries named in the deed from John A. Sutter to Rose, Reynolds and Kinlock, and that they took possession of a part of the tract purchased by them from Sutter, claiming the whole, and that no one at the time of the entry held adversely, then their entry and possession are deemed in law co-extensive with the whole tract purchased by them.

2d. That the decree of confirmation of the grant to John A. Sutter by the United States Land Commission and the United States District Court, cannot be impeached in this suit.

3d. That the possession of the three, Rose, Reynolds and Kinlock, the grantors under whom the plaintiff claims, inures to the benefit of the present plaintiff.

4th. That Joseph L. Davis did not, by his purchase from Richard

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Rose, acquire any greater right than Rose himself possessed; and that Rose, having entered upon the premises upon a contract for a lease from Rowe, was subject to the same estoppel as the tenant, and could (not) have disputed Rowe's title.

5th. That the same estoppel which prevents a tenant from disputing his landlord's title, extends to all persons who enter upon premises upon a contract for a lease, and to all persons who by purchase, fraud or otherwise, obtain possession from such tenant.

The Court gave several instructions at the request of the defendants' counsel, but refused to give the fourth asked by the defendants' counsel, which is in these words:

4th. "A demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act."

Plaintiff had verdict and judgment, and the defendants appealed to this Court.

Bryan & Filkins for Appellants.

The errors of the Court below are embraced in the refusal of the following instructions asked for by defendants' counsel, and refused by the Court.

The Court was asked to instruct the jury as a fourth instruction, as follows:

"A demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act."

This was certainly most pertinent to the case, and was *refused*.

The language of the instruction is precisely in the language of the opinion of Chief Justice Marshall, and a majority of the Supreme Court, in the case of *Blake v. Dougherty*, 5 Wheaton, 364 and 365.

On page 365 of the case last cited, the Court says:

"This private survey might have been made on any other part of the West Fork of the Cane Creek with as much propriety as on that where it has been made. It would have been equally admissible if placed anywhere else on that stream. To allow it any weight would be to allow the grantee to appropriate, by force of a grant, lands not

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originally appropriated by that grant. This would subvert all those principles relative to conveyances of land which we have been accustomed to consider as constituting immutable rules of property."

In *Surget v. Little*, 5 Smedes & Marshall, 330 and 331, Chief Justice Sharkey reviews the whole doctrine, and holds that in no case can a mere private survey bind parties who do not consent to the survey. See *James, Lessees, v. Stookey*, 1 Wash. C. C. Rep. 330; *Chirac v. Reinecker*, 2 Peters, 619, and other cases reviewed with favor by Chief Justice Sharkey in the above opinion.

In *Bearce v. Jackson*, 4 Mass. Rep. 410, Chief Justice Parsons in passing upon this point uses the following language in the close of his opinion: "A plan taken *ex parte* can never be used but as chalk, unless by consent." Upon the same doctrine is the case of *Gerrish v. Beard*, 11 Mass. Rep. 193.

It would be an unheard-of doctrine, to announce that an *ex parte* private survey should be evidence of boundary between two litigants.

As Chief Justice Marshall and Judge Sharkey say, this would be to allow a man to make his *title* in the shape of a survey or boundary. The boundary would be the limit of the conscience of the party or his surveyor; a dangerous standard to trust, perhaps, in this country.

So much for the private and *ex parte* Higgins survey.

We say that the survey of Von Schmidt, the deputy surveyor of the United States, is *equally* inadmissible before the patent has issued to the claimant, and before he is ordered to proceed by the Government of the United States to segregate the private land which may be claimed from the lands of the General Government.

We hold this position to be self-evident, that the government officer who acts without authority of law, his act is to be considered in no other light than that of a private individual. It would be idle to say that Von Schmidt or anybody else can dispossess me of land by his mere act of making a survey, without law, without orders, and without employment, except that of the party opposed to me in a suit.

The Act of March 3d, 1853, Congress of the United States, to provide for the survey of public lands in California, section 3, provides that the Surveyor General shall have the same powers as are conferred upon the Surveyor General of Louisiana, and can survey private

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claims to separate them from the public lands when they are "confirmed." The Sutter claim, Sutter himself says in the testimony before quoted, is not located, and he does not know where he will locate it. It is pending in the Supreme Court of the United States, and no authorized survey under the Act can be made until the claim is "confirmed," plainly referring to a final confirmation of the title, as the Louisiana Act referred to provides.

The Act is a limitation of his powers, as well as a proscription of his duties. He cannot survey until final confirmation, because the Supreme Court of the United States may throw the claim out, and in that case it is all governmental land, and there is none to segregate. Wood's Digest, Appendix, p. 748, sec. 3.

Where the Act last referred to says:

"He shall also cause all private claims to be surveyed after they have been confirmed, so far as may be necessary to complete the surveys of the public lands:" the grant of power to survey after confirmation is to deny that power, so far as the Government is concerned, before a final confirmation. The old maxim of law will apply here and govern "*Expressio unius est exclusio alterius*." But in any event he is limited by the language to make "such surveys only so far as may be necessary in the completion of the surveys of the public lands." They must show this to be that case, which they fail to do. Wood's Digest, p. 748, sec. 3.

The same authorities are referred to upon this point as upon the survey of Higgins, which was merely a private survey and had no shadow of authority.

Reardon, Mitchell & Smith for Respondent.

As regards the map of Von Schmidt. This map is presented to the Court with all the evidences of authenticity, and of its being a map of a survey taken in accordance with all the requirements of the Act of Congress and the decree of confirmation to Sutter. It is not pretended that it does not include the land in controversy; it is evidence in all Courts of the United States; it is conclusive against the United States for any claim to land within its boundaries; and it will scarcely be contended that it is not evidence, we might add "conclu-

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sive evidence," against sheer squatters on what they supposed to be government land, not even claiming right to preëmption. It may be proper to notice, *passim*, a sort of side argument, that the decree in favor of Sutter does not appear to be a final confirmation, within the words of Act of Congress before cited. We reply that the contrary nowhere appears. It would be a waste of time to contend, therefore, that the confirmation by the United States District Court was and is a final confirmation, or to argue that the Surveyor General was not bound to await the last possible day for perfecting an appeal to the Supreme Court of the United States, before proceeding to discharge the duties imposed on him by the law of Congress.

The appellants proceed to a formal assignment of errors.

I. The Court was asked to instruct the jury as a fourth instruction, as follows:

"A demarcation or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act."

"This was certainly most pertinent to the case," say the counsel, "and was refused."

We deny the pertinency, because:

1st. The map in question was not made by direction of a party interested under the grant.

2d. Because the reason, to wit: "that it would enable a grantee to fix a vagrant grant by his own act," does not apply. In this case there is no pretense of any attempt to fix a vagrant grant by any act of the grantee or others.

It will be perceived that the language of Chief Justice Marshall, so carefully followed in the words of instruction, was used in the case of *Blake v. Dougherty, &c.*, 5 Wheaton, 364, 365. In which, a certain grant of public domain called vaguely for the West fork of Cane creek, the waters of Elk river, &c.; and the plaintiff relied on a grant admitted to contain the lands in controversy. The defendants claimed under a prior grant, and exhibited what is called "a demarcation," which the Court understood to mean a private survey made by direction of a party interested under the grant, and which had the effect to locate the prior on the location of the subsequent grant, by

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the act of the party interested. It was, in short, the act of a party locating a "vagrant grant." Accordingly, the Court say: "This private survey might have been made on any other part of the west fork of Cane creek, with as much propriety as on that where it had been made. It would have been equally admissible if placed anywhere else on that stream."

The reason for the exclusion of such testimony is therefore obvious, but that reason is clearly not applicable to this case.

So also in the case of *Surget v. Little*, 5 Smedes & Marshall, 330, 331. The point presented does not arise in this case.

The Court there decided that, knowing judicially that most of the lands in the State had been surveyed, they would not permit a private map to be introduced, with proof that it conformed strictly to the map or survey in the land office. The Court saying: "Whether it did so conform was a question for the jury, and it was susceptible of better proof than was offered," &c.

The only point there decided was that the best evidence should be produced, or a reason given for not producing it.

In the case of *Bearce v. Jackson*: (4 Mass. Rep. 408, 409, 410) "The plaintiff offered in evidence a plan of the land described in the declaration, accompanied by the oath of the surveyor who took it, attesting its accuracy." The Judge refused to admit "the plan, because a plan including the lands in question had been taken by order of the Court, and with the consent of the parties to this action, which was proved to be correct," &c.

But we may save time by admitting, in the very words of appellants' counsel, that "it would be an unheard-of doctrine to announce than an *ex parte* private survey should be evidence of boundary between two litigants."

The Higgins map was not used as evidence for any such purpose; for this reason, if no other, that there was no question of boundary between the two litigants. We submit, therefore, that the Court did not err in refusing to grant this particular instruction, more especially as all that was material in it had been embraced in the instructions granted by the Court.

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BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was an action of ejectment to recover a tract of land in Yuba county. Plaintiff claimed by title deraigned from the grant of one Sutter, and his possession under it. Trial by jury on complaint and answer, putting in issue title and possession. There was a dispute as to whether the *locus in quo* was within the boundaries of the Sutter grant, and of the land conveyed to plaintiff, which was part of the Sutter grant. In order to make out his case, the plaintiff offered in evidence the map of J. W. Higgins of a survey of a tract of land called the Linda tract, it being a private survey made under the orders of the claimants of the Linda tract, for the purpose of showing that the land in dispute was embraced in said survey of said Higgins; and also offered a map made by one Von Schmidt, claiming to be a Deputy Surveyor of the United States, for the purpose of showing what was claimed to be the eastern line of the grant, before referred to, from the Mexican Government to John A. Sutter; and to the introduction of each of said maps, counsel for defendants made the following exceptions:

1. That the map of Higgins was a private survey.
2. That there was no proof that it was made by consent of the defendants, or any of their grantors, or upon notice to them, or any of the grantors, or by order of the Court.

The plaintiff's counsel introduced the Von Schmidt map, which was objected to as inadmissible:

1. Because no law of the United States, or order of a Court of competent jurisdiction within the United States, nor any order or instruction of any Department at Washington, connected with the business of the United States for this State, nor any other order, instruction or authority whatever, of either the Federal Government or the State Government, or any other instruction or authority was shown authorizing the said survey or map to be made, or to be used in evidence in any Court of Justice of the State of California.

2. That no notice upon the defendants or grantors was shown before the making of the said survey as to the same, and no consent of the defendants was shown, or their grantors, to the making of said survey.

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The Court ruled that Higgins' survey and map might go in evidence as a diagram, and that the said Von Schmidt's map and survey be admitted as evidence.

The Court, at the instance of plaintiff, gave several instructions, numbered from one to five in the record, which seems to us to be correct.

It gave several instructions at the instance of the defendants. These do not come up for review.

It refused the fourth instruction asked by the defendants, in these words: "A demarcation or private survey made by direction of a party interested under the grant is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act." This instruction was designed, doubtless, to apply to the Higgins map of survey, which, as has been seen, was admitted against the exception of the defendants. It will be observed that it was offered as evidence to establish boundaries, and the specific objection made to it by defendants was that it was inadmissible for that purpose; but the Court "admitted it to go to the jury as a 'diagram.'" Probably, as it was made a part of the complaint, and as it tended to show the jury more clearly than by verbal description the premises the plaintiff claimed, the Court did not err in permitting it to go to the jury for this purpose; but as it was offered for a different purpose, and as the jury might easily be misled as to the effect of it, the Court, under the circumstances, should have guarded them against any improper influence, by explaining more distinctly than by the general words used in overruling the objection, the precise purpose and effect of its admission. At any rate, the defendants had a right to have the direction of the Court, as sought in the charge, as to the effect of this paper. The Court, therefore, should have given the fourth instruction; for the law is too plain for controversy, that a private survey is no legal evidence of the facts it purports to contain; since, if it were, any man might recover another's land by including it himself, or getting some one else to do it, within his boundaries.

The objection to Von Schmidt's map was well taken for a like reason. No authority was shown for making the survey. The United States Surveyor, nor his Deputy, is not an officer generally empowered to

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make surveys of private lands, which shall be evidence of title of boundaries. He may have special authority by orders of Court, or of the political department for that purpose — in which case the orders or authority given him are his warrant for the act; and this must be shown before his acts are effectual for any purpose of proof. The authorities which support these opinions are numerous. (See *Blake v. Dougherty*, 5 Wheaton, 364; 5 S. and M. 330, and cases cited in C. J. Sharkey's opinion, 4 Mass. 410.) But the principle upon which they rest is too clear to justify further citation.

There is nothing in the point as to the misapprehension of the jury as to the law as laid down by the Court; and the Court was right in giving no effect to these affidavits. (*Hansberger v. Kinney*, 6 Grattan, 287; 4 Hump. 338.)

For the errors we have indicated, the judgment must be reversed and cause remanded.

HUTCHINSON v. RYAN et al.

Where the findings support the judgment, and the record discloses no exceptions to the admission of testimony, or to any ruling of the Court, the judgment below will be affirmed.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

Francis J. Dunn for Appellants.

McConnell for Respondents.

FIELD, J., at the April Term, 1858, delivered the opinion of the Court — TERRY, C. J., and BURNETT, J., concurring.

This action is upon a promissory note; the findings support the judgment; and the record discloses no exception to the admission of the testimony, or to any ruling of the Court.

Judgment affirmed, with ten per cent. damages.

Butte Canal and Ditch Co. v. Vaughn.

THE BUTTE CANAL AND DITCH COMPANY v. VAUGHN.

Where water from an artificial ditch is turned into a natural water course, and mingled with natural waters of the stream, for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not, in so doing, diminish the quantity of the natural waters of the stream, to the injury of those who have previously appropriated such natural waters.

The burden of proof devolves on the party thus mingling the water belonging to him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

The first appropriator of the water of a stream passing through the public lands in the State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity, as often as they choose.

APPEAL from the District Court of the Fifth Judicial District, County of Amador.

This was an action for the diversion of the waters of the South fork of Jackson creek in the County of Amador. Plaintiffs claimed under the first appropriator of the waters of said stream. Defendant in his answer set up a right to a portion of the water, by virtue of a contract with the owners of the Amador County canal, which drained the North fork of the Mokelumne river. From this canal, the water claimed by defendant was emptied into a natural ravine, and from thence flowed into the South fork of Jackson creek, above the dam of plaintiffs, and after descending the stream for a mile, was again taken up at a point above plaintiffs' dam and diverted through defendant's ditch to his mining ground. Plaintiffs demurred to this portion of the defendant's answer as *new matter*. The demurrer was sustained by the Court below, and the defendant appealed. The material facts sufficiently appear in the opinion of the Court.

W. W. Cope for Appellant.

This case in its material features is precisely similar to that of *Hoffman et al. v. Stone et al.*, 7 Cal. R. 46. There is no question as to

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the fact of priority; but the appellants, who were the defendants in the Court below, contend that they had the right to divert from said stream a quantity of water equal to that turned in for their use from the "Amador County Canal." The ditch of the defendants was constructed in pursuance of a contract with the owner of that canal for a supply of water, and the channel of said stream was *adopted* and *used* as a *connecting link* between the two, and as a *medium* for the conveyance of water from one to the other. The water turned into said stream was derived from a foreign source; it was turned in subsequent to the construction of the ditch of the defendants, and for the sole purpose of supplying that ditch. It was not *abandoned*, nor was the *possession* of it *lost* even for a moment.

The principal difference between this case and that of Hoffman *et al.* v. Stone *et al.*, consists in the fact that the water in this case, when turned into the creek, mingled with other water flowing therein, to the use of which the plaintiffs had the prior right. But the decision in that case indicates very clearly the immateriality of this difference. It settles a point of considerable importance in this case, that a mere prior right to the use of the water of a stream, does not entitle the party having such right to the exclusive use of the channel of the stream. A reasonable use may be made of such channel by any other person, and it would seem to follow, that *any use* must be regarded as reasonable from which no *actual damage* results to the prior appropriator.

If that case was correctly decided, the judgment in this must be reversed, or if affirmed, must be affirmed upon grounds purely technical. The only question is as to the effect upon the respective rights of the parties of the *mingling* of these separate bodies of water, by the voluntary act of the defendants. It is true, the identity of the water turned into the creek was destroyed by the *mingling* of such water with the natural water of the stream. But does it therefore follow, the whole was subjected to the prior rights of the plaintiffs? In the case of a *confusion* of goods, where one person willfully and without consent mixes his goods with those of another, so that they cannot be distinguished, the law gives the entire property to the injured party. But this is a rule of necessity, and is carried no farther

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than necessity requires. If the goods mixed are of the same kind, and of equal value, each party takes his given quantity, and neither is entitled to the whole. 2 Kent's Com. 437; 15 Ves. 442.

The attention of the Court is particularly requested to the case in 15 Vesey. The rule there stated appears to me to be peculiarly applicable to a case like the present.

Eddy v. Simpson, 3 Cal. R. 249, and Kelley v. Natoma Water Co., 6 Cal. R. 105, are not authorities in this case. The decision in both of these cases proceeded upon the ground of *abandonment* alone, whereas in this case no such question exists or can arise.

The decision in Hoffman *et al.* v. Stone *et al.* is confidently relied upon by the appellants as governing this case.

Robinson, Beatty & Heacock for Respondents.

The plaintiffs claim that all the water in South Jackson creek belonged to them, as first appropriators; that if any one negligently or willfully mingled other water with their water, they (plaintiffs) were entitled to the whole. The plaintiffs rely, with confidence, on the case of Eddy v. Simpson, 3 Cal. R. 249, to sustain the judgment of the Court below. The case of Kelley v. Natoma Water Co., 6 Cal. R. 105, is to the same effect. The latter case, however, has other facts mixed up with it, and other principles discussed, and among other things the doctrine of "relation." The case of Eddy v. Simpson has but one proposition in it, and we will examine that case, and endeavor to show that it does not in any one particular differ from the case now under discussion. We will further endeavor to show that that case is founded on the soundest principles of law, and ought to be sustained.

Appellants contend that this case differs from Eddy's case, in this particular—that in Eddy's case the water escaped, and flowed first into plaintiff's creek, and after it had flowed into the creek, defendants erected their dam to take it out; whereas, in this case, defendants erected their dam and ditch to take out the water before they had turned it in.

Now, the time at which the ditch was dug to take out the water, in either case, could make no difference, unless the question of abandon-

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ment had arisen; it might then have thrown some light on the intention of the parties. The digging of the ditch beforehand would clearly show that the party thus digging the ditch did not intend to abandon the water he was turning in above. If, then, the case of *Eddy v. Simpson* turned on the question of technical intentional abandonment, and it was on that ground that the Court sustained the action in that case, we admit that our authority is not in point. But if it turned on any other point than technical voluntary abandonment, then we think the case of *Eddy v. Simpson* is directly to the point. The difference of facts in the two cases could not upon any other principle be material.

How do the appellants in this case come to the conclusion that the case of *Eddy v. Simpson* was decided on the doctrine of abandonment? Neither the word abandon nor abandonment, nor in fact, any word of similar import is used, either by this Court in their opinion, nor by either of the counsel in their briefs, nor by the Judge of the Court below in his instructions.

The Court decides one doctrine clearly; that is, that the use of water is only usufructuary; that the defendants having suffered the water to escape from where they used it, and to mingle with water where plaintiffs were using it, it all became subject to the use of plaintiffs.

In this case, say the appellants, we did not suffer our water to escape, but we intentionally turned it into plaintiffs' water. They contend that having turned the water in willfully, they have greater rights than if it had escaped without their consent. In the case where the water had *escaped*, why could not the party who originally appropriated it take it up again, after its escape? Undoubtedly not; because it had, after its escape, mingled with the water of another, and they could not separate it. There is no law which hinders a man from pursuing the property which has escaped from him. If he has only a usufructuary interest, still he may pursue, to enjoy that interest. In the case of *Eddy v. Simpson*, no one will deny that, after the water which was brought to Cherokee Corral, by the defendants, and there used by them, had escaped from them, they might have pursued that same water, erected dams and reservoirs, and taken it up again, at

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any point before it mingled with water used by another. They might have retaken it anywhere on the flats, and in the natural dry ravines, before it mingled with the water of Shady Creek. They did not lose the water then, irrevocably, by letting it escape. After an ordinary escape they had the right of recapture, or new appropriation. But they had lost it by letting it mingle with water appropriated by another. The reason is, the law will not attempt to make impracticable divisions. If one voluntarily mixes his property with that of another, ordinarily he loses the whole. And this rule is enforced with more rigor against the person who voluntarily and willfully makes the confusion, than against one who does it accidentally or negligently. See Kent's Com. 365, margin, 437, 8th edition, note 1.

But in either case a division is refused, on the ground that it would be impracticable to tell what portion belongs to each of the parties, and the one who is faultless will not be subjected to a division in which, from the uncertainty of human testimony, and the impossibility of Courts doing exact justice, he might suffer a loss. If he is not in fault, he will not be subjected to any risk. The doctrine upon the subject of confusion of goods is well settled: that he who willfully mixes his goods with those of another loses the whole, except in the single instance where goods mixed are of the same quality, and are capable of being measured by some just standard, as wheat by the bushel, flour by the pound, wine by the gallon, etc., and in such cases, if the quantity mixed can be ascertained, then the wrong-doer may have his wheat, wine, or flour restored to him by measure, because it can make no difference to the innocent party whether he has the same identical grains of wheat, or drops of wine, which he originally had, provided he has the same quantity and quality. But the very moment it becomes impossible to make a decision, and do the innocent party certain justice — when the division can only be guessed at, or any injury has resulted to the innocent party from the admixture, then the wrong-doer forfeits the whole. We refer to the following authorities on this head: 2 Kent's Com. 365; *Willard v. Rice*, 11 Metcalf; *Breckenridge v. Holland*, 2 Blackford's Ind. R. 377.

In regard to the application of this rule to the use of the water, we think that we can show that it applies with more force than to any other class of property.

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In the first place, running water is incapable of accurate admeasurement; at least, no accurate means of admeasurement are in use among miners. It is true, they do measure by the square inch; but then a square-inch tube, with one foot head, would only carry half as much water as the same tube with four feet head, and one-third as much as with nine feet head, etc., that is, in proportion to the square root of the height.

But the difficulty of admeasurement is the smallest of the objections attending such confusion of water. If one party, after having conducted his water for some distance through artificial channels, and used it for mining purposes, turns it into a natural stream which has been appropriated by another, he of course empties mud and sediment with the water, and thereby injures the quality of the water in the natural stream. The quantity added would not, as a general rule, more than compensate for the depreciation of the quality.

Another difficulty is this: suppose water be turned into a creek at its head, which will fill a certain orifice, with a certain pressure; it runs down the creek say five or ten miles; now, how are you to measure it when it is taken out? During that five or ten miles, of course, there is a great loss by evaporation, leakage, sinking into the sand, etc. If you measure at the taking out in the same way as when it was let in, you make the innocent party, who first appropriated the creek, sustain all the loss of the wrong-doer. If you allow a per centage for loss, what will it be? The loss would be much greater in some cases than in others. Running over a gravelly bottom, in some cases, the loss would be fifty or seventy-five per cent., perhaps, in five miles. In other cases, with a narrow, shaded channel, and a compact rock bottom, the loss would not be ten per cent. in ten miles. But there is still another and greater difficulty, practically, than all we have yet mentioned. All men who have dug ditches from small creeks, have been in the habit of using their dams, at the head of the ditch, to accumulate water during the night, to be used during the day. Usually, these dams have filled up during the night. If, after the water is turned in, the dam soon fills up and runs over, much water is wasted during the night. Both parties commence using water out of the dam, or reservoir, in the morning, and it is soon emptied. All these

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things would make the equitable division of the water so difficult, that it would be impossible for the most equitable and right-minded persons to make a satisfactory division.

It was suggested, on the argument of this cause, that the doctrine of confusion of goods did not apply to this case, because plaintiffs did not own the water, and only had a usufructuary right in it. Well, that is a *special* property. They had a right to it, with all the rights pertaining to property, so long as it was in their possession. They have the same right to protection, so long as the water is being used by them, that they would have in the use of property absolutely belonging to them. The injury is done to them before they have parted with the water. For the time being, they are the *quasi* owners. To show that the doctrine of confusion applies not only to the case of absolute property, but also to cases where there is only a qualified property, we refer to the case of *Willard v. Rice et al.*, 11 Metcalf's Mass. Rep. 493.

The case in 15 Vesey, to which appellants refer, fully carries out the doctrine for which we contend in regard to confusion of goods.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The plaintiffs claim, under the first appropriators, the right to the waters of the South fork of Jackson creek, in the County of Amador, and previous to and at the time of the diversion by the defendants, which is the occasion of this suit, were the owners of a line of ditch and of flumes and aqueducts, into which, by means of a dam constructed across the stream, they diverted the waters from the natural channel of the fork, and conducted the same to adjacent mining ground to be used for mining purposes.

The defendants are the owners and in possession of valuable mining ground situated on the north side of the fork, and are endeavoring to obtain the requisite supply of water for its successful working from the North fork of the Mokelumne river and its tributaries, through the Amador County canal, under a contract with the owners of the canal. For that purpose the water is conducted from the canal by artificial channels to a natural gulch or ravine, from which it is

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emptied into the South fork of Jackson creek, above the dam of the plaintiffs. About a mile below the point where the water is thus emptied, the defendants have constructed a ditch leading to their mining ground, into which, by means of a dam at its head thrown across the fork, they divert a portion of the waters flowing in the channel, and it is this diversion which is the subject of complaint in this suit. The quantity of water diverted does not equal the quantity emptied into the fork from the Amador County canal through the ravine or gulch designated. Upon these facts the single question is presented whether the defendants, after the mingling of the water conducted by them from the canal with the waters naturally flowing in the fork, possess the right to take out an equal or less quantity from the stream, or is the right of the defendants to the use of the water whilst in the ravine, or to the use of an equal quantity, lost by its subsequent mingling with the natural waters of the fork?

This case is similar in its material features to that of *Hoffman et al. v. Stone et al.* (7 Cal. 46). In that case the plaintiffs were the prior appropriators, and as such entitled to the waters of a stream called Dutch gulch, the channel of which was dry at certain seasons of the year. This channel the defendants used as a connecting link between two canals constructed by them, emptying their waters by one canal into the channel, and subsequently diverting them by means of a dam into the other. The plaintiffs in that case, who were the owners of a ditch which received its supply of water from the creek, obtained a judgment perpetually enjoining the defendants from diverting the water from the main channel so as to prevent it from flowing down to the extent of the capacity of their ditch. But on appeal the judgment was reversed, and this Court, per Murray, C. J., said:

"The plaintiffs being the prior locators, it would follow that any interference with the waters of Dutch gulch would be an infraction of their rights. But the appropriation of the waters did not give them the exclusive use of the bed of the stream. We see no reason why it might not be used by others as a channel for conducting water, so long as it did not interfere with their rights. If the defendants were diverting the natural water of the stream, as well as that brought into it by themselves, then the plaintiff would have a just cause of complaint."

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In the case at the bar the channel of the South fork of Jackson creek is used as a connecting link between the Amador County canal and the ditch of the defendants. The water from the canal is emptied into the fork with no intention of abandoning its use, but for the sole purpose of supplying the ditch. The principal difference between this case and that of *Hoffman v. Stone*, is the mingling of the water introduced by the defendants with the waters of the creek. In that case the channel of the stream was dry in certain seasons of the year, and at the time the suit was brought there was no natural water flowing in it. But it does not appear that this circumstance had any controlling influence upon the decision. The point settled in that case is this: that the prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If the plaintiffs in the present case receive their full supply, as previous to the introduction of water by the defendants, they have no cause of complaint.

It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture — both are entitled to take their given quantity. Where there is a confusion of goods willfully made by one owner, without the consent of the other, so that it becomes impossible to distinguish what belongs to each, the common law gives the entire property to the injured party. "But this rule," says Kent, "is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So, if the corn or flour mixed together *were of equal value, then the injured party takes his given quantity and not the whole.*" (Coms., 2d vol., 365; *Lupton v. White*, 15 Vesey, 442.)

The plaintiffs rely, with apparent confidence, upon the case of *Eddy v. Simpson* (3 Cal. 249). In that case the plaintiffs were the prior appropriators of the water of Shady creek, having diverted the same

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by a dam across the stream. The defendants, by like means, obtained the water of Bloody Run and Grizzly cañon, which they brought to a place known as Cherokee corral, where, after its use, it passed from their possession and found its way, by natural channels and the natural level of the country, to Shady creek, at a point above the dam of the plaintiffs. And when the defendants undertook to retake from Shady creek, a quantity of water equal to that which thus found its way into the channel, the Court held their rights to the water were gone. "When the water of Grizzly cañon and Bloody Run," said the Court, "left the possession of the defendants at Cherokee Corral, all right to and interest in that water was lost by the defendants. It might be made the property of whomsoever chose to possess it. Without the agency of the defendants, it found its way into Shady creek, joining the waters there in the possession of the plaintiffs, and became a part of the body of water used and possessed by them."

It is very evident that the Court considered the fact that the water had passed from the possession of the defendants, and found its way to Shady creek without their agency, as material circumstances of the case; in other words, it regarded the water as having been abandoned. This is the view taken by Mr. Chief Justice Murray, when he notices the objection that *Hoffman v. Stone* was within the rule of that case; for the reason he assigns, as an answer to the objection, is the finding of the jury that the water was not abandoned by the defendants, and left to find its way by natural channels into Dutch gulch, but was turned in by the defendants, making the gulch a connecting link of their ditch.

There may be some difficulty in cases like the present, in determining with exactness the quantity of water which parties are entitled to divert. Similar difficulty exists in the case of a mixture of wheat and corn — the quantity to be taken by each owner must be a matter of evidence. The Courts do not, however, refuse the consideration of such subjects, because of the complicated and embarrassing character of the questions to which they give rise. If exact justice cannot be obtained, an approximation to it must be sought, care being taken that no injury is done to the innocent party. The burden of proof rests with the party causing the mixture. He must show clearly to what

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portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled.

Cases involving questions of analogous character and equal difficulty, are of frequent occurrence. The illustration given by the defendants' counsel is in point. A constructs a ditch, and appropriates a portion of the water of some stream for mining purposes; B subsequently constructs a ditch for a similar purpose, tapping the stream. A then enlarges his ditch, destroying the landmarks of its original capacity. A dispute then arises between A and B, as to whether A is not diverting more water through his enlarged ditch, than he is entitled to by virtue of his first appropriation. Here the quantity of water to which A and B are respectively entitled, becomes difficult of accurate adjustment; and if, instead of two, there be a greater number of ditches taking water from the same stream, questions respecting the conflicting rights of the parties become exceedingly complicated and embarrassing. The Courts do not, however, as we have observed, refuse to entertain such questions; but endeavor to relieve them of their complication and embarrassment, and to mete out justice to all parties. (*Priest v. Union Canal Company*, 6 Cal. 107, and *White v. Todd's Valley Water Company*, 8 Cal. 443.) In *Embrey et al. v. Owen*, (4 Eng. Law and Equity, 470) Baron Alderson refers to a case in point. "There was a case," says the Baron, "of *Dakin v. Cornish*, tried before me at Leeds, in 1845, where water was taken from the river Ayr to work a steam engine. There was an artificial course from the river to a reservoir in the yard of a mill; the water was there mixed with other water obtained from the earth, the whole was then used for the steam engine, what remained was transferred into another tube and carried back to the river; and the question was whether this was an injury to some other mills lower down on the stream. We took much care about the case, and I left it to the jury to say if the same quantity of water continued to run in the river, as if none of its water had ever entered the premises of the defendant, and if so, he was entitled to their verdict."

The first appropriator of the water of a stream passing through the

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public lands in this State, has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint.

It follows that the Court below erred in sustaining the demurrer to the new matter set up in the answer, and the judgment rendered thereon must be reversed, and the cause remanded for further proceedings. Ordered accordingly.

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A bill of sale for a mining claim, not under seal, and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity. In such a case, the purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies to all such cases.

APPEAL from the District Court of the Fourteenth Judicial District, County of Nevada.

Ejectment to recover a mining claim.

The case was tried before a jury, who, under the instruction of the Court, returned a verdict for the plaintiff. It seems that one Matteson, in 1853, was possessed of a certain piece of mining ground, and in consideration of a note made by one Head and one Flippen, with one Grier as surety, in July of the same year, executed and delivered a bill of sale of the ground to Head and Flippen, jointly. Evidence was offered, in the course of the trial, tending to show, if credited,

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that Head and Flippen, after getting the bill of sale, went to the ground, not far off, and found some other persons in possession. They then returned to Matteson, and informed him of the fact. The bargain was thereupon rescinded, the note destroyed, and Flippen agreed to destroy the bill as soon as he returned to his cabin, where it was. It had not been recorded. Matteson, Head, Flippen and others then determined to drive the persons in possession off the ground. They did so, and kept the possession themselves. Two or three days afterwards Flippen sold the claim, or his interest in it, to Clark, the plaintiff below. Matteson, shortly after this sale, sold the interest or share to Head, who thereby, as claimed, became owner of the entire claim. Head remained in possession, working this and other claims, forming a compact body or tract of land, for several years, and until sold to the defendant below. In December, 1857, Clark, the plaintiff, brought this suit.

It seems to be assumed, in the instructions and in the argument, that some proof was made that Flippen, at the time of the sale to Clark, was in possession, and showed Clark the bill of sale from Matteson, or that Clark saw it, or had knowledge of its existence and contents; and we assume that this is true.

The bill of sale from Matteson to Head and Flippen is not in the record. The bill of sale from Flippen to Clark is, in these words:

“NEVADA, July 5, 1854.

“Know all men by these presents, that in consideration of two hundred and fifty dollars, in hand paid and this day received, I hereby sell and transfer all my right, title and interest — said interest being one-fourth — in claim situated, etc., on Little Deer creek, and known as Booth & Co.’s claims, unto J. M. Clark; in token of which, I hereby set my hand and seal, this day.

“ (Signed)

WILLIAM H. FLIPPEN.

“G. H. GRANT, *witness*.”

No seal is affixed to the name of Flippen.

The first instruction of the Court was as follows:

“That if the jury believed from the testimony that Head and Flip-

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pen purchased two interests in the ground in dispute, gave a joint note with Grier as security, and received a joint bill of sale; that on finding other parties claimed the ground, they returned to Matteson, from whom the ground had been purchased; that an agreement was then made to cancel and annul the sale of said claims, for the surrender of the bill of sale, and that the joint note was given up and canceled, but the bill of sale, being away, was not given up—then as between the parties, and all parties having notice, these acts worked as a cancellation of the bill of sale. But if, notwithstanding such agreement, Flippen neglected to destroy the bill of sale, as he had promised, and that Clark, upon the strength of the bill of sale, knowing it had been executed, and not knowing of the agreement to cancel, was induced thereby to purchase—then he would be entitled to recover against a subsequent purchaser of the same interest from Matteson; and at request of defendants' counsel, the Court said to the jury, that if Clark was not induced to purchase by the bill of sale, (or if the bill of sale was not the principal inducement to the privileges) then those holding under Matteson subsequently are not estopped from setting up claim against Clark."

Plaintiff had judgment, and the defendants appealed.

Meredith and Hawley for Appellants.

The instructions were erroneous.

1st. Because thereby the jury was required to regard "a bill of sale" for a mining claim in the light of a negotiable instrument, and the purchaser in good faith, from the holder of such bill of sale of the land mentioned in the same, in like position with, and with like rights to, an endorser in good faith of a bill of exchange.

The doctrine of *caveat emptor* is entirely ignored in the instructions, and the whole case made to turn with the jury upon the question whether the purchaser Clark had notice that his grantor had no title.

The instructions required the jury, after finding that the sale had been revoked or cancelled by mutual agreement and concurrence, and that the interest before intended to be conveyed had reverted or remained in Matteson, leaving none in Flippen, plaintiff's grantor, at the time of sale to plaintiff; further and also to find that *the bill of sale*

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had been destroyed, and that Clark, plaintiff, did *not* know that his grantor had *no* title.

How could the interest of the parties be affected by the *destruction* of a bill of sale of a mining claim, when the contract intended to be expressed in such instructions had been revoked by the parties to it?

A contract may be rescinded by consent of the parties, and this is an elementary rule of law applicable alike where real or personal property is the subject of the agreement. 1 Parsons on Cont. 190.

When a contract is rescinded, it cannot be rescinded as to one of the parties, and remain in force as to the other; and this proposition logically results from the well established rule that there must be mutuality in every agreement. The surrender and destruction of the note, pursuant to the agreement to annul the bargain, worked a cancellation *in toto*.

If the contract was rescinded as to Matteson, it was rescinded as to Flippen, and this left Flippen no interest whatever in the subject of the contract — the mining claims.

Flippen having no interest, could convey none: "*nemo plus juris in alium transferre potest quam ipse habet.*" Broom's Legal Max. 354.

The only exceptions to this principle controlling the transfer of property are —

1st. That in favor of a *bona fide* purchaser of goods in *market overt*.

2d. That in favor of a *bona fide* purchaser of a negotiable instrument, bill of exchange, etc.

3d. That in favor of a *bona fide* purchaser of a bill of lading.

There is no *market overt* in this State, or in any State of America.

It is wholly unstained by reason or judicial ruling (unless in this instance) that "a bill of sale" for a mining claim, so long as it is *not destroyed*, is a *negotiable instrument*; and that the holder thereof, without right or title to the lands mentioned in it, can by reason of such holding convey such lands to one whose innocence equals his simplicity in purchasing without inquiring as to the title of such holder.

The learned Judge in the Court below seems to have regarded the bill of sale as a negotiable instrument, and that its transfer carried the land mentioned in it to a purchaser *without notice* of the defect of the holder's title.

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Is a mining claim land or personal property? Until the question is otherwise decided, I must hold the opinion that its characteristics are those of realty. This Court seems to have so regarded a mining claim in the case of *The Merced Mining Co. v. Fremont*, 7 Cal. Rep. 317.

If a mining claim is real estate, a bill of sale, not being an instrument under seal, conveys no title, and imparts notice to no one. Neither the instruction of such an instrument, therefore, nor the execution of a like one reconveying, was required in this case to produce a rescission of the contract; and one with knowledge of all the acts, or the whole transaction between the parties, could become a purchaser in good faith from Matteson, the original owner, and acquire title.

2d. The instructions of the Court were erroneous, because contradictory to and irreconcilable with those given at defendant's request.

The latter rendered the finding of title in Flippen, plaintiff grantor, at the time of the pretended and false sale to plaintiff, indispensably necessary to a verdict for plaintiff. Those which were immediately afterwards given on the Court's own suggestion, completely ignored that requisite, and placed plaintiff's right to recover alone on the grounds of the destruction of the bill of sale, and that plaintiff had *no notice* that his grantor had *no title*.

The first proposition of the judge's oral charge is, in substance, that parties to an agreement and their privies with notice are bound by such agreement. We apprehend that this doctrine, as applied to the case at bar, will not be questioned. See *Hostler v. Hays*, 3 Cal. 302; *Barroilhet v. Battelle*, 7 Cal. 450; *Bird v. Lisbros*, 9 Cal. R. 1.

The second section of the oral charge, if taken by itself, may be questionable law; but if wrong, the error is against the plaintiff and in favor of the defendants.

This is an action of ejectment, and under the pleadings we have only to establish title in ourselves or in our grantor; but the instruction is to the effect that we must prove: 1st. That at the time of our purchase we believed Flippen had no title. 2d. That we were induced to purchase by the first bill of sale. 3d. That we were ignorant of the agreement existing between Matteson and Flippen, our grantor, to destroy a certain instrument. All this was certainly against a plaintiff who had only to prove title. Belief, inducement and ignorance are

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issues alike foreign to the case presented by the pleas, and maintained by the proof; and the rule is well established that the verdict will not be disturbed unless the instruction prejudice the party complaining. See 4 B. Mon. Rep. 386.

If, however, this oral charge be examined in connection with the written instructions which follow, it will be seen that as a whole they embody the law of this case. Says the Court, through defendants' written instructions: "If Clark's grantor parted with his title before his sale to Clark, you must find for defendant." Any doubts which the jury may have entertained from the oral charge of the judge, were fully corrected by the full and positive instructions which followed. The rule is too well established to require argument, that instructions must be construed together. Although some single propositions may be incorrect, yet, if from the whole it appears that the law was correctly given, the verdict will not be disturbed. *Dwinelle v. Henriquez*, 1 Cal. 388; *Carrington v. Pacific Mail Steamship Company*, 1 Cal. 475; *Haskell v. McHenry*, 4 Cal. 411.

The rule in all these cases appears to be this: that if, from the whole charge construed together, the law was correctly given, an incidental error will not vitiate the verdict.

In the case of *Cunningham v. Dorsey*, 6 Cal. 19, a new trial was granted, though an erroneous instruction was given with a correct one upon the same point. It will be seen, upon an examination of that case, that the only question was the amount of damage sustained by the plaintiff, and the error of the Court was in giving the measure of damages sustained by the plaintiff. The rule of computation was exclusively a question of law, and the verdict of the jury was directly dependent upon this. In such a case, the Court may properly decide that the true rule upon this point being absolutely necessary to the determination of the case, and there being nothing in the verdict to decide by which instruction the jury were governed, a new trial must be had. In that case, also, both instructions were in writing, and with the jury in their deliberations. But in the case at bar, the correct rule alone was in writing, and the oral error, if it existed, was lost to all save the ear of the defendant's attorney.

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BALDWIN, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

It is not very material, in the view we have taken of this case, whether we regard these mining claims as real or personal estate. The bill of sale from Matteson to Flippen and Head may be left out of the question. The bill from Flippen to Clark only purports to convey to the latter the right, title and interest — whatever that was — of the grantor. If Flippen had no real interest, by reason of the cancellation of the contract of sale, he could convey none, by such a contract as that in evidence, to his grantee.

The bill of sale, not being under seal, even if it were otherwise sufficient to pass the legal title to real estate, it did not pass any in this instance; it passed only an equity, and this equity is subordinate to the legal title or to any superior equity. This was decided in the case of Dupont v. Wertheman, 10 Cal. 354. In such case, as shown in the case cited, the assignee stands in the shoes of his assignor.

The instrument does not pretend to be a conveyance of the land, but only of the right, title and interest in it, and this without warranty. It is held in such cases that the instrument only conveys the present right or title of the party granting. The purchaser takes the risk of any infirmities or defects of title which may exist. (Adams v. Cuddy, 13 Pick. 463; Morse v. Godfrey, 3 Story's R. 364; 1 Cowen, 613; 9 *Ib.* 18; 4 Kent, 261; 12 Pick. 47; 13 *Ib.* 116, 460; 14 Johns. 193; 20 *Ib.* 478; and 11 Sergt. and R., 389, cited in case of Dupont v. Wertheman.) The doctrine of *caveat emptor* applies in every such case. It was the duty of Clark, under such circumstances, to inquire of Matteson into the true state of the title; or if he buys only the interest of the grantor without such inquiry, he must run the risk of his speculation. The title being really in Matteson, or Matteson, after the cancellation, having on the hypothesis of fact assumed the superior equity, Clark would get nothing by his purchase under the contract evidenced by this bill of sale. The defendant succeeding to the title of Matteson, has the same rights.

There is nothing in the point made by the respondent, that no exception was taken to separate portions of the charge. It will be seen

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that the charge is so connected as that each part relates to the rest, and the substance of it opposes the view we have just presented. Nor is there anything in the point that the Court gave the instructions asked by the defendant; which, considered alone, seem to place the law substantially as we have given it. If the instructions were directly contradictory this would be a good ground for reversal. If to be taken altogether, the one set qualifying the others, then the error we have pointed out exists.

We are not to be understood as expressing any opinion, or giving any intimation whatever as to the facts of this case. It is for the jury to pass upon them. The parties are entitled to have the law applicable to any supposed hypothesis of fact of which there is legal evidence, distinctly given to the jury, that they may apply the law to the proofs.

The judgment is reversed and the cause remanded.

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The granting or refusing a continuance rests in the sound discretion of the Court below; and even when the facts show that the action of the Court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witnesses, if such affidavits can be obtained, or if not, then it should be shown to the Court that they cannot be obtained. Unless this be done, this Court will not interfere, in civil cases, with the action of the lower Court.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action brought to recover damage done to a ditch by reason of defendants mining in the cañon above, and running down sediment and earth into the ditch.

Defendants alleged that they were miners, and claimed priority of location and working their claim.

When the case was called for trial, defendants moved for a continuance of the case on the ground of absent witnesses. This motion was based on the affidavit of one of the defendants, showing diligence

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in attempting to obtain the testimony of such absent witnesses, and the nature of the proof. The Court denied the motion for a continuance, and the cause was tried by a jury, who rendered a verdict for the plaintiff, and judgment was entered therein. Defendants moved for a new trial on the papers in the case, which was denied, and they appealed.

John Hume for Appellants.

Sanderson & Newell for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The first assignment of error in this case is for the refusal of the Court below to grant a continuance on the affidavit of the defendant.

In the case of *Musgrove v. Perkins* (9 Cal. 211) we held that "the granting or refusal of a continuance rests in the sound discretion of the Court below; and its ruling will not be reviewed except for the most cogent reasons. The Court below is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate Court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed." It is true that the facts in this case show that the action of the Court approached very closely the line within which, it is intimated, this Court will interfere. But in such cases we think the party whose application has been refused should move the Court for a new trial, and support the application by the affidavits of the absent witnesses, if such affidavits can be obtained, or it should be shown to the Court that they cannot be obtained. Unless this be done, this Court will not interfere, in civil cases, with the action of the lower Court.

The second assignment of error is without merit. It has nowhere been held that a defendant is not responsible for injuries done the ditch of another by the deposit of mud and sediment in it. The doctrine of the *Bear River Company v. York Mining Company*, 8 Cal. 327, probably went quite as far as it ought to have gone, when confined to the express points there announced, and we certainly feel no disposition to extend it further.

Judgment affirmed.

Dye v. Dye.

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In an action for the division of the common property of husband and wife after a decree of divorce, the plaintiff, to bring herself within the provisions of the Act "defining the rights of husband and wife," passed April 17th, 1850, must affirmatively state such facts as give her the right to the property under the Act.

It is not material where the marriage was solemnized, if the parties afterwards, and after the passage of the Act, resided and acquired the property here.

There is no presumption of law that a marriage took place at any particular point, nor that property, especially money "and other personal property," was acquired in any particular locality.

When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts; those facts which the statute requires as the foundation of the right must be stated in the complaint.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This bill was filed by complainant for a division of common property, upon the allegation of a dissolution, by a decree of the Twelfth District Court, of the matrimonial union once existing between these parties. The decree was procured at the instance of the defendant. The bill states "that at the time of the rendition of said decree, the said Job F. Dye was in possession and held a large amount of property; all of which said property was acquired after the marriage and during the coverture with your complainant, to wit: a rancho, situated in the county of Tehama and State aforesaid, containing eleven leagues of land; one hundred acres of land situated in the county of Sacramento; a house and lot, situated in the town of Monterey; two hundred head of horses; two thousand head of horned cattle; two thousand head of sheep; ten thousand dollars in cash, and other personal property; which said property is common property, as made by the statute of this State." The marriage is alleged to have taken place on the ——— day of ———, 1838; where, is not stated, nor the then residence of the parties. To this complaint the defendant demurred, upon several grounds. The demurrer was sustained and the plaintiff appealed.

Thompson, Irving & Pate for Appellant.

The objection urged by the respondent's counsel is, that there is no averment that the property was acquired subsequent to the Act passed

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seventeenth of April, 1850; that this Act only affects property acquired since the passage of the Act.

We deny this to be the true construction of the law. The language of the twelfth section of the statute provides that in case of a dissolution of the marriage, *the common property* shall be equally divided between the parties. It makes no distinction whatever between property acquired *previous* to the Act and the property acquired since.

It applies to all the common property: we are aware that some doubt has been raised as to this construction of the statute. By reference to the fifteenth section, where it is provided "that the rights of husband and wife, married in this State, prior to the passage of this Act, or married out of this State, who shall reside and acquire property herein, shall also be determined by the provisions of this Act, with respect to such property as shall be hereafter acquired, unless so far as such provisions may be in conflict with the stipulations of any marriage contract."

We submit, to construe the language of this section as is contended for by the respondent, would be to bring it directly in conflict with the twelfth section, which provides for a division of "*the common property*," that is, common property acquired *before* as well as *since* the passage of this Act.

It would be doing injustice to the Legislature, to suppose that after having provided for a divorce, for the causes set forth in the statute, it has made no provision as to the disposition of any property held by parties in common at the time of the passage of the Act; that it had provided, with jealous care, for the equal division of the property *to be acquired*, but had made no provision as to the disposition of that held at the time of the passage of the Act.

At the time of the passage of this law, perhaps one-half of the property in the State was held as common property between the husband and wife. Can we suppose that it was not the intention of the Legislature to make some provision in reference to interests so large? Let us see the consequences of the construction contended by the respondent.

The Legislature has provided for a divorce for certain cases.

The husband and wife are entitled to certain property in common. She institutes her suit for a divorce, establishes her right to a divorce

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She asks a division of the common property. She is told that the Act "which grants a right to a divorce, gives the Court no power to decree a division of the common property held by herself and husband before the Act."

Thus, the marital tie having been dissolved, the husband is discharged from his marital obligations to provide for the wife. The common property remains in the same state, that is, under the power of the husband, with an absolute right of disposition. Suppose, on the other hand, that the husband institutes his suit, and obtains the divorce; the same consequences would ensue. *This is the case presented by the record.*

The husband has been discharged of all his marital obligations, and now claims all the common property. Should the construction contended for by the respondent be sanctioned by the Court, the Act providing for a divorce would, in many cases, act as a confiscation of the rights of the wife, and a bestowal of the same upon the husband, whilst it would often furnish the strongest inducements to the husband to obtain a divorce, and thus appropriate to himself the result of the joint acquisitions of himself and wife.

Stanley & Hayes, for Respondent.

There is no averment in the complaint, or anything to show, that the property was acquired by the defendant subsequent to the passage of the Act of April 17, 1850.

The plaintiff, irrespective of this statute, can have no possible claim on the property of the defendant. By section 15 of this Act it will be found that "the rights of husband and wife, married in this State prior to the passage of this Act, or married out of this State, who shall reside and acquire property herein, shall also be determined by the provisions of this Act, *with respect to such property as shall be hereafter acquired*, unless so far as such provisions may be in conflict with the stipulations of any marriage contract."

It will thus be seen that the Act operates prospectively; it only affects property acquired *after* its passage; as indeed, if it had operated retrospectively, it would be unconstitutional.

We suppose the complaint ought to contain every averment necessary

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to show a cause of action in the plaintiff; but the very essence of the cause in this case is wanting; that is, an averment that the property was acquired *since the statute went into operation*; and also that it was not acquired by any of the modes that would constitute it separate property. What judgment could the Court render upon the complaint as it stands? It certainly could not adjudge that the property therein referred to was common property, for the want of an allegation showing that it came within the provisions of the statute. It might have been acquired at any time from the year 1838, the time of the marriage, up to the year 1850; and yet the plaintiff could have no claim upon it, there having been no community of property until the passage of the Act in question. The Court, to render judgment for the plaintiff, would have to assume the fact of its being acquired subsequent to April 17, 1850; and also to assume that it was not acquired by gift, bequest, devise, or descent; neither of which assumptions the Court will indulge in.

Every allegation must be direct and positive and not argumentative, or by way of recital, or inference. Suppose the action was by a wife, against a person who had levied on her separate property, as the property of her husband, and she, to show that the property was hers, averred that it was acquired by her after marriage; would that be sufficient? Would she not have to aver that she acquired it by gift, bequest, devise, or descent?

A person claiming a right derived from a statute, must bring himself, by an express averment, within its provisions.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

It will be perceived that the plaintiff deduces her right from the statute of this State. This statute was passed April 17th, 1850 (C. L., p. 814). Sections 14 and 15 provide that, in every marriage hereafter contracted in this State the rights of husband and wife shall be governed by the Act; which Act makes property acquired after April 17th, 1850, in this State, by husband and wife, who had been married in this State theretofore, or who had married out of the State before that time, but who resided and acquired property in the State,

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governed by the Act. To bring herself within the provisions of the Act, therefore, the facts must be stated which give the right to the wife by the terms of the statute. It is not material where the marriage was solemnized, if the parties afterwards, and after the passage of the Act, resided and acquired the property here; but this is nowhere stated. It may be true, as the plaintiff's counsel in an ingenious argument has suggested, that the Mexican law was the same as ours. But we apprehend, that neither by the Mexican law nor by our statute, if a marriage takes place in a State retaining the common law system in respect to the relation of husband and wife, would personal property, acquired by either spouse in the place of the matrimonial domicil, and removed or brought into California, be common property; nor even if personal property were brought here by the husband, when he was residing and had married in New York, would it be common property. It is, however, obvious that the plaintiff counts upon a statutory right; she claims her title through the statute. The statute was passed in 1850, and refers to and embraces property acquired after that time. It gives the right only to property acquired under particular circumstances. The plaintiff, counting upon and claiming through this statute, is not at liberty to seek any other or different source of title. Taking the averment most strongly against the pleader, we must infer that the property was acquired since the passage of this Act, since we can scarcely conclude that she claims under a statute which has nothing to do with the property she claims. What facts, then, does the statute make essential to give her this right? The language is plain: whether married in this State or in any other State, prior to the passage of the Act, the rights of property acquired after the passage of the Act are determined by this Statute; but the statute does not affect property after acquired in this State, if acquired by a husband or wife whose marriage occurred elsewhere, unless they "resided and acquired the property herein." There is no presumption of law that a marriage took place at any particular point, nor that property, especially money "and other personal property," was acquired in any particular locality. When a pleader wishes to avail himself of a statutory privilege or right, given by particular facts, he must show the facts. The Court pronounces upon the law, or the legal

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effect of these facts. The only question in this connection is whether, in a bill of this sort, it is sufficient to aver, in general terms, that the plaintiff is entitled, under the statute, to certain property, describing it as "common property."

It is said in *Mann v. Morewood*, (5 Sand. 516) that the facts which the code requires to be stated, as constituting a cause of action, "can only mean real traversable facts, as distinguished from propositions or conclusions of law; since it is the former, and not the latter, that can alone, with any propriety, be said to constitute the cause of action." So in *Adams v. Holley*, administratrix, (12 How. Pr. R. 330) it was held that a count was fatally defective which averred the plaintiff to be the owner of certain effects; the Court saying: "The defendant has the right to be informed how and when the plaintiff became the owner of the rights and interests of the respective proprietors. The plaintiff only alleges that he is the owner, etc., which is only a legal conclusion. He should state some issuable fact, by which it would appear that he was the owner." In *Thomas v. Desmond*, (12 How. Pr. 321) the same question arose on the same words: "The allegation (of ownership) is only a conclusion of law. The defendant has a right to be informed by the complaint how the plaintiff became the owner of the demand—whether by purchase, assignment, operation of law, or how otherwise. Some fact or facts should be stated, by which it would appear how he became such owner." (See also, *Russell v. Clapp*, 7 Barb. 482; *Bently v. Jones*, 4 How. Pr. R. 202; *McMurray v. Gifford*, 5 *Ib.* 14; *Parker v. Totten*, 10 *Ib.* 233.)

The averment that particular property is common property amounts, in the connection in which it is used, to the same general claim of ownership. It could only, under the statute or the civil law, be such by virtue of particular facts or relations; and it is necessary for these to appear, to enable the Court to pronounce whether it be such. According to the argument, it would do for the late wife, in a proceeding of this sort, to omit every averment except the fact of marriage and dissolution, and the averment that there was "common property" now held by the husband. We think this cannot be maintained.

It is insisted, however, that the demurrer, on the general ground that there are not facts sufficient, etc., contains several specifications,

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and that these do not contain any sufficient grounds of objection, and that this Court will not look to any other. The first specification is "that there is no averment that the plaintiff is now or was the owner of the real or personal property referred to in the complaint." If, as we have shown, the mere general averment that this was common property is no averment of any issuable fact, but a conclusion of law, then it would seem the defendant is right in objecting to the complaint that it contains no averment of title.

The second specification is "that there is no averment or anything to show that said property was acquired subsequent to the passage of the Act of April 17th, 1850, referred to in said complaint."

We have already argued to show that the plaintiff, resting upon this statute, must show herself within it. If, in some respects, the Mexican law was the same as the statute, it was not, we believe, in all respects, (see *Panaud v. Jones*, 1 Cal. 488,) nor was it, in respect to all property acquired by the parties during the coverture within the Mexican dominions. If, as suggested, the rule as to real estate when the matrimonial domicile is elsewhere, would be the same under the statute and under the Mexican law preceding it — the *lex rei sitæ* governing the marital right — it is not the case in respect to personal property. But as the plaintiff has chosen to rest her case upon the statute, those facts which the statute requires as the foundation of the right must be stated in the complaint.

The other grounds of demurrer, we are inclined to think, are not well taken.

But we express no opinion in regard to those which would conclude, as if hereafter we should be called upon to pass upon the question, and it becomes necessary to decide them.

The judgment is affirmed.

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PEOPLE *ex rel.* RAUN AND PLANT v. THE BOARD OF
SUPERVISORS OF EL DORADO COUNTY.

The Board of Supervisors of a county possesses no power to allow the County Auditor compensation for the issuance and cancellation of warrants drawn on the County Treasurer.

Such a claim is not authorized by law, and the power of the Board to allow accounts against the county is confined to those "legally chargeable."

County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time.

The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This is a proceeding to review by *certiorari* the action of the Board of Supervisors of El Dorado County, in allowing the Auditor of that county seventy-five cents for each warrant issued by him from the first of October, 1855, to the nineteenth of January, 1857. The allowance was made on the affidavit of the Auditor that, in the discharge of the duties of his office, he had performed a large amount of service between those dates in the issuance and cancellation of warrants, for which he had received no compensation. The allowance was by a resolution of the Board, and was accompanied by an order authorizing the Auditor to draw his warrant upon the County Treasurer, payable to himself or bearer, in pursuance of the resolution. No statement was made, either in his affidavit or in the resolution or order of the Board, of the number of the warrants issued and cancelled, or of the amount which the Auditor claimed for his services.

Upon the entry of the order, the Auditor drew a warrant in favor of himself for the sum of \$2,327.25, and presented the same to the Treasurer of the county, by whom it was duly indorsed as "presented, and not paid for want of funds."

The writ in the present case was granted upon the petition of the relators, who are residents and tax-payers of the county, and at the same time an injunction was issued restraining the Auditor from

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transferring and the Treasurer from paying the warrant. It subsequently appeared that the warrant had been sold and transferred previous to the issuance of the writ, for a valuable consideration, to one Miles Jewett, who became the purchaser without notice of the character of the services for which it was allowed; and upon his petition, he was permitted to intervene and contest the proceedings upon the return of the writ. The Court below adjudged the allowance to the Auditor illegal, and the warrant void, and perpetually enjoined the Treasurer from its payment, and directed the intervenor to produce and surrender the same for cancellation, and the Board of Supervisors at its next meeting to rescind and annul its resolution of allowance. From this judgment the appeal is taken.

Newell & Williams for Appellants.

Upon the facts in this case we make the following points:

1st. That the Board of Supervisors has allowed the account; that the same was a proper subject of adjudication by it, and its decision in the premises is final and conclusive.

2d. That at the time of the services for which said account was presented, there was no law requiring them to be performed by the Auditor; therefore that section 51 of the Fee Bill is not applicable to them. That the interests of the county required that they should be performed, and that it was competent for the Supervisors to have the same done; that to do this, they must procure the services of the Auditor; for such services the Auditor shall be allowed a compensation. The Board has made such allowance, and as of right and according to law it could do; and its decision as to the amount allowed is not the subject of review. (See *Brady v. The Supervisors*, 2 Sandford's Reports, page 473; directly in point.)

As to the intervenor, he is the innocent holder of the warrant; that the same is a negotiable paper, and although not collectible in the hands of Noteware, it is in the hands of the present holder.

Sanderson & Hewes for Respondents.

The proceedings were irregular, null and void:

1st. Because said allowance was made without there having been

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first presented to the Board on account or bill of particulars showing the nature and amount of the services for which compensation was claimed, as is required by law and the practice of the Board.

2d. Because there was no "examination or settlement," on the part of the Board, of the amount to which said Auditor was entitled, if any, for these pretended services, as required by law.

3d. Because the order does not specify the amount for which the Auditor was authorized to draw his warrant, but leaves the same to be *ascertained* and fixed by the Auditor himself; a proceeding alike opposed to law and common sense.

4th. Because the pretended services for which said allowance was made are not "legally chargeable against the county."

5th. Because in passing said order and making said allowance the Board acted without color of law, and exceeded its jurisdiction.

6th. Because the action of the Board, instead of being in conformity with and sustained by the law, is in direct conflict with the express provisions of the statute in such case made and provided.

7th. The action of the Board being illegal, and its order null and void, the warrant was also illegal, null and void; and therefore, Jewett, the intervenor, by his purchase took the warrant upon the same terms as its first holder. He does not occupy the position of an innocent holder of negotiable paper, without notice of some *fraud* thereto in the hands of his endorser; but his position is rather that of a holder of forged paper. That which never was a "legal charge," cannot be made so by a simple transfer from one hand to another. Besides, the warrant, as required by law, (Wood's Digest, page 695, sec. 14) should carry upon its face the evidence of its own legality. The warrant in question does not specify the "liability" for which it was drawn within the meaning of the statute. The warrant only says "for Auditor's services;" it should have said, "for Auditor's services in issuing county warrants;" nor does the warrant specify when the "liability" accrued. If these defects were not fatal to the legality of the warrant, they were at least sufficient to put the intervenor upon inquiry; and such inquiry would have resulted in safety to him.

Establish the doctrine that a county warrant, illegal at its birth, becomes legal by a transfer to the hands of a "so called" innocent

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holder, and corrupt officials, with a pliant or careless Board of Supervisors, will have the power to rob the County Treasury "*ad libitum*." Government can only be bound by its tribunals or agents when they act strictly within the powers delegated to them by law; and what those powers are, every citizen is bound to know, for "*ignorantia legis neminem excusat*." With these remarks we dismiss the case, so far as the intervenor's rights are concerned.

In passing the order under consideration, it is presumed that the Board acted under and by virtue of the second division of its powers and jurisdiction, which reads as follows:

"The Board of Supervisors shall have power and jurisdiction to examine, settle and allow all accounts legally chargeable against the county." Wood's Digest, 694, sec. 9.

When acting under this branch of its powers, the Board exercises "judicial functions." *Brady v. Supervisors of New York*, Sandford's Superior Court Reports, vol. 2, pages, 460, 472.

They must therefore be governed like other judicial tribunals by certain essential rules. They must require the presentation of an account or bill of particulars of services for which compensation is claimed, and have proof thereof. Wood's Digest, 696, sec. 24.

In this case there was no account presented, no examination, no computation, no proof, no settlement, and no allowance as the law required. Therefore there was nothing before the Board for it to act upon.

It is the duty of the Board to fix the amount of the allowance; it cannot delegate its powers to another. Its order must specify the nature of the services rendered, when rendered, and the amount allowed for the same.

This order fixes no amount, but leaves the same to be ascertained by the very party in whose favor the allowance is made; hence the order is irregular and a nullity, and the subsequent action of the Auditor in drawing the warrant without authority and illegal.

The services for which this allowance was made, were not a legal charge against the county. The Board could not therefore legally allow the same; and in doing so it exceeded its jurisdiction.

The Auditor accepted his office without any stipulation as to compensation for his services, other than such fees as the Government might

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see fit to allow him. The Auditor, therefore, can claim no fees except such as are allowed by law.

At the time these services were rendered, the Auditor was not authorized to issue county warrants. *People v. Noteware*, 8 Cal. 58.

Wood's Digest, 440, section 15, prescribes the fees which the County Auditor shall receive, and the services for which he can charge fees.

This section certainly does not allow the Auditor fees for issuing county warrants. He cannot charge any other fees than those specially set forth in the Act. Wood's Digest, 453, art. 2453, sec. 51; *Ibid.*, 455, art. 2472, sec. 69.

FIELD, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The action of the Board is entirely indefensible. It has no support in any provision of law. From its commencement to its end it was illegal. In the first place, the affidavit of the Auditor presents no claim or account upon which the Board could act. It simply states that services have been rendered for which no compensation has been received. It does not give the amount or value of such services, or furnish any items which the Board could examine, settle and allow. In the second place, the allowance is not of any claim or demand, but only of a rate of compensation; seventy-five cents for each warrant. Of the number of warrants issued, no information appears to have been asked, and none given. To ascertain and determine this point no inquiry was had. The whole subject was turned over to the Auditor himself, the party for whose benefit the order was made. He was authorized to issue a warrant, and to insert such sum as, according to his system of examination and settlement, he should adjudge correct. In the third place, the services for which the allowance was made were not a legal charge against the county, and the power of the Supervisors to allow accounts is confined to those "legally chargeable." (Session Laws 1855, chap. 74, sec. 9.) The statute of 1855, regulating the fees of office, provides that the compensation to Auditors for specific services shall consist of certain fees, and that no fees shall be charged for any other services than those mentioned in that Act. Secs. 15, 51, 69.) The Auditor of El Dorado County accepted his office whilst

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this Act was in force, and his claim for compensation for the issuance and cancellation of warrants is not authorized by any of its clauses; it was not, therefore, "legally chargeable;" it was not a claim which the Board was empowered to "examine, settle and allow."

The purchaser, Jewett, is in no better position with the warrant than the Auditor would have been. County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time.

The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. Were this otherwise, it is easy to see that the county would be entirely at the mercy of the Board. A transfer of the warrant, no matter how illegal the claim for which it was issued, would leave the county remediless.

Judgment affirmed.

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The twenty-fifth section of the Act of Congress of 1789, commonly called the Judiciary Act, is constitutional.

In the exposition of Constitutions, as of inferior laws, the solemn, deliberate, and long-settled precedents of Courts, and the practice and acquiescence of Governments and people, should possess controlling weight.

This Court does not, however, recognize an unlimited right of appeal from its decisions to the Supreme Court of the United States. The Act gives no such right. The appellate power of the Supreme Court in this respect is strictly limited to the cases given in the Act. Like any other special authority, it is to be strictly pursued, and the record must show upon its face the facts which give the power. In a case falling within the provisions of section twenty-five, this Court acknowledges the right of appeal, but denies it in all other cases.

On application for a citation on production of a writ of error from the Clerk of the United States Court, and for a stay of proceedings in the Supreme Court of this State, the duty and power of issuing the citation devolves on the Chief Justice, as a chamber proceeding, and he must see, when he is required to act or authorized to proceed under the Federal law, that he is within that law.

A contrary doctrine would permit writs of error in every case, whether civil or criminal, and would delay the whole machinery of justice in the Courts of the State in every case, however destitute of any right to a writ of error.

An action of ejectment, raising the question whether a grant made by the Mexican

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Government passed title to the tract within the limits of the grant, is not a case in which a writ of error lies under the Judiciary Act.

The judiciary system created by the Constitution of the United States is entirely disconnected with, and independent of, the Judiciary of the several States.

Per Terry, C. J.

The appellate jurisdiction of the Supreme Court of the United States, conferred by the second section of article three of the Constitution does not extend to the State Courts, but is confined to the inferior Courts mentioned in the preceding section. *Ib.*

There is no provision in the Federal Constitution from which a supervisory power over the State Courts can be vested in the Supreme Court of the United States by any fair or legitimate implication or construction. *Ib.*

In a large class of cases the jurisdiction of the Federal and State Judiciary is concurrent, and in all such cases the judgment of the higher Courts of the system first acquiring jurisdiction is final and conclusive. *Ib.*

The Government of the United States is one of delegated powers; the right to decide ultimately upon the extent of powers granted has not been delegated to the United States, nor prohibited to the States, and is reserved to the States by the provisions of the tenth amendment to the Constitution; and therefore, the decision of the Supreme Court of the United States on such questions is not binding in the State Courts. *Ib.*

The right and jurisdiction to determine finally all controversies between her citizens, and all conflicting claims to property within her limits, is an essential element of sovereignty, which was possessed by each State before the adoption of the Constitution, and this right was not surrendered by that compact.

In answer to the suggestion that this question of jurisdiction is, so far as California is concerned, settled by the Act of the Legislature of 1855, it may only be said, that there is no provision in the Constitution which delegates to the Legislature of California the power to enlarge the jurisdiction of the Federal Courts. *Ib.*

MOTION for a citation to the respondent, on a writ of error from the United States Circuit Court for California to this Court.

A final judgment was rendered by the Court in the above case on the eighteenth ultimo, affirming the judgment of the Court below. For the facts, see 10 Cal. R. 589.

Afterwards the appellant obtained from the Clerk of the United States Circuit Court for California a writ of error, commanding the record to be sent before the Supreme Court of the United States, in order that the judgment of this Court may be there reviewed, and applied to one of the Associate Justices of this Court to fix the necessary bond, grant a stay of proceedings, and award a citation to the respondent to appear before the Supreme Court of the United States, and maintain the validity of his judgment. The Justice applied to ordered that the application should be argued before the Court, upon notice to respondent to show cause why it should not be granted.

The questions raised upon the argument of this motion are: *First,*

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the constitutionality of the twenty-fifth section of the Judiciary Act of 1789, which provides for an appeal from the highest State tribunals to the Supreme Court of the United States; *second*, whether, admitting the validity of the Act, the case under consideration is within its provisions; and *third*, whether the authority to determine this latter question can be properly exercised by this Court.

John H. McKune and — *Weeks* for the motion.

Thos. Sunderland, Contra.

' BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

In this case, after the rendition of a final judgment, the defendant has moved the Court, or one of the Justices thereof, to grant a citation, upon his production of a writ of error from the Clerk of the Circuit Court of the United States for the District of California, and for a stay of proceedings under the judgment rendered by us.

The majority of this Court acknowledge the validity of the Act of Congress of the United States passed in 1789, commonly called the Judiciary Act, the twenty-fifth section of which is as follows:

"And be it further enacted, That a final judgment or decree in any suit, in the highest Court of Law or Equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the Chief Justice, or Judge, or Chancellor of the Court rendering or passing the judgment or decree complained of, or

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by a Justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, commissions, or authorities in dispute."

We do not propose, nor is it necessary for us to go into an examination of the question so fully and elaborately discussed, as to the constitutionality of this section of the Act. The argument upon that question has long since been exhausted. The intellects and the various and profound learning of the ablest jurists and statesmen of the Union, on one side or the other of this mooted question, have been called into requisition, and nothing new could now be said either in support of, or in opposition to, the validity of this law. It is enough for us to say that a long course of adjudication by Courts of the highest authority, State and National, commencing almost from the foundation of the Government, and the acquiescence of nearly all the State Governments, in all of their departments, have given to this doctrine a recognition so strong and authentic that we feel no disposition to deny it at this late day, even if the reasons for such denial were more cogent than they seem to us to be. We recognize the rule that, in the exposition of Constitutions, as of inferior laws, the solemn, deliberate, and long-settled precedents of Courts, and the practice and acquiescence of Governments and people should possess controlling weight. With all proper deference to opposing views, it appears to us that a just respect to such high authority, especially in cases of doubt, ought to conclude the action of Courts in favor of the principle so established, even when the individual opinions of the judges would be different were the question *res integra*. In this instance, we do not feel warranted, in the

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face of the elaborate and learned reasonings and repeated adjudications of the highest Courts and the most eminent Judges of the Union, to hold the clause of the Act *clearly* unconstitutional which they have pronounced *clearly* constitutional. Nor are we insensible to the benefits which flow from the decision which they have made. That there should be a central tribunal, having power to give authoritative exposition to the Constitution, and laws, and treaties of the United States, and which should also possess the power to secure to every citizen the rights to which he is entitled under them, seems to us highly expedient. The value of uniformity of decisions where the Constitution and laws of the Federal Government are to be expounded in cases of individual rights, and the importance of the principle that every citizen of the United States know the extent, and be protected by a tribunal of the highest authority and free from local prejudices or passions in the enjoyment of all the rights, exemptions and privileges with which the Constitution and laws of the Union invest him, cannot easily be exaggerated. Indeed, in order to render the Constitution and laws of the Federal Government the same things to the people of the United States, it is necessary that they receive their ultimate construction from the same tribunal; for there is but little practical difference between two or more different Constitutions and one Constitution variously and differently construed.

But in holding the Judiciary Act of 1789 to be constitutional, we by no means recognize an unlimited right of appeal from the decisions of this Court to the Supreme Court of the United States. That Act gives no such right. The appellate power of the Supreme Court in this respect is strictly limited to the cases given in the Act. Like any other special authority, it is to be strictly pursued, and the record must show upon its face the facts which give the power. In a case falling within the provisions of the section quoted, we acknowledge the right of appeal. We deny it in all other cases. By the provisions of this section, in such cases, the Chief Justice of this Court is authorized to issue the citation. That duty or that power is cast upon him alone. The Associate Justices have nothing to do in the premises. The Act is his, as a chamber proceeding. But still the power is, in its nature, in some degree judicial. He must see, when he is required to act or

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authorized to proceed under the Federal law, that he is within the law. If there is much doubt or question as to the jurisdiction, he might, in his discretion, (and perhaps it would be advisable) issue the citation, leaving the fact of jurisdiction to be determined by the Supreme Court of the United States. This is what we understand Mr. Justice Johnson to mean in the case of *Buel v. Van Ness* (8 Wheat. 312). He says: "We see no reason why it should be so expressed. The writ of error is the act of the Court; its object is to cite the parties to this Court, and to bring up the record. How else is this Court to ascertain whether the judgment be final? Nor can there be any danger of its being hastily or erroneously used, since it must be allowed either by the presiding Judge of the State Court or a Judge of the Supreme Court of the United States."

A contrary doctrine would be fraught with enormous and intolerable evils. If an appeal, with stay of execution, be matter of absolute right, then every case, civil or criminal, decided by the highest Court having jurisdiction in the State, could be taken up to the Federal Capital, and all proceedings suspended until its return. In every criminal case, the pretext would be that the law was *ex post facto*. It would be no answer to say that the record showed plainly the contrary; the reply to this would be, "The Supreme Court is to decide that question." And every civil case might be carried thither upon the ground of a supposed or asserted repugnance to some provision of the Federal Constitution or law, or of some treaty. That damages might be given for frivolous appeals would be no adequate protection against them, and in criminal cases no protection at all. The Supreme Court of the United States holds but one term in each year, and from the embarrassments and delays attending the taking of cases from this Court to that, especially in criminal cases, the recognition of this principle would produce the worst possible results. If the Chief Justice of this Court should err in deciding the case not to be appealable, the jurisdiction of the Supreme Court of the United States would not thereby be ousted. That Court could, on the inspection of the record, grant the writ, or issue the citation, and proceed to hear and determine the case.

In the present case we see no pretext for contending that this case is within the Act of 1789. No question is made by the record that

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any right claimed under the Constitution or under any law of Congress has been called in review and denied. The fact intimated that this may possibly be public land, if not the land of the plaintiff, is not a sufficient suggestion even to base an argument upon in favor of the jurisdiction. The authorities cited by the appellant only go to the extent of showing that where the record shows that the question giving jurisdiction must *necessarily* have been passed upon, in or by the judgment of the Court, the Supreme Court may take jurisdiction, although it does not appear in so many words that it was so passed upon, and decided against the validity of the claim set up. But here the record shows no such thing. The case before the Court is simply a claim for land made by one man and denied by another; the main question made being whether a grant of land by a Mexican Governor passed title to the land within the limits of the grant. The defendant nowhere sets up a law of the United States, the exemption privilege, or claim under which has been denied to him. If this record be the subject of appeal to the Supreme Court, we do not see why every ejectment suit would not be, and indeed, every other suit. For the pleadings, proofs, judgments and decision here do not put in issue any right or claim under any Federal law, organic or legislative.

Of this matter of issuing the citation, we, as a portion of the Supreme Court, or as Associate Justices of this Court, have nothing to do. But as the question was argued before us in open Court, and our opinions requested, we have thought proper to give our views upon the matter.

TERRY, C. J., after stating the facts, delivered the following dissenting opinion:

The questions raised upon the argument of this motion are: *First*, the constitutionality of the 25th section of the Judiciary Act of 1789, which provides for an appeal from the highest State tribunals to the Supreme Court of the United States; *Second*, whether, admitting the validity of the Act, the case under consideration is within its provisions; and *Third*, whether the authority to determine this latter question can be properly exercised by this Court.

While all the members of the Court agree as to the conclusion at

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which we have arrived, I have the misfortune to differ with my associates upon the first and third propositions.

I think, if we admit the appellate jurisdiction of the Supreme Court of the United States over the judgments and decisions of this Court, it must follow that the province of determining the cases in which the jurisdiction can be exercised belongs to the appellate Court, and that a contrary doctrine would involve the inconsistency of allowing the jurisdiction of the superior to be defeated by the action of the inferior tribunal.

The constitutionality of the Judiciary Act has been the subject of much controversy between Federal Courts and the Supreme Courts of several of the States. Able arguments on both sides have been delivered from the Bench, by lawyers who have had few superiors in any age or country, and whose thorough and laborious investigations have so nearly exhausted the subject as to leave little to be said in support of either position, which has not already been so well expressed as to render presumptuous an attempt to add to the force and cogency of the reasoning. The controversy arose in the case of *Martin v. Hunter*, lessee, at a time when the judicial offices of the United States were filled by men who were identified with the Federal party.

The principles of this party, which favored a liberal interpretation of the provisions of the Constitution in favor of the powers of the General Government, found a zealous and able exponent in Mr. Justice Story, (see 1 Wheaton, 298) while those who contended for a strict construction of the instrument were no less ably represented by Justice Roane, of the Virginia Court of Appeals. (4 Mumford, page 1.)

The judgment of the Virginia Court of Appeals in the case referred to had been reversed by the Supreme Court of the United States, and the cause remanded to the State Court, with directions as to future proceedings. After full argument and mature deliberation, the Court of Appeals unanimously refused to obey this mandate; each of the Judges filed an opinion in the case, and the opinion of the Court was entered as follows, "The Court is unanimously of the opinion that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the

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Constitution of the United States; that so much of the twenty-fifth section of the Act of Congress to establish the judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non iudice* in relation to this Court; and that obedience to its mandate be declined by this Court." The case was again carried to the Supreme Court of the United States, where the judgment of the Court of Appeals was reversed; but no attempt was made to enforce obedience to the judgment on the part of the State Court, which remained contumacious. On the contrary, it was expressly admitted that that Court had no power to do so. (See opinion of Mr. Justice Johnson.) So that, according to the authority of that case, the judicial system of the United States presents the strange anomaly of a Court of final resort, vested with full and ample appellate jurisdiction, without the power of compelling obedience to its judgments and process on the part of the inferior tribunals. The claim of jurisdiction asserted by the Federal Court in *Martin v. Hunter's Lessee* was reaffirmed in later cases by the same tribunal, and with a few exceptions has been acquiesced in by the Courts of the various States, generally on the ground of *stare decisis*.

It has never been admitted in Virginia, has always been repudiated by Georgia, and has lately been questioned in several other States. The decisions of the United States Supreme Court, on this question, embody the political principles of a party which has passed away. The reasoning by which it is attempted to sustain them is based upon rules of construction now universally regarded as unwarranted by the letter or spirit of the Constitution, and directly opposed to those adopted by the same tribunal in the late case of *Dred Scott v. Sandford*, (19 Howard and in a more recent case in 20 Howard, 393, in which the admiralty jurisdiction of State Courts is admitted, notwithstanding the 9th section of the Judiciary Act.

The force and authority of the opinions of the Supreme Court of the United States upon the question of jurisdiction, as well as all

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others of a political nature, is much weakened by the consideration that the political sentiments of the Judges in such cases necessarily gave direction to the decisions of the Court. The Legislative and Executive power of the Government had passed, or was rapidly passing into the hands of men entertaining opposite principles. Regarding the Judicial as the conservative department; believing the possession by the General Government of greater powers than those expressly granted by the Constitution to be absolutely necessary to its stability, they sought, by a latitudinarian construction of its provisions, to remedy the defects in that instrument, and by a course of judicial decisions to give direction to the future policy of the Union. In order to accomplish this end, the Court almost invariably upheld every assumption of power by the General Government, (however at variance with the limitations of the Constitution) including the alien and sedition law, the Embargo Act, the charter of a United States Bank, and a retrospective bankrupt law; the constitutionality of which Acts is supported by the same course of reasoning, and the same *liberal* construction of the *implied* powers of Congress, as is applied to the Judiciary Act of 1789.

All the arguments adduced in favor of the claim of jurisdiction on the part of the Federal Court are answered, and the unconstitutionality of the 25th section of the Judiciary Act, to my mind, conclusively established, by the able opinions in *Hunter v. Martin*, 4 *Mumford*; *Padelford, Fay & Co. v. Mayor and Aldermen of Savannah*, 14 *Geo.* 438; *Johnson v. Gordon*, 4 *Cal.* 368; and the very elaborate opinion of Mr. Chief Justice Bartley, in the case of the *Piqua Bank v. The Treasurer of Miami County*, 6 *Ohio State Rep.* 342, in which all the authorities are collated.

The results of these authorities are:

1. That the judiciary system created by the Constitution of the United States is entirely disconnected with and independent of the judiciary of the several States.
2. That the appellate jurisdiction of the Supreme Court of the United States, conferred by the 2d section of article 3d of the Constitution, does not extend to the State Courts, but is confined to the inferior Courts mentioned in the preceding section.

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3. That there is no provision in the Federal Constitution from which a supervisory power over the State Courts can be vested in the Supreme Court of the United States, by any fair or legitimate implication or construction.

4. That in a large class of cases the jurisdiction of the Federal and State judiciary is concurrent, and in all such cases the judgment of the highest Courts of the system first acquiring jurisdiction is final and conclusive.

5. That the Government of the United States is one of delegated powers; that the right to decide ultimately upon the extent of powers granted has not been delegated to the United States, nor prohibited to the States, and is reserved to the States by the provisions of the tenth amendment to the Constitution; and therefore, the decision of the Supreme Court of the United States on such questions is not binding on the State Courts.

6. That the right and jurisdiction to determine finally all controversies between her citizens, and all conflicting claims to property within her limits, is an essential element of sovereignty, which was possessed by each State before the adoption of the Constitution, and this right was not surrendered by that compact.

In answer to the suggestion that this question of jurisdiction is, so far as California is concerned, settled by the Act of the Legislature of 1855, I have only to say that there is no provision in the Constitution which delegates to the Legislature of California the power to enlarge the jurisdiction of the Federal Courts.

The question here raised was presented to the Court in *Gordon v. Johnson* (reported in 4 Cal. 368). In the opinion delivered in that case all the Judges who at the time constituted the Supreme Court of California concurred. Of the correctness of the principles there announced, I am entirely satisfied. Indeed, had the question been presented for the first time, the soundness of the opinion would scarcely have been questioned. As an original question, the entire independence of the State Judiciary is generally conceded by the bar: almost the only argument now advanced in support of the appellate power of the Federal Courts is that founded on expediency and long acquiescence.

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The expediency and policy of providing a tribunal with general appellate jurisdiction over a certain class of cases, whether they were originally instituted in the State or Federal Courts, in order that uniformity of decisions in such cases might be secured, was a question for the Convention which framed the Constitution; it is sufficient for me that they made no such provision. But it is said, the decision of the Supreme Court of the United States upon the point has so long been acquiesced in that it ought not now to be disturbed.

The answer to this proposition is, that if the doctrine that all usurpations of power which have been unwillingly acquiesced in for a length of time ripened by prescription into law had been acted on in the past, the principles of civil and religious liberty would have been as little understood, and the rights of man as little regarded in the nineteenth as in the tenth century; and if adopted for the future, will be an effectual bar to all progress.

This is not, in my opinion, one of those questions to which the doctrine of *stare decisis* ought to be applied. No interests which have grown up, no rights of property which may have been acquired under the rule established, would be endangered or lost by its abrogation. The effect of the contrary doctrine would be felt only by future litigants, and could not by possibility have a retroactive operation.

Hoary usurpations of power and jurisdiction on the part of the Federal Judiciary, or time-honored encroachments on the reserved rights of the sovereign States, are entitled to no additional respect on account of their antiquity, and should be as little regarded by the State tribunals if they were but things of yesterday.

It is the duty of Judges to decide all questions which arise in cases before them according to the Constitution and laws; and while the decisions of other tribunals should be respectfully considered, and all due weight given to them to which they may be entitled by reason of the learning and ability of the tribunal from which they emanate, yet respect for their authority, or a rigid adherence to precedent, should never be permitted to influence a Judge to go counter to his own convictions of the requirements of the Constitution and laws. For these reasons I think the application should be denied.

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MCDONALD v. MADDUX, TREASURER OF SACRAMENTO COUNTY.

The Act of 1854, to fund the Floating Debt of the City and County of Sacramento, forbidding the redemption of any warrants accruing prior to a certain date, is obligatory upon County officers. The Legislature is the paramount political power, and can control and direct them in this respect.

The Board of Supervisors, therefore, has no power to direct and authorize the Treasurer to pay warrants in violation of the provisions of the statute.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

A statement of facts appears in the opinion of the Court.

W. S. Long for Appellant.

I. The plaintiff is not affected by the Funding Act of 1854; as section 8 of that Act clearly exempts him from its operation so far as the present case is concerned.

II. Neither is he affected by section 120 of the General Revenue Law of 1854, for the following reasons:

1st. That section has reference exclusively to revenue collected for that purpose.

2d. By the Act of 1855, creating Boards of Supervisors, and conferring upon them general supervision and control over the affairs of the county, they are made the fiscal agents of the county. If you take from them *all discretionary power*, as to the appropriation of its moneys, you necessarily weaken the energies of the Board, and defeat many of the purposes for which it was created.

3d. The Supreme Court has recognized in the case of *Laforge v. McGee*, 6 Cal. 285, the power that is here contended for, as residing in the Board of Supervisors.

If any additional authority were required to establish the proposition that the Board of Supervisors possessed the power exercised by it in passing the Order of March 16th, the following may be given:

In the case of *Thompson v. Rowe*, 2 Cal. 68, the Supreme Court says: "The Act concerning Courts of Justice and Judicial Officers,

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passed May 11th, 1851, confers general powers of taxation and *appropriation upon the Court of Sessions for county purposes.*"

Section 25 of the Act of March 20th, 1855, creating Boards of Supervisors, is in the following language:

"The Board of Supervisors shall have and exercise in its county all jurisdiction and powers, other than criminal, conferred by any law on the Court of Sessions, or heretofore exercised by said Court under any statute, or by any statute provided to be exercised by said Court, when the same do not conflict with the provisions of this Act." See Laws of 1855, p. 56, sec. 25.

This section clearly gives to the Board of Supervisors the same power to appropriate the county revenue which the Court of Sessions possessed under the Act of March 11th, 1851.

Upton & Hereford for Respondent.

Appellant's counsel cites *Laforge v. McGee*, 6 Cal. 285, and *Thompson v. Rowe*, 2 Cal. 68. In the former case, the principal point decided is with respondent, viz., that the Legislature having appropriated the fund, the discretion of the Supervisors was at an end. The latter had reference to powers of the Court of Sessions, supposed to be conferred by the Act of May 11th, 1851, to appropriate the County revenue. That power was repealed prior to the passage of the Act of 1855, creating Boards of Supervisors.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Proceeding for a *mandamus* to compel the County Treasurer of Sacramento to pay certain moneys.

The only facts necessary to be stated in order to show the application of the principle decided are these: In 1853, certain warrants were issued on the Treasurer of the County of Sacramento, of which the plaintiff is the holder. These warrants were presented in August, 1853, to one Rowe, then Treasurer of that county, and payment refused for want of funds, and the warrants registered according to law.

The complaint shows that there was received into the Treasury of the county, in 1853, a large sum of money, of the revenue of that year,

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properly applicable to the payment of these warrants, and a sufficient sum to have paid the same in the order of the registry; but the then Treasurer refused to pay the same; and that said Treasurer, after going out of office, paid to his successor, in lieu of money which he had not accounted for, on a settlement of his official business, some \$3,426 in Sacramento County bonds of the funded bonds of that county, thereby transferring that sum from the General Fund of 1853 to the Sinking Fund of 1854; the effect of which was to destroy or divert the fund out of which the plaintiff was entitled to payment.

The complaint further states, that on the sixteenth of March, 1857, there was in the Treasury several thousand dollars belonging to the Sinking Fund, for the redemption of the funded bonds for the year 1853, and more than the amount necessary to redeem and pay off all the funded bonds of that year, which surplus was not appropriated by law to any other purpose; and for the purpose of supplying the deficiency in the General Fund of the year 1853, created by receiving from Cyrus Rowe the aforementioned bonds instead of money due the General Fund of 1853, the Board of Supervisors made an order on the sixteenth of March, 1857, that the Treasurer redeem out of said fund any outstanding warrants upon the General Fund of 1853, according to the date of the registry thereof.

If this order could be maintained, the plaintiff might, with much plausibility, insist upon his claim to the remedy he seeks.

But by the Act of 1854, entitled "An act to Fund the Floating Debt of Sacramento County, and to provide for the payment of the same," an obstacle which we consider insuperable is interposed. By the 8th section of that Act (Laws of 1854, p. 201) it is provided: "From and after the first day of May, one thousand eight hundred and fifty-four, it shall not be lawful for the County Treasurer of said county to redeem any warrants drawn for indebtedness accruing prior to the said first of May, excepting with the funds he may then have on hand, or which may be by him received after that date, properly belonging to the revenue of the county previous to said term."

Conceding the power of the Supervisors to dispose of the money of the county, not otherwise appropriated, to the payment of debts, in such order and in favor of such creditors as they may choose, it seems

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clear the Legislature, as the paramount political authority, may direct and control them in this respect.

By this section the Treasurer is expressly inhibited from paying warrants issued on indebtedness accruing prior to the first May, 1854, except with funds then in hand, or subsequently received and belonging to the revenue of the county previously to 1854. This fund was collected in 1856, and belonged to the revenue of the county of that year. At any rate, there is no pretense that it belonged to the revenue of the county previously to the first of May, 1854.

We cannot see that the Supervisors had any right to order the Treasurer to do what the law expressly inhibited him from doing. Nor can there be any serious question of the power of the Legislature to direct in what manner the debts of the county shall be paid or its funds disbursed, subject to certain well known restrictions, which do not apply to this case.

The claim of the appellant seems to be a just one, and we could wish that the remedy he seeks were reconcilable with the law. But as it is, we must affirm the judgment below denying the *mandamus*.

MONTGOMERY v. TUTT, WILSON *et als*.

A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the Sheriff's deed.

Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite, but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendant in the suit. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee.

APPEAL from the District Court of the Fifteenth Judicial District, County of Colusi.

The facts appear in the opinion of the Court.

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Edwards and Sanders for Appellant.

I. The Court below erred in ordering the issuance of a writ of assistance against the appellant alone. The action and the decree were against him and several others jointly. The writ should conform to the decree.

II. The decree does not authorize the issuance of the writ. It does not require the delivery of the possession to the purchaser under the mortgage sale, and there was no technical foreclosure. *Daniell's Chan. Prac.* 1280; *Smith's Chan. Prac.* 447.

Belcher, Beatty & Clark for Respondent.

1. A Court of Chancery has power to carry its own decrees into execution.

2. When the mortgagor in possession, after foreclosure and sale, and expiration of time for redemption, refuses to deliver possession to the purchaser under Sheriff's deed, the writ of assistance is the proper remedy. *Story Eng. Juries*, sec. 959; *Daniell's Ch. Prac.* 1267 and 1281; *Edw. on Injunc.*, chap. 17, p. 425; *Smith's Chan. Prac.* 445; *Kershan v. Thompson*, 4 *Johns. Ch.* 609; *Ludlow v. Lansing*, 1 *Hopk. R.* 231; *Valentine v. Teller*, 1 *Hopk.* 422; *Buffum's Case*, 13 *N. H.* 14; *Oliver v. Caton*, 2 *Md. Ch. Dec.* 297; *Garretson v. Cole*, 1 *Har. & John.* 370; *Wolf v. Fleischacker*, 5 *Cal.* 244.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

The principal question presented by the appeal in this case is, whether the writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the Master's or Sheriff's deed. Of this there can be no doubt, as against the defendants in the suit, who are bound by the decree, and who refuse to surrender possession upon the order of the Court to that effect. The order, like the one made in this case, takes the place in our system of procedure of the judicial writ of injunction, used in the old Chancery practice, in the en-

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forcement of decrees respecting lands. (Eden on Injunc., Waterm.'s Ed. 12.) "Injunctions of this sort," says Story, "are older than the time of Bacon, since in his ordinances, they are treated as a well known process. Indeed, they have been distinctly traced back to the reign of Elizabeth and Edward the Sixth, and even of Henry the Eighth." (Story's Equity, sec. 959.) The power of the Court to issue the judicial writ, or to make the order, and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the Court to afford a remedy must be co-extensive with its jurisdiction over the subject matter. Where the Court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. It is true that in the present case the decree does not contain a direction that the possession of the premises be delivered to the purchaser. It is usual to insert a clause to that effect, but it is not essential. It is necessarily implied in the direction for the sale and execution of a deed. The title held by the mortgagor, passes under the decree to the purchaser, upon the consummation of the sale by the Master's or Sheriff's deed. As against all the parties to the suit, the title is gone; and as the right to the possession, as against them, follows the title, it would be an useless and vexatious course to require the purchaser to obtain such possession by another suit. Such is not the course of procedure adopted by a Court of Equity. When that Court adjudges a title to either real or personal property, to be in one as against another, it enforces its judgment by giving the enjoyment of the right to the party in whose favor it has been decided. And when it decrees a sale, it transfers possession to the purchaser, as against the party whose interest has been sold. The question in this case has been fully considered by Chancellor Kent, in *Kershaw v. Thompson* (4 Johns. Ch. 609) in which all the leading authorities are cited and examined. "When the Court," says the Chancellor, "has obtained lawful jurisdiction of a case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice, merely to declare the right, without affording the remedy. If it was to be understood, that after a decree and sale of mortgaged premises, the mortgagor or other party to the suit, or perhaps, those who have been let into the possession by the mortgagor, *pendente lite*, could withhold the possession in defi-

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ance of the authority of this Court, and compel the purchaser to resort to a Court of Law, I apprehend that the delay, and expense, and inconvenience of such a course of proceeding, would greatly impair the value and diminish the result of sales under a decree." (See also *Ludlow v. Lansing*, 1 Hop. Ch. 231.)

According to the old chancery practice, there was, first: the order for the delivery of possession; then an attachment for not complying with the order, which was seldom served and could be dispensed with; afterwards the injunction issued, which, if not obeyed, was followed by the writ of assistance. In our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if upon its service that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendants in the suit. (*Valentine v. Teller*, 1 Hop. Ch. 422.)

The several objections taken by the appellant to the order, aside from the one made to the character of the remedy, are without merit and entitled to no consideration. There was no stay of proceedings on appeal from the decree; the presence of the appellant by his counsel and the argument of the motion by him, obviated the want of any notice of the motion; the allegation that the appellant lives with his parents, who claim the premises as a homestead, cannot avail him; the mortgage upon which the suit was brought being given as security for the purchase money of the premises, no homestead could be carved out of the property so as to impair the rights of the previous mortgagee; and the allegation of irregularity in the sale under the decree, rests without proof.

Order affirmed.

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JENNY LIND CO. v. BOWER & CO.

Where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, it is not such a patent ambiguity as falls within the rule forbidding its explanation by parol testimony. It belongs to that intermediate class of cases which partake of the nature both of patent and latent ambiguities.

In an action concerning a disputed boundary between two mining claims, depending on an agreement between the parties, in which the word "north" was used, and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that that was the understanding of the parties: *Held*, that such evidence was admissible, not to contradict or vary the term, but to ascertain the sense in which it was used.

On a motion for a new trial on the ground of newly discovered evidence, the affidavit of one of the defendants as to what an absent witness will testify, is insufficient. It should be accompanied by the affidavit of the witness himself; if that cannot be obtained in time, additional time should be applied for.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

This was an action to recover damages for an alleged trespass upon the mining grounds of the plaintiffs. The claims of the parties adjoin each other; and in June, 1857, they entered into a written agreement as to the dividing line between the claims, describing the same as commencing at a designated point, and "*running thence north twenty-three degrees and fifteen minutes west, six hundred and forty-three feet to a pine stake,*" and "*thence north forty-five degrees west to Devil's cañon;*" and the principal question presented by the record relates to the admissibility of parol evidence to show that the last course of the dividing line thus agreed upon was run according to the magnetic, and not the true meridian. It appeared from evidence allowed on the trial, that it was the general custom at Forest Hill, where the ground in controversy is situated, to run boundary lines by the magnetic meridian; and from the testimony of a witness present at the execution of the agreement, that it was understood the line was to run "the way the needle points." The cause was tried by a jury, who returned a verdict as follows, to wit: "We, the jury, find for the plaintiffs, and assess their damages at \$3,100. We further find, that the lines mentioned in the agreement introduced in the evidence in this case were to run by the magnetic meridian." Judgment was

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entered upon this verdict for the plaintiffs. Defendants moved the Court for a new trial on several grounds, and amongst others, on the ground of "newly discovered evidence, material to the defendants, which they could not with reasonable diligence have discovered and produced at the trial." The motion was supported by the affidavit of Marshall, one of the defendants; setting forth that since the trial of the cause, one Hoffman had informed him that he would testify to certain facts, which facts are set out in the affidavit; but affiant being ignorant of the law, did not know that Hoffman's affidavit as to what he would testify to was necessary, until it was too late to procure the same in time for the hearing of the motion. The affidavit sets out the residence of Hoffman, and alleges that if a new trial is granted, defendants will be able to produce his testimony at the trial.

The Court below overruled the motion, and the defendants appealed to this Court.

Thos. H. Williams for Appellants.

1st. The Court erred in permitting parol evidence of the agreement made by the parties to this action, which was reduced to writing and signed by the parties.

2d. The Court erred in permitting proof of custom which varied the terms of the agreement referred to.

3d. The Court erred in not granting a new trial upon the ground of newly discovered evidence.

Authorities: Chitty on Contracts, pp. 107, 109, 80, 81, 106, and 107; 1 Peters' Rep., p. 591; 1 Greenleaf on Ev., pp. 351, 352, 356, 367, and 377; 1 John. 192; 2 Sumner, 568; 7 Yerger, 340; 3 Grattan, 262; 2 Wheat. 316; Doe v. Lea, 11 East, 312; 11 Mass., pp. 30 and 31; Wood's Dig., p. 701, sec. 10.

Hillger for Respondents.

No clear case of a *latent ambiguity* ever existed.

The evidence excepted to was proof by plaintiffs, offered to show in which sense the parties used this term, by showing: *First*, the usage upon Forest Hill, generally, in speaking of a course; *Second*, a con-

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versation between plaintiffs and defendants showing how they understand it.

The books are full of cases sustaining the admissibility of each of these classes of evidence in similar cases. We shall refer to only a few.

1st. As to usage and custom of the particular district, 1 Greenleaf on Ev., secs. 292 and 295. The author in this last section speaks of the present case at bar — a word having two meanings, one technical and one common. C. and H., Notes to Phillips on Evidence, part 2, vol. 4, p. 505, part 2, note 954; Ashton v. Insurance Co., 7 Cowen, 202; 12 Wendell, 573; 2 Sumner's Rep. 569. In this case, Judge Story says parol proof may be admitted to ascertain the true meaning of a particular word, or words, in a given instrument, when the word or words have various senses — some common, some qualified, and some technical. 3 Barn. & Adol. 728; 4 N. & M. 602.

2d. As to the admissibility of the conversation between the parties to prove their understanding of the term. Waterman v. Johnson, 13 Pick. 261; Stone v. Clark, 1 Metcalf, 380; Birch v. Deipster, 4 Camp. Rep. 385; Gray v. Harper, 1 Story's Rep. 574; Ballenger v. Eckett, 16 Levy & Rowel, 422; Selden v. Williams, 9 Watts' R. P. 14.

The above cases are all directly to the point, and sustain the admission of the evidence. Should the Court desire to look further, we cite: Doe *ex dem* Gord v. Nud, 2 M. & W. 129; Osborne v. Wise, 7 Carr. & Payne, 761; 5 Pick. 34; 8 John. R. 116; 1 Mason, 10; 4 Hening & Munford, 283; 3 Rand. 83; Woods v. Lee, 5 Monroe, 59; 5 Mills & Law. R. 275; C. & H. Notes to Phillips, part 2, vol. 4, p. 535.

The Court will notice that the evidence was introduced, not to show what *agreement the parties intended to make*, but to show what *agreement they did make*.

The thing to be proved being, "how did the parties understand this term when they used it," can there be any better evidence of this than direct admissions by Phillips, one of the defendants. as to how it was understood?

The distinction in all the cases is this: you are not allowed to

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prove an *express intention* different from the agreement, or to vary it: but are allowed to prove, by *any competent evidence*, how the parties understood the ambiguous term.

As to the affidavits of Marshall, one of defendants, concerning what Hoffman will testify:

1st. The Court cannot consider Marshall's affidavit, but Hoffman's should have been procured. Vol. 3, G. and W. on New Trials, 1065.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

This is an action to recover damages for an alleged trespass upon the mining ground of the plaintiffs. The claims of the parties adjoin each other, and in June, 1857, the parties entered into a written agreement as to the dividing line between their claims, describing the same as commencing at a designated point, and "*running thence north twenty-three degrees and fifteen minutes west, six hundred and forty-three feet to a pine stake,*" and "*thence north forty-five degrees west to Devil's cañon;*" and the principal question presented by the record relates to the admissibility of parol evidence to show that the last course of the dividing line thus agreed upon was run according to the magnetic and not the true meridian. It appeared, from the evidence allowed on the trial, that it was the general custom at Forest Hill, where the ground in controversy is situated, to run boundary lines by the magnetic meridian, and from the testimony of a witness present at the execution of the agreement, that it was understood the line was to run "*the way the needle points.*" It is true, parol evidence is inadmissible to contradict or vary the terms of a written agreement; but we do not perceive that the rule was violated in the present case. It was not to contradict or vary the meaning of the term *north* that the evidence was admitted, but to ascertain the sense in which it was used by the parties. The term has two meanings, one common and the other technical. Unprofessional men generally mean, in stating courses, the lines indicated by the compass, without making any allowance for variation in the needle; and even professional Surveyors, as appears from the evidence in the case, would not consider the true meridian as intended, unless specially so informed.

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The language of every instrument should be so construed, if possible, as to effectuate the intentions of the parties; and to ascertain the meaning attached to particular words, when such words are used in various senses, parol evidence is perfectly legitimate. And this evidence is received to explain, and not to contradict or vary the written language. The patent ambiguity, which according to the rules of Lord Bacon cannot be aided by averment, arises from uncertainty upon the face of the instrument in the application of the terms used, and not from uncertainty in the meaning of the terms themselves, when those terms are susceptible of two meanings. (See 2 Parsons, 69, and note.) In the present case the ambiguity lies in the word north; and yet it is not within the rule laid down by Bacon. It belongs to that "intermediate class of cases," of which Mr. Justice Story speaks in *Peisch v. Dickson*, (1 Mason, 11) "which partake of the nature both of patent and latent ambiguities; and that is," where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. "In such a case, I should think," says the Justice, "that parol evidence might be admitted, to show the circumstances under which the contract was made and the subject matter to which the parties referred. For instance, the word 'freight' has several meanings, in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board of the ship or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term." (*Goddard v. Bullock*, 1 Nott & McCord; *Smith v. Wilson*, 3 Barn. & Adol. 728; *Heald v. Cooper*, 8 Greenl. 32; *Clayton v. Gregson*, 4 Ner. & Man. 602.)

And Cowen and Hill, after referring to the illustration given by Mr. Story, observe that this and other instances of a kindred character "fall exactly within the general definition of a patent ambiguity. The terms used have in themselves a doubtful meaning, and consistently admit of more than one interpretation, according to the subject matter in contemplation of the parties. The ambiguity is not *latent* in

any proper sense; it arises from the known infirmity of language; it is inherent in the instrument; appearing on its face, and evincing a difficulty at the very moment of perusal. And yet it admits of explanation.

“It will not do to say, therefore, that a patent ambiguity (meaning thereby merely an ambiguity patent or appearing on the face of the instrument) cannot be explained by evidence *aliunde*; though such remarks are frequently found in the books.” (Notes to Phillips, part II, note 269.)

The motion for a new trial was properly overruled. The position of the boundary line was the principal question in the case, and upon this point several surveyors were examined, and upon their conflicting testimony the jury passed. The subsequent survey of one of the surveyors would only have corroborated the testimony of the defendants' witnesses, and correspondingly weakened the testimony adduced by the plaintiffs. We do not perceive that it would, taken in connection with the different starting point from the first survey, have materially changed the result.

Each of the surveyors testified to using the utmost care, and each was of opinion that his survey was correct. The Court below was in a better position to judge of the effect of Brewster's testimony in the case, and the probable result of his evidence after the second survey, than this Court, and we do not feel warranted in disturbing its action in the premises.

The affidavit of Marshall, as to the testimony which Hoffman would give, should have been accompanied by Hoffman's affidavit. Hoffman's absence at his residence at Forest Hill, and the consequent inability of Marshall to obtain the affidavit in time, was not a sufficient excuse for its non-production. If necessary, application should have been made to the Court for additional time to obtain and file it.

Judgment affirmed.

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JOHNSON v. JOHNSON.

In an action for a division of the common property after a divorce, where it appeared that the property in question had been in the possession of the husband, before marriage, without title, and that he purchased the property and obtained deeds therefor after marriage, the purchase money being paid with the common funds: *Held*, that it was common property: *Held*, further, that the defendant having purchased, with the common funds, from another, under deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

A statement of facts appears in the opinion of the Court.

Crocker & Robinson for Appellant.

Counsel discussed at considerable length, and cited many authorities to sustain the proposition, that the partition and division of the common property of husband and wife, in case of divorce, must be made in the divorce suit, and that a separate action cannot be maintained. But as the Court did not pass upon that point directly, the argument is not given.

Second. That defendant owned the property *before* the marriage, and therefore is not common property.

The statute provides that "all property, both real and personal, *owned* by the husband before marriage, shall be his *separate* property." Wood's Dig. 487, art. 2605.

In this case the defendant *owned* the property *before* marriage. He had purchased it of a prior occupant, and had a deed of it, and was in possession, and had made valuable improvements on it. The purchases made of the McKees, as he avers, were merely to prevent litigation, and no title whatever was shown in them.

Conceding that this separate action will lie, this question becomes an important one. What is the nature of the title to real estate necessary to constitute a person an "*owner*" within the meaning of this statute, and of the words "*property acquired* after marriage," used in the succeeding section of the same statute? Must it be clear, unincumbered title, in fee simple? We contend that this is not neces-

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sary; that he becomes an "owner," or "*acquires*" the property by the purchase, or mere taking possession of the land. The possession of property is *prima facie* evidence of ownership. 2 Cal. Rep. 370; 4 Cal. Rep. 67, 70. All the decisions of this Court sustain this principle, so important to the welfare of this State.

Defendant being therefore the "owner," and having "acquired" this real estate before the marriage, it was his *separate*, and not the common property. He had a title, *prima facie* a good title; and even if it had been proved that some third person had a better title at that time, proof of that fact would not have transformed it from his separate into common property. It follows, therefore, that the real estate was not liable to be divided or partitioned between the parties.

Third. Her right, if any she has, is confined to one-half the money (\$700) expended in procuring the deeds made during the marriage.

Under the second point we have shown that she could not hold any estate in the land itself; in other words, they were not *jointly seized* of these lots as common property, but the entire estate was vested in him as his separate property. But if the common property was used in paying off incumbrances, quieting adverse claims, or making improvements on the premises, then the question would arise, what are her rights in the matter? We contend that these expenditures of money from the common property can give her no estate in the land itself, but will merely give her a right to be paid the one-half of the amount of the common property thus appropriated by him.

Fourth. It was error to merely decree a conveyance to plaintiff of the interest acquired under the McKee deeds.

The decree in this form does not finally determine the rights of the parties; it does not put an end to the litigation, but only lays the foundation for another suit, to partition the property between the parties. The plaintiff brings her action for the express purpose of having the property divided. The defendant consents, if she has any rights, that that is the proper relief, not only for the plaintiff, but for the defendant. But the Court, by its decree, instead of dividing the property, merely decrees a conveyance. The *division* of the property is what both parties wish, and it is the appropriate relief. But under this

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decree they will be compelled to litigate nearly the whole matter over again, to procure a division.

It is the duty of a Court of Equity, when all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for future litigation. *Ord v. McKee*, 5 Cal. Rep. 515; *Wilson v. Lanssen*, 5 Cal. Rep. 114.

C. Cole for Respondent.

As to plaintiff's ownership. He had no title whatever to any part of the property till he obtained the McKee deeds. The so-called "deed" from Shaw was only a bill of sale of a mule and cart. It contains no words of grant or conveyance, and is *not under seal*. It could therefore pass no interest in real estate. Defendant succeeded Shaw in business, and to the possession of his shanty, which happened to be on one of the lots.

Another fact not to be overlooked is, that the instrument from Shaw was *not either acknowledged or recorded till long after the marriage!* The idea of converting it into a conveyance was an afterthought, but a failure.

But, say appellant's counsel, he was in possession of the property, or at least the part which Shaw occupied, and possession is *prima facie* evidence of ownership.

True; but possession is *only prima facie* evidence of title, while the proof is *positive* in this case that he was not the owner before marriage, nor till some time afterwards, but that John McKee and John Henry McKee were the owners.

There is not a particle of proof that appellant ever even claimed to be the owner of any portion of the real estate before the marriage, and he admits that he was not the owner by seeking and purchasing the McKee titles.

The deeds from the McKees were not mere quitclaims, or deeds of *release*, taken to quiet title, as defendant now pretends; but they were full deeds of bargain and sale, *with covenants of warranty*.

There is nothing in the evidence showing that those deeds were obtained simply to "prevent litigation;" but, on the contrary, it appears that they were sought for the purpose of acquiring ownership,

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which the appellant neither had, nor pretended to have, until he obtained them.

The appellant is *estopped* by purchasing the McKee warranty deeds from now denying the title thereby obtained; and hence the reason why the Court below ruled out all evidence to show a good title in the McKees.

It is a well established doctrine that "in an action for dower the grantee of the husband is estopped to deny that his grantor had title;" and surely the reason is stronger for denying to the husband, in an action of this kind, the right to question the title of his grantor.

The case of *Sales v. Smith*, 12 Wend. 57, goes to a much greater length than is demanded in this. It is there held that, "a party admitting the title to the land to be in another, and agreeing to purchase, is estopped from setting up title in himself under a deed which he had held for six years previous to such admission, and such estoppel extends to all claiming under him."

But the principle may be regarded as settled by this Court in the case of *Ellis v. Jeans*, 7 Cal. R. page 417.

"The fact that the plaintiff had purchased from Basye, and he from McDaniel, would estop the plaintiff, as between him and the Longs, from disputing the title of Baca to the land described in the deed to McDaniel, as the plaintiff was bound to know the contents of all the mesne conveyances through which he claimed. The plaintiff could not, then, rely upon any title under land warrants, so far as they were located upon the land described in the deed to McDaniel."

See further, 1 Greenleaf's Evidence, sec. 25; 4 Greenl. R. 214; 9 Wend. 209; 12 J. R. 201; 4 Barb. 419; 10 Wend. 414; 1 Comst. 525 and 242; 7 Wheat. 535 and 547.

Appellant will be deemed to have been holding under the McKees, and having purchased the Sutter title from them, he cannot now dispute that title as against them. But Mrs. Johnson claims under the McKee deeds, and is virtually their grantee. Can he dispute their title when set up by one of the grantees?

Her money, in equal proportions with his, was used to purchase that title, and the two are, in contemplation of our law, joint grantees, equal owners, tenants in common.

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The covenants of warranty are still binding upon the McKees, and appellant cannot now say he got nothing by those deeds. He had nothing before, as is admitted; but he obtained a good title by them, as plaintiff offered to show on the trial.

If defendant could contest that title against others, he is estopped from denying it as against plaintiff, whose money was paid for it, and who is under our law to be deemed joint grantee with him. Her right to the premises is a *vested right*.

The appellant's third point. That Mrs. Johnson is only entitled to half the money that was paid for the land itself, is answered by the statute. (Wood's Dig., art. 2606.) "*All property acquired after marriage by either husband or wife, except, &c., shall be common property.*"

She is as much entitled to the increase in value and profits as he.

Crocker & Robinson in reply.

It is urged that the appellant, by taking warranty deeds from the McKees, is *estopped* from saying that the title was not in them, and cites authorities to sustain this position.

The rule of law is settled in some cases, that the *vendor* of land is estopped from denying that he had title at the date of his conveyance; and some cases have gone so far as to hold that in a suit by the vendor or those claiming under him, against the vendee, *who was let into possession* by the vendor, the latter cannot dispute the title by which he was let into possession, until he has delivered up such possession to the vendor.

But we think no case can be found holding that a party in possession of land and claiming title, as in this case, taking a deed from a third party, is estopped from saying that he acquired no title by that deed; but on the contrary, there are numerous authorities which fully sustain the opposite.

The grantee of a deed may deny the seizin or title of his grantor, even though there be covenant of warranty in the deed. 4 Barbour S. C. R. 180; 1 Comstock, 242; 3 Hill, 518; 7 Wheaton, 535; 4 Peters, 506; 5 Peters, 402; 16 Peters, 25; 3 Peters, 43; 2 A. K. Marshall. 27; 4 Littell, 274; 2 Metcalf, 32; 15 Mass. 495-499; 3 Bing. N. C. 69.

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TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

This is an action for the partition of common property; the marriage contract between the parties having been dissolved by decree of a competent Court.

It appears that at the time of the marriage, defendant was in possession of certain lots to which he had no title, his claim being based upon a paper not under seal, purporting to transfer a mule and dray, and an "interest in the possession of the lots." After the marriage, defendant purchased the lots, taking a deed with covenants of warranty, the purchase money being paid from common funds. The premises were occupied as a homestead until the dissolution of the marriage.

The defence set up is, that the lots are the separate property of the defendant, owned by him before marriage; that the purchase of an adverse claim, which was a cloud upon his title, did not change the character of the property; and that plaintiff was only entitled to claim the moiety of the money expended in the purchase of the outstanding title.

The Court below decreed the title purchased by the common fund to be common property, and directed defendant to convey to plaintiff one undivided one-half of the interest acquired by the purchase.

The objection to this decree is, that it does not finally determine the rights of the parties.

The Act defining the rights of husband and wife (Wood's Dig. 487) provides that "upon a dissolution of the marriage by the decree of any Court of competent jurisdiction, the common property shall be equally divided between the parties."

We think it clear, from the testimony, that the lots in question were common property; defendant had no pretense of title before coverture, and having, with the common fund, purchased from another under a deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase.

Judgment reversed and case remanded, with directions that the Court below proceed to make a division of the premises in question as the common property of the parties, and respondent recover cost.

People v. Board of Supervisors San Francisco Co.

PEOPLE *ex rel.* O'DONNELL v. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO.

An Act of the Legislature authorizing and directing the Board of Supervisors of the City and County of San Francisco to audit and allow the claim of a judgment creditor is not unconstitutional, as being judicial in its character. The Legislature may as well control and direct in this matter as in any other matter of municipal regulation.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

The facts sufficiently appear in the opinion of the Court.

F. P. Tracy for Appellant.

I. The Act of April 21st, 1858, for the relief of Hugh O'Donnell is unconstitutional.

1st. It is against the provisions for the protection of private property in the eighth and third sections of the Constitution of California. See sec. 37, art. 4.

2nd. It is an usurpation of judicial powers on the part of the Legislature contrary to article 3, Constitution of California.

II. It is submitted that: *First*, The City and County of San Francisco is a municipal corporation, and that, so far as the said city is concerned, (that being the corporation indebted) it is a corporation holding its property in fee, and having the sole right to administer that property under general laws. That it is not a political division of the State, merely, but as independent in its existence as any other corporation, and not subject to the control of the Legislature, except under such general laws as may be enacted, not for a special case, but for the general management of the affairs of the corporation.

If the city is a mere political division of the State, and has power to contract debts, then its debts are the debts of the State. Then the State can make no grant to the city of lands. The State cannot sue the city, nor can the city owe the State.

Then all sorts of absurdities follow, and the whole theory of municipal corporations, since the rise of cities in the middle ages, and their first resistance of the tyranny of the Legislature in the person of the Emperor, has been a mere delusion and fallacy.

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Cities once incorporated have, like any other corporation, a distinct independent existence. The Legislature can only interfere with them by general laws, or amendments, or repeal of their charters. The Legislature cannot undertake to administer their local government, and act in the capacity of auditor of the demands against their treasuries.

The doctrine that the Legislature can, by an Act, undertake to determine that a municipal corporation owes a certain debt, and shall pay that debt in a certain manner, takes away all the rights and liberties of the city, and is revolutionary and dangerous.

It falls into the absurdity of saying that a municipal corporation owes so much money and that the Legislature has a right to so determine, because the municipal corporation is a mere political division of the State, and so incapable of owing anything.

The doctrine must go to the length that the Legislature might, by Act, transfer to and vest in any private individual the whole property of any city.

There are no authorities in this case. Like parricide, against which the Romans had no law, because the crime was thought impossible, such an usurpation by the Legislature has never been contemplated or guarded against, and no Supreme Court of any State ever had to pass upon a doctrine so monstrous as that contended for by this O'Donnell bill.

Shattuck, Spencer & Reichert and McDougal for Respondent.

It is contended by appellant, that the Legislature does not possess the power to direct or divert the revenues of the City and County of San Francisco to the payment of particular indebtedness.

It is conceded that the Legislature does possess the power over the State revenues. It was also distinctly admitted in argument that the Legislature possesses the same power over the county revenues, the counties being only subordinate, subject subdivisions of the State. It is contended, however, that cities (and therefore the City and County of San Francisco) furnish an exception to the rule, and that, as "*municipal corporations*," they had the control and direction of their revenues as charter rights. It is further suggested, that the creditors of the city, under the laws existing at the time of the pas-

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sage of the Act in question, had acquired certain fixed or contract rights, with which legislation could not interfere.

It is submitted that the error of this position lies in this, that municipal corporations under our system are confounded with the "*free cities*" of Europe. With us, a State, a county, and city, are equally municipal corporations. It is true, we call a law erecting a city into a special department of the Government, a *charter*, but we do not use the term in which it is applied to a private corporation. We do not use it to describe *the grant of a franchise*. Our laws for the organization and administration of the affairs of counties are *provisions*, not *concessions*. So of our laws for the organization and administration of cities. Counties have their local government; their Boards of Supervisors, Sheriffs, Clerks, Courts and subordinate officials. They collect and disburse revenues, construct roads and bridges, license ferries, and do all other things required, in the way of local administration and government, under the authorization and direction of State legislation, which is not always general, but frequently particular as to counties. The interests and necessities of cities generally require more of local government and administration. Cities and counties do not differ in kind, but in degree.

The correctness of this position will not be disputed, upon careful consideration. It must follow, that if the revenues of counties may be directed, so may the revenues of cities.

Cities, as well as counties, are but parts of the general State government; the creatures of legislation, and as in their organized constitution subject, even to the extent of absolute repeal, so by the stronger reason subject in all matters of administration. If the notion advanced by defendant is true, then it would follow that the charter would not be subject to amendment, much less to repeal.

It is an error to suppose that the moneys in a City Treasury are the property of the corporation, in the same sense that property exists in individuals or private corporations; they are moneys collected by a subordinate department of government for the purposes of government, and to be distributed *in obedience to the law*, as it does or may exist for those purposes.

It is an error to suppose that any individual has a contract right in the general revenues collected for city, any more than for county and

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State purposes. The *necessities* and obligation of government for general and local purposes are constantly changing, and to meet those necessities, *provisions* must be made. To make those provisions is the office of the Legislature.

This power has been exercised without question in every State of the Union, and in no State more frequently than our own during the brief period of our history. The history of legislation for the City of San Francisco furnishes a number of instances of the exercise of the same power questioned in this case.

This is not all the Legislature does in the premises; it takes the ascertainment of claims out of the hands of the Judiciary; invests a commission of its own appointment with this power; requires that the creditors shall take promises, not money, and then diverts a portion of the revenues to the payment of interest due them, and the residue is diverted to the payment of a distinct class of liabilities.

This, it is said, the Legislature may do, thereby levying the established legal rights of O'Donnell against the city as judicially determined. Yet the Legislature does not possess the power to partially retrace her steps and provide for the payment of an antecedent and just debt.

If it is admitted that the Government, as constituted, possesses all power not exclusively granted to the Federal Government, and not embraced within the inhibitions of the Federal or State Constitutions, and if this act is not the exercise of a judicial or executive power, how can this exercise of power by the Legislature be questioned? It does not interfere with the obligations of contracts, and we cannot perceive any other provision of the Federal or State Constitution bearing upon the question.

In reply to the second position assumed by the appellant, it would seem sufficient to remark, that the Judiciary had exhausted the power of its office when it pronounced the final judgment in favor of O'Donnell; that all that remained to be done was the enforcement of the adjudged right; that this exercise of power is in no respect judicial, as is manifest from the fact that it is a power which, in the given case, the Courts could not have exercised.

But if we consider for a moment what are the several and distinct

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constituent qualities of *Legislative, Judicial and Executive* power, we have a simple solution of any question on this point.

The office of the Legislature is to make LAWS — RULES regulating the relations and conduct of individuals; and REGULATIONS and *provisions* for the management and administration of Government in all its departments.

The office of legislation ceases when the statute is enacted.

The office of the Judiciary is to *ascertain and pronounce* upon questions of right or wrong, in pursuance of the established laws. *When it has ascertained, and adjudged, and declared in the form of judgment, the application of the law to the case presented, the office of the Judiciary has ceased.*

Neither the record of legislative action in the statute book, nor the record of the judgments of our Courts, have any greater efficiency than so many written or printed words, *until the Executive power of Government is invoked.*

It is the office of the Executive to see that the *laws* are executed. By *laws*, in this sense, are meant both statute law and the law of cases adjudged as determined by the sentence of the Court.

The various executive and administrative officers of Government are so many arms and members of the Executive body. They have nothing to do with legislation or judgment, *further than by acts of recognition and execution.*

In the present case, the claim of O'Donnell had been exhibited in the Courts and established against the defendant, but as the means of the *defendant* were subject to the regulations and provisions of then existing legislation, the power to discharge this liability did not exist without legislative aid. With this aid asked and granted, all that remained to be done was in the way of *administration*, just in the same manner and to the same extent as were it permissible to sue the State; and had O'Donnell recovered judgment against the State, and the Legislature had directed its payment, the auditing and payment of the amount out of the State Treasury would be a *purely administrative act.*

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

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The relator obtained a judgment against the late City of San Francisco for a sum of money, and the Legislature, on the twenty-first day of April, 1858, passed an Act, "whereby the Board of Supervisors of said city and county were authorized and directed to allow said O'Donnell the amount of his judgment," and also providing "that the Auditor of said city and county be authorized and directed to audit the sum so allowed and issue his warrant therefor; whereupon, and upon the presentation thereof, the Treasurer of said city and county shall pay the same as other indebtedness of the city and county aforesaid." The Board of Supervisors having refused to audit and allow this sum, as by the Act directed, this proceeding is taken to compel them to do so.

It is objected by the appellant's counsel that this Act is judicial in its character, and therefore, unconstitutional. We do not think so. The Legislature neither attempts to create or to adjudicate in respect to a debt against the corporation. It merely, in this instance, makes provision for the payment of a debt already created by the corporation and fixed by judgment. The duty and mode of the payment of debts of corporations of this sort are legitimate subjects of legislative direction. As all the powers and duties of these local governments come from legislative grant, and paying their debts is a legitimate function and duty, it is not possible for us to see why the Legislature may not as well control and direct in this matter as in any other matter of municipal regulation; nor can we see why it does not as well possess *the power* — whatever the expediency of its exercise in any instance — of making this provision in respect to a single debt of the municipality, as in regard to all its debts. In truth, so far as the record shows, (and we cannot look beyond it) there is no other judgment or even indebtedness. The interesting question argued at the bar, as to the extent of the power of the Legislature over the finances of the municipality, does not arise in this case; for this proceeding is only taken to compel the allowance and auditing of the claim by the proper authorities. It was clearly competent, we think, for the Legislature to direct this; and the judgment of the Court below only orders the defendants to obey the Act of the Legislature in this respect.

The judgment is affirmed.

Williams v. Price.

WILLIAMS v. PRICE.

A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence.

In such a case, it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go farther, and show that he could not, with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with, or ascertained the existence of the facts.

A general averment of such diligence will not do. The bill should state how and why the facts could not have been discovered at the time.

APPEAL from the Probate Court of the County of Sacramento.

Price and Williams were physicians and partners, and as such, joint contractors for the keeping and conducting of the Sacramento County Hospital. Williams died in 1855, leaving a will, by which one Stanley was appointed his executor. Stanley qualified and acted as such. W. G. Williams was made the sole legatee of the testator. Upon a settlement of the accounts of Price and Williams, made by the executor and Price, a balance of over \$2,000 was found due to Price, and this sum was allowed by the executor as a claim against the testator's estate. This allowance was approved by the Probate Court; and on the final settlement of the estate in December, 1857, a decree was entered, among other things directing the payment of this balance by the executor. It seems that the attorneys of the legatee were present at this decree and settlement, and no objection was then interposed by them. Some three or four months afterward, the legatee, Williams, filed his petition in the Probate Court to set aside the decree of final settlement, so far as concerns this allowance to Price. The grounds were that the legatee was not personally present at the settlement; that certain Hospital furniture had been converted by Price, and not allowed for; that Price had failed to give the deceased the full benefit of the Hospital contract; that the deceased was entitled to a certain credit not given; that an item of \$1,600 included in the settlement was presented to the executor more than ten months after the publication of notice of letters. etc., and several other objections of like kind. The petition also alleges that the petitioner's knowledge

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of all these facts was obtained after the final settlement of the estate was made. A demurrer was filed to this petition and overruled, and the defendant appealed to this Court.

Smith & Hardy for Appellant.

1. The Probate Court erred in overruling the demurrer to the petition of the legatee.

2. The Probate Court erred in making the order of the fourth of June, 1858.

Latham & Sunderland for Respondent.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., concurring.

It is not necessary to consider many of the questions made at the bar. The petition itself shows no grounds for the relief asked. The accounts having been settled by the executor and Price, with the approbation of the Court, and a final decree had, the accounts could not be reopened upon the showing made by the petition. The legatee having been notified, and appearing by his counsel, must be held concluded by the settlement and decree, even if he would not otherwise have been bound by the judgment; and this before the Probate Court as well as any other, and on the concession that the Probate Court, after this final decree and settlement, had jurisdiction of the subject. It would not be sufficient in an ordinary case of a bill for a new trial, to aver that the party thus represented was ignorant at the time of the trial (or settlement) of the facts. The bill must go further, and show that he could not with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with, or ascertained the existence of the facts. It is never tolerated to a party that he may go on and take his chances of a trial, and after it has gone against him, move to set it aside on grounds which he might have availed himself of by the exercise of a proper degree of diligence. Litigation would be endless if this were so, and a party encouraged in supineness and negligence.

It is true, the petition states that petitioner could not with any dili-

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gence have discovered the facts on which he relies; but this general averment will not do. The petition should state how and why the facts could not be discovered. Besides, this allegation is denied by the answer, and no proof made of it. It is not perceived why the attorneys of the legatee could not have ascertained all the facts, which do not seem difficult of ascertainment, even if the absence of the petitioner himself from the State prevented him from personally prosecuting the necessary inquiries. This view renders it unnecessary to examine the case upon the merits, though upon the proofs, we think the same result would follow.

The judgment of the Probate Court is reversed, and the petition dismissed.

RITTER v. MASON.

A stipulation inserted in the transcript, and not embodied in a statement or bill of exceptions, forms no part of the record which this Court can notice. Nor do affidavits used on motion to open the judgment, form any part of the record, where there is no certificate of the Judge or Clerk, or an admission of counsel that they were used for that purpose.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

E. B. Mastick for Appellant.

J. B. Hart for Respondent.

FIELD, J., at the April Term, 1858, delivered the opinion of the Court — TERRY, C. J., and BURNETT, J., concurring.

The stipulations inserted in the transcript are not embodied in any statement or bill of exceptions, and form, therefore, no part of the record; and there is no certificate of the Judge or Clerk, or any admission of counsel, that the affidavits constitute the papers used on the motion to open the judgment. There is left for our consideration only the judgment roll, which discloses no error. Practice Act, section 346; *Newland v. Kean*, and *Davis v. Stratton*, January Term, 1856; *Gates v. Buckingham*, 4 Cal. 286.

Judgment affirmed.

People v. Buster.

PEOPLE v. BUSTER, LATE COUNTY TREASURER OF SONOMA
COUNTY, AND HIS SURETIES.

A surety has a right to stand on the precise terms of his contract. He can be held to no other or different contract.

In the case of sureties on the official bond of a County Treasurer, they all contract together, and with reference to the common responsibility. In case of a breach or loss, each surety has his recourse for contribution on his fellows. The discharge of one of the obligors affects the contract as to all, and amounts to a release of all as to all future acts of such official.

Statutes in derogation of common law principles are construed with strictness, and sureties are favored in the law.

APPEAL from the District Court of the Seventh Judicial District,
County of Sonoma.

A statement of the facts appears in the opinion of the Court.

Attorney General for Appellants.

The only serious question urged by respondents, as we understand, is to this effect: "That a discharge of one surety operated as a discharge of the whole."

In answer to which we say:

1st. That the discharge in the outset was void, because made by a Judicial officer, when the act was merely ministerial; and

2d. That the bonds given subsequent to the first were merely cumulative, and were the voluntary acts of defendants, made for the benefit of plaintiff, and not the sureties upon the original instrument or instruments.

The sections of the Act under which the proceedings of the pretended discharges were had, do not require the hearing of any evidence, or the doing of any act necessary to form an opinion in the nature of a judgment, and in fact require nothing in its nature judicial, but merely impose the performance of a certain act by the County Judge, upon presentation of a certain affidavit showing a state of facts named to him; he makes no inquiry in regard to the matter, does not hear the respective parties, and does not hear evidence or argument from the applicant, therefore the act is only ministerial.

We can see but little difference between the act spoken of and those

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usually conferred upon Boards of Supervisors; which latter this Court has determined could not be performed by the Courts of Sessions, because they were not judicial in their character.

That the act is ministerial, see 1 Kelly's Rep., page 579 (Georgia). The bonds are cumulative. See 9th Iredell, (N. C.) 71.

The language of the Act is, that *any surety* may apply for a discharge, leaving it optional with each and every one to make application, or not, as he might deem proper; and the bond being several, as well as joint, it cannot be objected that the relation of the sureties to each other is so affected as to render the instrument inoperative after the discharge of one. Section 211, page 77, Wood's Digest.

Baker & Howard for Appellants.

1st. It is manifest that the Legislature intended that the bond should remain in force as to all parties not discharged by the Court, and that the new bond is merely additional security acquired to the State or county. The discharge, in the language of the statute, is expressly limited to the sureties applying to be discharged. Wood's Digest, p. 79, art. 227.

2d. The general principle of law is, that a discharge of one surety by the obligee is a discharge of all. But it is submitted, that it would be competent for the Legislature, as to all future contracts, to change the rule, and parties would be held to contract with reference to the law. The rule has been changed in this State as to sureties on official bonds.

3d. The statute which authorizes the County Judge to discharge one surety and take another in his place, is prior in date to the execution of the bond in this case, and therefore the obligors contracted that, as to their co-obligors, they might be discharged and new obligors, substituted to their liability. This is as much a part of the contract as though it has been expressly incorporated into the bond. The Act of the Legislature is as much a part of the bond, and enters as fully into the contract, as though it had been recited in the bond in precise terms. *McCracken v. Hayward*, 2 How. U. S. R. 612.

4th. The discharge of the surety in this case is not the act of the obligor, but the act of the law; and it was the act of the defendants

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to elect to remain in the bond, and not join in the application for a discharge.

5th. If the law enters into the contract, the substitution of the new bond did not vary the contract, or change the security or liability, without the consent of the obligor. He consented to the terms of the law, and therefore to the substitution of a co-obligor, by means of a new bond.

Campbell & Pratt for Respondents.

First — That a discharge of one surety on a joint and several bond, at common law, releases all the other co-sureties. *Burchard v. Dias*, 3 Denio R. 238.

Second — That this rule applies to bonds made to Government, under statutes, as well as to common law bonds. *Ibid*, 238; *The State v. Polke et al.*, 7 Blackst. R. 27; *Davis v. The People*, 1 Gilman R. 409; *The People v. Brown*, 2 Doug. R. 9.

Third — That all the defendants, sureties, are discharged by the release of a portion of the number, and the approval and filing of new bonds. Wood's Digest, p. 77, art. 205. Official bonds of County officers to be approved by County Judge.

Idem, p. 80, art. 231, sec. 2, (under which the releases in these cases were made) authorizes any surety on the official bond of a County officer to be relieved from subsequent liabilities in the mode prescribed.

When the office shall be declared vacant, "unless within ten days such officer shall give (not a sufficient bond to make up for the deficiency occasioned by the retiring of the applicant bondsman, but) good and ample security for the discharge of his official duties, as required originally."

The Legislature would seem to have recognized the discharge of *all* the former sureties, and the necessity of new security, as "ample" as required "originally."

It can scarcely be contended, that the effect of the release of one surety should be to give the county greater security than it had originally; and yet this would be the effect if the new security, although "ample," should be held to be merely cumulative, and additional to

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that claimed to be remaining in force against the non-applying bondsmen.

It is contended by plaintiff, on the authority of *McCracken v. Hayward*, that as defendants contracted with plaintiff, after the passage of the law authorizing the discharge of one or more sureties, the right of any portion of the sureties to such discharge became an element of the contract; and that knowing this, they agreed to remain and did remain. in law, liable, notwithstanding the discharge of their co-sureties.

The authority cited fails to establish the principle contended for.

Every co-surety in a common law bond contracts with full knowledge that the obligee can release any one of the sureties, and that the legal effect would be the discharge of all. And yet this principle of the common law cannot be urged as a reason why a surety is not discharged by the release of his co-surety.

The force of this last statement would seem to have been apprehended, as plaintiff is obliged to urge that the discharge of the sureties applying is not the act of the obligee, but of the law. It could with equal force be contended, that the release of one co-surety on a common law bond, through an authorized agent, is the act of the law. The County Judge is the authorized agent of the plaintiff in this behalf. In either case, the release is the act of the obligee, by his or its agent, the law merely declaring the effect of such act.

There is no privity of action among the sureties; it may equally as well be urged, that the sureties not applying for their discharge elected to avail themselves of the release resulting by law from the discharge of their co-sureties.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This was an action brought against defendants as sureties on the official bond of one Buster, as Treasurer of Sonoma County. The breach alleged in the non-payment of certain moneys received by the Treasurer, and the defense set up is, that a portion of the sureties were discharged by proceedings taken in pursuance of the statute, and that the defalcation occurred after the release of such sureties and the giv-

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ing of a new bond with other sureties. The Court below found, as matter of fact, that this defense was well founded, and as matter of law, that this released the co-sureties. The record shows that two or more of the sureties on the original bond applied to the Judge of the County Court to be released from their liability; that the Treasurer was ordered by the Judge to give a new bond, which he did, with Fisher and Ward as his sureties, and that the Judge received and approved the new bond, and formally released these sureties.

The provisions of the statute are as follows:

"ARTICLE 231, SECTION 2.—Any surety on the official bond of a city, county, or State officer, may be released from the liabilities thereon, afterwards accruing, by complying with the following provisions of this Act:

"SECTION 3. Such surety shall file with the Court, Judge, Board, officer, person or persons authorized by law to approve such official bond, a statement in writing setting forth the desire of the said surety to be relieved from all liabilities thereon afterwards arising, and the reasons therefor, which statement shall be subscribed and verified by the affidavit of the party filing the same.

"SECTION 4. A copy of the statement shall be served on the officer named in such official bond, and due return or affidavit of service made thereof, as in other cases.

"SECTION 5. In ten days after the service of such notice, the Court, Judge, Board, officer, person or persons with whom the same may be filed, shall make an order declaring such office vacant, and releasing such surety from all liability thereafter to arise on such official bond, and such office shall thereafter be held in law as vacant, and be immediately filled by election or appointment, as provided for by law, as in other cases of vacancy of such office, unless such officer shall have, before that time, given good and ample surety for the discharge of all his official duties as required originally.

"ARTICLE 232, SECTION 6. This Act shall not be so construed as to release any surety from damages or liabilities for acts, omissions or causes existing, or which arose before the making of such order, as aforesaid, but such legal proceedings may be had therefor, in all respects, as though no order had been made under the provisions of this Act." (Wood's Digest, p. 80.)

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If we concede that the release of one surety by these statutory proceedings discharges the bond as to all, then the case is with the defendants. No order declaring the office vacant, after the application of these sureties for a discharge, was made. This omission of the Judge, however, would not affect the sureties. The question then arises as to the effect of this application and discharge of those sureties who were released, upon their associates. The defalcations complained of occurred after the release of these sureties. A surety has a right to stand on the precise terms of his contract. (10 John. R., 587.) He can be held to no other or different contract. In this case, the sureties all contracted together and with reference to the common responsibility. In case of a breach or loss, each surety had his recourse for contribution upon his fellows. The discharge of any one of the obligors affected the contract as to all. It made it, indeed, a different contract from that made by the parties.

The authorities which sustain these principles are numerous and decisive. (*Averill v. Lyman*, 18 Pick. 346; *Goodman v. Smith*, *Ib.* 416; *Canegie v. Morrison*, 2 Met. 381; *Wiggins v. Tudor*, 23 Pick. 434; *Crane v. Roberts*, 5 Greenl. 423; *United States v. Thompson*, Gilpin, 614; 14 Pick. 123; 17 Mass. 581; 13 *Ib.* 148; 7 Vermont, 324; 7 Johns. 207; 3 Denio, 238; 1 Gilman, 409; 7 Blackf. 27.)

If there were any doubt that the mere discharge of these sureties discharged the rest from liabilities accruing after their discharge, we think that the statute making it the duty of the Judge, when the application is made by a surety, as in this case, to declare the office vacant unless the new bond required be given, removes all difficulty. The Act contemplates that the new bond will be an ample security, and that no further acts will be done by the officer after the order declaring the vacancy, unless and until he executes the new bond. It does not appear by the statement of the case that the money, for embezzling which this action is brought, was in the hands of the officer before or at the time of these releases of these discharged sureties; but on the contrary, it appears that the funds were received by him afterwards.

The counsel for the appellant contends that the last bond is merely cumulative. We think, however, that neither the language nor the reason of the law supports the argument. The general statute in rela-

tion to official bonds in those provisions (Wood's Dig. pp. 78, 79) which require new bonds in certain cases, expressly declares that the original shall not be discharged or affected when the additional bond is given. The omission of this provision in the sections which touch cases like this is significant to show that a different intention existed. If such had been the intent, probably the Legislature would have only required the substitution of new sureties in the place of those applying for release; as it would not, probably, have been considered reasonable to multiply sureties upon every case of individual application for discharge. But when a new bond is required to be executed and approved, "in like manner as the original," it can scarcely, in such cases as this, be inferred that the Legislature meant to continue in force the old bond as a security for future liabilities, especially when that would be to innovate upon the established principles of the common law, by holding the contract binding after its terms had been essentially changed. Statutes in derogation of common law principles are construed with strictness, and sureties are favored in the law.

We are referred to but one case by the Attorney General; that of *Poole v. Cox*, in 9 Iredell, 71; but neither the facts nor the reasoning of that case are in point. The Court says: "The new bonds are not required for the relief of the sureties upon the first bonds, but are taken for the benefit of those who may be concerned in the proper discharge of the duties of the office; and when the office is to continue for more than a year, it was presumed that the bonds taken at first might become insufficient from the insolvency of the sureties or other causes; hence the Legislature took the precaution to require new bonds to be given from time to time, and the Courts, in order to give effect to the intention of the law makers, consider the new bonds not as taking the place of the old ones, but as additional thereto." The reasoning certainly has no application to the case before us, where, by a release of a portion of the sureties, a new contract is made for the rest, and they required to abide by the more onerous terms of the last contract. Although we do not dispute the proposition of the learned counsel, that the Legislature might have provided, by law passed prior to the making of this contract,

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that it should have this effect, yet we must look for some clear evidence that this was the Legislative design. The case in N. C. was merely the case of a Sheriff elected for two years, and giving bonds, and afterwards, in conformity with a law requiring a renewal of his bond, executing another bond, it was *held*, that the last bond was not in substitution of the first.

The consequences of the doctrine contended for might subject sureties to risks they never contemplated; for if twenty signed a bond, and nineteen should be secretly discharged — and no notice is necessary — the remaining surety might be bound for all the liabilities of the officer; or if not all, the effect would be to make him a co-surety with subsequent obligors, with whom he never consented to be bound.

The judgment below is affirmed.

Ex parte ELLIS, ON APPLICATION FOR HABEAS CORPUS.

The writ of *habeas corpus* should not issue to run out of the county, unless for good cause shown; as the absence, disability or refusal to act of the local Judge, or other reason, showing that the object and reason of the law requires its issuance.

If the local Judge refuses to act, then resort may be had to officers out of the county.

The Legislature can never have intended that a party imprisoned under sentence of conviction for a misdemeanor, should have the privilege of selecting from the judiciary of the whole State the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him, at the expense of the county.

It is the duty of the courts to execute all laws according to their true intent and meaning: that intent, when collected from the whole and every part of the statute taken together, *must prevail, even over the literal sense of the terms, and control the strict letter of the law*, when the letter would lead to possible injustice, contradiction and absurdity.

FIELD, J.—Although the Supreme Court may issue the writ of *habeas corpus*, its allowance in term time is not obligatory, but rests in the sound legal discretion of the Court. To allow it may be obligatory upon the Judges in their individual capacity.

Petition to this Court for a writ of *Habeas Corpus*.

Petitioner alleges that he is held in custody by the Sheriff of El Dorado County, under a warrant of commitment issued by a Justice of the Peace of the county, upon a conviction for a misdemeanor, for keeping the store and place of business of petitioner open for business purposes, and exposing his goods, wares and merchandise for sale, on

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the Christian Sabbath, or Sunday, contrary to the provisions of an Act, entitled "An Act to provide for the better observance of the Sabbath," approved April 10, 1858.*

Petitioner also alleges that the Justice acted without jurisdiction: that the act for which he was convicted constitutes no offense in law; and he asks a writ of *habeas corpus* returnable before the Supreme Court.

Samuel J. K. Handy for Petitioner.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

Petitioner alleges that he is held in custody by the Sheriff of El Dorado County, under a warrant of commitment issued by a Justice of the Peace of the county, upon a conviction for a misdemeanor. He also alleges that the Justice acted without jurisdiction; that the act for which he was convicted constitutes no offense in law; and he asks a writ of *habeas corpus* returnable before the Supreme Court.

The statute provides that the "writ of *habeas corpus* may be granted by the Supreme Court or any Judge thereof, or any District or County Court in term time, or by any Judge of such at any time, whether in term or vacation."

It also provides that the writ shall issue without delay; that it shall be served without delay, and that the Judge or Court who issued it shall immediately after the return proceed to hear and examine, etc.

In considering this application, a construction of the Act concerning *habeas corpus* will be necessary, in view of the frequency with which applications for the writ are made to this tribunal on the part of persons in custody in other counties.

A familiar rule in the construction of statutes is to give effect to the meaning and intention of the law maker; this may be gathered from the reason of the statute: "The motives which led to the making of it, the object in contemplation at the time the Act was passed." (Smith Com. 634.) Puffendorf says, that which helps us most in the discov-

* See *ex parte Newman*, 9 Cal. 502.

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ery of the true meaning of the law is the reason of it, or the cause which moved the Legislature to enact it.

The object of the statute concerning *habeas corpus* was to afford all persons illegally restrained of personal liberty an adequate and speedy remedy; therefore, in such cases, full and ample jurisdiction is given to all judicial officers except Justices of the Peace; and a speedy remedy to the party imprisoned is provided, by having in each county of the State at least one officer authorized to afford all the relief given by the statute.

The Legislature can never have intended that a party imprisoned under sentence of conviction for a misdemeanor should have the privilege of selecting from the judiciary of the whole State the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him, at the expense of the county, it may be from San Diego Klamath, in order that he might avail himself of a remedy which the local Judge of his county was equally authorized to grant.

Nor need he stop here; the refusal to discharge by one Judge is not a bar to another application before a different Judge. After failing in his first application, the party may sue out another writ before a different officer, and thus the term of his imprisonment may be passed in traveling from one part of the State to another, at the expense of the county in which he was convicted, to the entire subversion of justice. Such a construction would lead to manifest absurdity. As it is the duty of Courts to execute all laws according to their true intent and meaning, that intent, when collected from the whole and every part of the statute taken together, *must prevail, even over the literal sense of the terms, and control the strict letter of the law*, when the letter would lead to possible injustice, contradiction and absurdity.

“When a particular construction of a statute, applied to a case which it seems by its terms to include, there follows from such a construction and absurd consequence; respect for the Legislature will induce the Court from thence to conclude that some other construction, which will not produce such a consequence, ought to be adopted. Hence, every construction which leads to an absurdity ought to be rejected.” (Smith’s Com. 663.)

Ex parte Ellis, on application for Habeas Corpus.

"It is said that this rule should be followed, even in cases where there is neither obscurity nor anything equivocal in the law itself, for the reason that the absurdity of the literal sense of the law does not proceed merely from the obscurity or any other fault in the expression, but from the narrow limits of the human mind, which cannot foresee all cases and circumstances, or include all the consequences of what is ordained; that it is impossible for the Legislature to enter into immensity of detail. It can only make laws in a general manner, and in applying their acts to particular cases, the construction ought to be conformable to the intention of the Legislature. It cannot be presumed that the Legislature intended anything absurd. When, therefore, the words, when taken in their obvious and proper sense, lead to it, it is necessary to turn them from that sense just as far as is sufficient to avoid an absurdity, if from the whole perview of the law, and giving effect to all the words used in it, it may fairly be done." (*Ib.* 664 U. S. *v.* Fisher, 2 Cranch, 400.)

Testing the *habeas corpus* Act by these rules; looking at the evil provided against and the remedy afforded, the motives and objects of the Legislature in passing it, and the manifestly absurd consequence which may result from a different construction; we conclude that the writ of *habeas corpus* should not issue to run out of the county, unless for good cause shown — as the absence, disability or refusal to act of the local Judge — or other reason showing that the object and reason of the law requires its issuance.

This does not militate against the true and wise purposes of the Act, nor deny to any citizen the essential rights given him by the writ of *habeas corpus*. The application to the local Judge may be made speedily and his answer soon given. If he refuses to act, then resort may be had to officers out of the county. This secures the right of a citizen and of the people, and deprives a process intended to be used for beneficial purposes of the power to injure the public interests by possible escapes, and delays, and onerous costs. The mere caprice of the prisoner ought not to prevail against the interests of the people and the public convenience.

Petition denied.

Re parte Ellis, on application for Habeas Corpus.

FIELD, J. — This is a petition for a writ of *habeas corpus*. The petitioner alleges that he is illegally restrained of his liberty by the Sheriff of El Dorado County, under a commitment of a Justice of the Peace. No reason is assigned for not presenting the petition, in the first instance, to the Judge of that county, or to the District Judge of the district in which that county is situated; and the question arises whether, under such circumstances, this Court should exercise its discretion, and allow the writ.

It is true, the writ of *habeas corpus* is one of right, to which every person unlawfully restrained of his liberty is entitled *ex merito justitiæ*. It is true, the privilege of the writ is an express constitutional right at all times, except in cases of rebellion or invasion, when the public safety may require its suspension. (Const., article 1, section 5.) But like any other constitutional right, its privilege is to be exercised in a reasonable manner. Local Judges of the county and district are as fully competent to inquire into the causes of an alleged illegal restraint as this Court, and ought to be applied to in the first instance. Although this Court may issue the writ, its allowance in term time is not obligatory. That must rest in the sound legal discretion of the Court. To allow it may be obligatory upon the Judges in their individual capacity, but no such obligation lies upon the Court.

The statute of New York, in force in 1810, like the statute of this State, imposed a heavy penalty upon the Judges for the refusal of the writ on a proper application: and yet in *Yates v. Lansing*, (5 Johns. 297) Kent, C. J., said: "The Chancellor and Judges may refuse such a writ at their discretion, if applied for a term time, and the penalty will not attach;" and subsequently, in the matter of *Ferguson*, (9 Johns. 239) the Supreme Court refused the writ to a soldier of the U. S. army. In that matter Kent, C. J., placed his decision on the want of jurisdiction, but Thompson, J., said: "The objections herein stated by the Chief Justice against the jurisdiction of this Court are entitled to great consideration, and as the allowance of the writ, in term time, rests in sound legal discretion, and as the party may have relief by application to one of the Judges of the Supreme Court of the United States, or of the District Court for this district, where jurisdiction in this case is unquestionable, I think the application ought to

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be denied." The three other Judges, Spencer, Van Ness, and Yates, all concurred in the judgment upon the grounds assigned by Justice Thompson.

There are obvious reasons why the allowance of the writ by the Court should rest in its discretion. They can be issued by the local Judges of the county and district. The causes of the restraint of the petitioners can be inquired into as fully by those Judges as by this Court. The expenses of transporting parties from extreme portions of the State under the writ, to be again in the greater number of instances retransported back, would subject the counties to oppressive burdens, and the time of this Court, were these writs allowed as a matter of course, would be occupied to the exclusion of matters pressing upon its attention, to the serious inconvenience of litigants and the public.

In the present case, no reason being assigned in the petition for the exercise of the discretion of the Court which may not be urged in every instance, I am of opinion that the writ should be disallowed.

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It would be a fraud, which no Court of Equity could tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large sums of money, improving the property, without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny all obligation on his part to comply with his engagements.

In such a case, where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

A statement of facts appears in the opinions of the Court.

Wm. H. Rhodes for Appellant.

First — The demurrer in the District Court ought to have been sustained:

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1st. Because the complaint is a Bill in Equity, to obtain specific performance of an alleged agreement for the purchase of land; yet the complaint nowhere alleges that said agreement, or any note or memorandum thereof expressing the consideration, was in writing; nor does the said complaint set out any such agreement, as having been executed in writing.

The agreement therefore, if simply existing by parol, is *void*. Stat. Fraud. sec. 8. Wood's Dig., p. 106.

This statute has received a judicial interpretation at the hands of this Court, and the strict rule adopted (that no equitable construction can control) that unless the words of the statute are fully complied with, no relief will be granted. All equity usurpation is abrogated. *Abell v. Calderwood*, 4 Cal. 90.

2d. But if it be contended that the bond itself, which is copied in the complaint, is such a note or memorandum of the agreement as would fulfill the requirements of the statute, then the defendant contends that the bond does not express *the consideration* of the contract.

The language of the statute is not that the note, etc., must express a consideration, but "*the consideration*." The complaint sets forth "the consideration" of the contract for the sale of the land, as five hundred and thirty-three dollars. The consideration mentioned in the bond, is the payment within four months of the sum of three hundred and eighty dollars, in accordance with the provisions of two promissory notes.

3d. The complaint shows that the bond was not the contract. It alleges that it was executed after, and in "pursuance of the contract of purchase and sale," and not until the payment of one hundred and fifty dollars and the execution of two certain promissory notes.

4th. It also appears from the complaint itself, that a portion of the *consideration* of the purchase was by agreement paid to a Mr. Randall Hobart, yet this fact nowhere appears in writing, subscribed by the defendant.

The plaintiff therefore is not entitled to recover.

Secondly — The demurrer ought to have been sustained, upon the second ground:

1st. Because the plaintiff, by the allegations in his bill, presents to

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the Court a clear case of inexcusable *laches*. He admits that he did not pay the notes, or either of them when they fell due; yet he alleges that he knew precisely where they were.

He shows that the first note fell due on the thirteenth October, 1856, yet he avers no tender until the tenth February, 1857; that the second note fell due the thirteenth December, yet he did not offer to pay it till tenth February, 1857.

He shows furthermore, that the deed to be executed was to be executed "at the request of the plaintiff within four months," yet he does not show any such request until the tenth February, 1857, nearly two months after the time expired for the payment of the notes; and nearly a whole month after the period expired "within" which the request was limited to be made. The rule "that he who seeks equity must do equity," applies with full force to bills for a specific performance.

The party plaintiff must first show his own readiness and willingness to perform, before he can call upon the defendant to do so. Willard's Eq. Juris. 291; *Brown v. Covillaud*, 6 Cal. 566; *Goodale v. West* 5 Cal. 341; *Story's Eq. J.*, sec. 771.

It may therefore be stated as a general principle, that a Court of Equity will in no case decree a specific performance where the plaintiff is in default, unless he comes into Court with clean hands, and makes a case fully excusing his negligence. See the case of *Drew v. Duncan*, 11 How. Pr. Rep. 279. In the case at bar the plaintiff admits his negligence, but endeavors to excuse it by setting up the peculiar circumstances inducing the delay. We shall therefore inquire *Second*, whether the matters set up are sufficient for that purpose?

The only reason alleged by the plaintiff is, "*because at the time the contract was made, and at the time the notes fell due, the defendant, Vaughn, was not the holder of the legal title of said premises.*" To render this excuse of any avail, two things were indispensable prerequisites.

1st. That by the agreement for the purchase and sale, it was stipulated that the title conveyed should be the legal title; and

2d. That the deed agreed to be given should be such as at law would convey "*the legal title.*"

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Now the complaint nowhere alleges that the defendant agreed to convey "the legal title" of the land to the plaintiff; no agreement to that effect is set out, and we may reasonably conclude, therefore, that none such was made.

With regard to the second prerequisite, we have written testimony to guide us; indeed, aside from the bond itself, the complaint contains an allegation that the defendant agreed to execute to the plaintiff, for the consideration set out, a *quitclaim deed to the premises*.

The inquiry then presents itself: What are the nature, requisites, and effect of a quitclaim deed?

The deed which seems to have been agreed on, or at least which is tendered by plaintiff to defendant to execute, and which has been fully set out in the complaint, contains only the following form of conveyance: "By these presents, I do hereby *remise, release, and quitclaim, etc.*, all my right, title, interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy," to which there is no *habendum and tenendum*, and no covenants of warranty attached. 2 Hill. on Real Prop. 318, and note (a); Doyle v. Knapp, 3 Scam. 338; 2 Hill. Real Prop. 318; Fray v. Pierce, 7 Mass. 381; Russell v. Coffin, 8 Pick. 143; 12 Iredell, 184; 12 New H. 291; 2 Hill. R. Prop. 399, and note (a); Allen v. Holden, 20 Pick. 458; Sweet v. Brown, 12 Met. 175; 2 Hill. R. Prop. 423; Gayley v. Price. 16 John. 269; 12 Ib. 442.

This general rule of law is not changed in any respect by our statute. The statute refers only to "conveyances purporting to convey the real estate in fee simple absolute," and prescribes that all subsequently acquired titles "shall immediately pass to the grantee." Wood's Dig., p. 103, art. 370.

The statutes of Missouri contain the same provision *verbatim*; Mo. Rev. Stat. 119; and yet it is held that the act does not apply to a *quitclaim deed*. Boge v. Shoab, 13 Mo. 365.

Hence the excuse set up for non-performance on the part of the plaintiff amounts to nothing, and should be entirely disregarded by the Court.

But the plaintiff had no right to postpone payment for any purpose, under the agreement as set out. He shows that possession was

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delivered to him, and that from a very small portion of the land sold he was deriving an income of fifty dollars per month.

Robinson & Beatty for Respondent.

From the first passage of the statute of frauds, in the reign of Charles the Second, down to this time, there has been one uniform current of decisions by all the Chancellors, without one dissenting voice, either in England or in America, so far as we are aware, declaring that they will enforce contracts by a decree for a specific performance, whenever there is an agreement in writing (whether expressed in one instrument or several referring to each other, and connecting themselves as part of one transaction) from which the Court can infer by proper rules of construction and interpretation, that there has been an agreement on one part to buy and on the other to sell. No set form of words is required to make a contract for the sale of land valid. 24th Wendell, p. 41; Story's Equity Jurisprudence, sec. 715.

A *consideration* expressed in a contract for the sale of land is, so far as that contract is concerned, *the consideration*. It is *the consideration* of that contract. Douglass v. Howland, 24th Wendell, p. 44.

In this case it is contended that the plaintiff has no equitable claim to relief, for two reasons. First, because he did not pay the amount of the purchase price the day it fell due; and second, (the appellant only slightly alludes to this objection) that the condition of the parties was altered before a compliance with the terms of the contract was demanded to be complied with.

With regard to the first point, there is no conflict of authorities; time is not of the essence of an ordinary contract for the sale and purchase of land. See Story's Equity Jurisprudence, secs. 775 and 776, and the notes and authorities there cited. There is no pretense in this case that there is anything in the form of the contract making time an essential part of the agreement. The only ground here relied on is the *great lapse of time* which transpired after the day the contract was to have been performed before a tender of the money and request for the deed was made by the plaintiff. The time within which the deed was to have been made, according to the original contract, expired on the thirteenth day of January. On the sixteenth

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day of February, just one month and three days after, the money was tendered for the notes and a deed demanded. Now, in all the cases which we have examined, where great lapse of time has been assigned for a refusal to enforce a contract in a Court of Equity, we remember none where the time was less than seven years, (*Brown v. Covillaud* excepted) and in most of the cases the time elapsed has been from ten to twenty years. In *Brown v. Covillaud* the time elapsed before demand was over four years from the making of the contract, and over three years after the last of the purchase money fell due. Yet the Court lays but little stress in its decision on the lapse of time. The main points in this case are, that the plaintiff took advantage of the unsettled state of the country to avail himself of the chances, either to hold under his purchase, or disclaim the title of the vendor and hold as a settler, as future events might show would be most profitable to him.

As for the change of the condition of the parties in relation to title, the facts of this case are a sufficient answer to any objection on that head. The bond is dated thirteenth of October, 1856. The deed is to be made within four months, at the request of plaintiff. If he did not ask it sooner, the deed should have been executed on the thirteenth of January, 1857. The sale of the defendant, Vaughn, by the administrator, was confirmed on the fifteenth of January, 1857, eight days before the time of executing the deed. Had Vaughn made his deed on that day, although he had no legal title, still he had a fixed and certain equity which would have passed to Farley, and entitle him to receive the deed from the administrator; or if the administrator still proceeded to make the deed to Vaughn it would have passed to plaintiff under the operation of our statute. See *Wood's Dig.*, p. 103, art. 370.

No principle is better settled than this: that Courts, in interpreting written contracts, will not only look to the language of the contract itself, but will look to all the surrounding circumstances connected with the parties of the contract, and the subject matter of the contract. The law on this subject is well collated in *Parsons on Contracts*, vol. 2d, from page 69 to 78, inclusive. Now, if the Court takes into consideration the fact that Vaughn had bought this land at

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administrator's sale; that this was the only claim or title which he set up to it; that the law requires that a certain time shall elapse after the administrator's sale before the same shall be confirmed; that the plaintiff was put in possession at the time of his purchase; that when he purchased and took possession he paid one hundred and fifty dollars to the administrator, who sold the land to Vaughn; there is no difficulty in understanding the contract.

In the case of *Calmes v. Birch*, 4th Bibb, 453, Ch. Justice Boyle (who stands pre-eminent among the Kentucky jurists) says: "As far as we are aware, there is no example of a Court of Equity refusing, on the ground of lapse of time, its aid to one who has been in continual possession."

In the case of *Kercheval v. Swope & Clift*, reported in the 6th vol. of *Monroe's Reports*, (Kentucky) page 362, we have a case almost exactly like this.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring — FIELD, J., having been consulted in the Court below, did not sit in the case.

This was a bill filed for a specific performance of a contract for the sale of certain real estate. A demurrer was interposed to the bill and overruled. The question here is as to the sufficiency of facts stated to sustain the judgment of the Court. The bill charges that about the thirteenth of September, 1856, the plaintiff entered into a contract with the defendant, Vaughn, for the purchase of the real estate in dispute; the purchase was in consideration of five hundred and thirty-three dollars, to be paid thereafter by the plaintiff to defendant, and the bill avers that, in consideration of this sum, the defendant sold the undivided half of the property; that in pursuance of this contract the plaintiff, on the thirteenth of September, 1856, paid to one Hobart one hundred and fifty dollars, for the use of the defendant, which was agreed to be paid and taken as a part of the purchase money; that the plaintiff also made, at the same time, his two promissory notes—one for one hundred and sixty-three dollars, payable thirty days from date, with interest at three per cent. per month; and the other for two hundred and eight dollars and seventy-five cents, at ninety days;

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that Vaughn thereupon executed his bond, the condition of which was that if, within four months from date, (September 13th) upon the request of plaintiff, and the payment of three hundred and eighty dollars, according to the tenor of the notes before recited, Vaughn should make, execute and deliver to him a good and valid deed (quit-claim) of the land, describing it, and should also acknowledge the same to be his free act and deed, the obligation to be void—else to remain in force; that on and after, and in pursuance of this agreement, plaintiff was let into possession, and that, with one Lyman Bristol, who had bought the remaining interest of the defendant, he made valuable and permanent improvements, and with the knowledge and consent of Vaughn, caused the land to be surveyed into streets, etc., in accordance with the plan of the town of Oroville, where the land is situated, and also sold portions of it to other persons, who have made improvements. The bill further avers that at the time of this contract, and of the maturity of the notes, Vaughn was not the holder of the legal title to the premises, but claimed as a purchaser under a sale made by one Hobart, who was administrator of the estate of one Carlton deceased; and that, at the maturity of the notes, the sale by Carlton's administrator to Vaughn had not been confirmed, and no deed had been made by the administrator to Vaughn; that the sale was not confirmed until the fifth of January, 1857, and the deed to Vaughn was made on the seventeenth of the same month; that about the time of the maturity of the promissory notes, they were in possession of Hobart, Carlton's administrator, and that at said time plaintiff had caused to be deposited in a banking house in Oroville three hundred and eighty dollars for the payment of the notes, and which sum was subject to the order of Hobart, in case the sale of the land to Vaughn should be confirmed; that said Hobart did not draw the money from the house and apply the same to the payment of the notes, for the reason that the sale had not been confirmed, and for the reason that proceedings had been instituted for setting aside the administrator's sale. Plaintiff further avers that the notes have been since delivered back by Hobart to Vaughn; that the title of Vaughn has been perfected by the execution of the administrator's deed; that Vaughn has not at any time tendered to the plaintiff a good and sufficient deed of

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quitclaim and demanded payment of said notes; that on the tenth of February, 1857, plaintiff did tender to Vaughn the full amount due upon said two several promissory notes, with interest, and further tendered to Vaughn a quitclaim deed to be by Vaughn executed and delivered to plaintiff, which money Vaughn refused to accept, and also refused to execute the deed; the bill then alleges that the defendant conveyed a portion of the premises to Mrs. Newell, the other defendant. The bill also avers a readiness to pay the principal and interest due, etc.

The defendant, Vaughn, demurred to the complaint. Several causes of demurrer were assigned. 1. That the complaint did not state facts sufficient to constitute a cause of action; and this, because the complaint is upon a contract of sale of land, and no allegation that the same or any part thereof is in writing; nor is any such contract set out in the bond, nor any such consideration therein mentioned. 2. That there is no allegation of tender of payment of the notes at maturity, nor of actual payment; but on the contrary, plaintiff states that at the maturity of the notes the plaintiff caused three hundred and eighty dollars to be deposited, and to be paid in case the Probate sale was confirmed; yet the deed to be given was a mere quitclaim. 3. That the complaint disclosed *laches*, and set up no sufficient ground for relief in equity.

Upon the case thus made we will proceed to state the principles of law applicable to it; and consider whether by force of these the judgment of the Court below can be maintained.

It is not necessary to consider whether a mere oral contract for land may be specifically enforced in equity; or whether the circumstances of this case, if the contract existed merely in parol, would entitle the plaintiff to specific execution of the agreement. For here, there was an agreement in writing, under seal, apparently upon sufficient consideration, for the land sued for in the action. There is nothing in the point that the contract must state the precise consideration of the agreement, especially if the contract be under seal. This has been decided so often, that it would be a waste of time to consider the point further.

The main and only point worth considering is, whether, under the

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facts stated in the bill, the lapse of time intervening between the period mentioned in the contract and the date of the tender of the purchase money is sufficient to defeat the claim of the plaintiff to a specific performance.

About two months elapsed after the maturity of the notes, and about a month from the expiration of the four months mentioned in the contract, before the tender; and no special circumstances are shown even conducing to prove that any material change had happened in the meantime in the relations of these parties, or in the value of the property. On the contrary, there appears upon the face of the contract a very plain intimation that this contract was made in direct reference to the state of the title, and that the making of the deed by Vaughn was deferred until he could get the deed from the administrator of Carlton; for it seems that the parties knew that the title — or the only pretense of it on the part of Vaughn — was to be got from that source. The plaintiff paid a portion of the purchase money to the administrator; went into possession; made valuable improvements with the knowledge and consent of Vaughn; and a period of time after the maturity of the notes given for the making of the deed — the deed to be made on the request of the plaintiff — and in the meantime proceedings were going on in the Probate Court, which it was necessary should be terminated in order that the plaintiff might get any title at all. It is true that the defendant contracted to give a quitclaim deed; but the whole statement shows that what was meant by this was not a quitclaim deed of the right held at the time of the contract, or even at the time of the maturity of the notes, but of the interest to be obtained by the defendant at the time of request, after the expiration of the four months mentioned in the agreement.

This application is addressed to the discretion of the Court of Equity; and we think the facts stated in the bill are sufficient to account for the short delay occurring after the expiration of the time expressed in the contract. That period was not limited to four months, much less to the maturity of the notes. The phraseology adopted by the parties evidently contemplated that the time of demand or request by plaintiff for the deed might be extended beyond this period; and it is only fair to infer from the whole facts stated, that it was the

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understanding of the parties that if a demand was made within a reasonable time after the expiration of the four months this would be sufficient, and that this provision as to time was inserted in the paper in order that the title might be perfected under the Probate sale.

It seems to us that it would be a fraud which no Court of Equity could tolerate, to hold that the defendant, receiving a portion of the purchase money, and seeing the plaintiff expend large sums of money, improving the property without objection, and not making any demand of the purchase money, should insist, because the plaintiff had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid, and all the improvements, and deny all obligation on his part to comply with his engagements.

This case is widely different from the cases of *Brown v. Covillaud* and *Green v. Covillaud*. In those cases there had been long delay, to the injury of defendants, and no explanation of the delay, and there were suspicious circumstances.

This case in some of its features is not unlike the case of *Beck v. Simmons* (7 Ala. 76). That, it is true, was a case of attempted rescission of a contract for failure of compliance with the terms of agreement. The Court in that case says:

"It appears from the proof that it was well known at the time of the exchange that the title to the Kirkland tract was not in the plaintiff in error, but that the land belonged to certain minors, of whom the plaintiff was the guardian, and that it was expected and understood that he was to cause the land to be sold and procure the title. It would be contrary to equity and good conscience to permit one who proceeds so far in a purchase as to obtain possession, with knowledge of a defect in the title, to object afterwards the want of title as a reason for not complying with his contract.

"If he knows that the defect can only be obviated by a judicial proceeding, it is impossible to suppose that the time stipulated for the completion of the contract was considered by him an essential ingredient of the contract, as it could not be known what length of time it might take to obtain the title. The question, therefore, in such cases, is not whether the party was able to make the title on the day stipu-

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lated, but whether there was unreasonable delay in obtaining it." (Selton v. Slade, 7 Vesey, 265; Colton v. Wilson, 3 P. Wms. 190.)

It would seem that this reasoning is as applicable to show that it would be as inequitable to hold the delay in applying for the title under the circumstances set forth here, as a ground to defeat the plaintiff's right to a title. No material injury is shown to have been done the defendant by this delay. From the terms of the contract, taken in connection with the payment of a portion of the purchase money to Hobart, Carlton's administrator, and the handing of the notes to him by the parties, and the want of any title in Vaughn except what he got, or was to get, from the administrator of the estate, it is fairly inferable that it was the understanding of these parties that the title was to be procured by Vaughn from the administrator before he made his deed to the plaintiff; and but a short period elapsed after it was so procured before it was demanded by the plaintiff. We see nothing in the recent case of Green v. Covillaud, 10 Cal. 317, which militates with this view. Indeed, in that case we studiously sought to exclude the presumption that the decision embraced cases of this sort.

The decree of the Court below is affirmed.

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The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the County Recorder.

Such lien cannot be divested by the failure of the Sheriff to make a proper return of the writ.

Nor is it necessary, where the levy is made by posting a copy of the writ on the premises, that the return of the Sheriff should show that the premises were at the time unoccupied.

Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained.

The deposit in the Recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. A mistake in the date of the Sheriff's return may be corrected at any time.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

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This was a proceeding to enjoin the sale of certain real property under execution.

It appears that an attachment was levied on the premises on the thirteenth day of November, 1854, and a copy of the writ deposited in the Recorder's office on the same day, with the following return endorsed upon it:

"By virtue of the within writ I have, this thirteenth day of November, 1854, attached all the right, title and interest of the within named defendants, Isaac M. Merrill and Russel Warren, in and to all that piece or parcel of land, situated in the city and county of San Francisco, and marked and numbered on the official map of said city and county as one hundred vara lot No. 195; also, water lots 514 and 515, together with all improvements thereon."

The return to the attachment, which was filed in the Clerk's office on the eighteenth of December, 1854, is the same as the above, (except the date) with the addition of the words: "and being on the corner of Washington and Drumm streets, by posting a copy of the within writ on the above described land, and registered the same in the office of the County Recorder." This return is dated October 30th, 1854.

Plaintiff claims title under a mortgage executed and recorded December 9, 1854, and the question presented is whether the proceedings under the attachment constituted a valid levy, and created a lien on the premises prior to the plaintiff's mortgage.

The objections to the validity of the attachment are:

1st. That the return does not state with sufficient particularity the acts which constituted the levy.

2d. That the return is contradicted, in an important respect, by the copy filed in the Recorder's office.

Plaintiff had judgment, and the defendants appealed to this Court.

Nathaniel Bennett for Appellants.

Did the acts of the Sheriff before the ninth day of December create a lien in favor of the attaching creditor? The answer to this must depend entirely on the statute. The first subdivision of sec. 125 of the Practice Act is as follows:

"Real property shall be attached by leaving a copy of the writ with

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the occupant thereof; or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the Recorder of the County."

There is nothing here about the return of the Sheriff being necessary to create the lien. The lien exists as soon as these several acts are performed, and the plaintiff is driven to maintain the position that the failure of the Sheriff to make sufficient return destroys a lien already acquired under the attachment. The statute does not specify what evidence shall be required to prove the several acts necessary to be performed by the subdivision above quoted; and in the absence of any particular species of proof being required by statute, these acts may be proved the same as any other acts in *pais*.

The return of the Sheriff is nowhere made evidence, much less the sole evidence, of the performance of the acts mentioned in the first subdivision of sec. 125. It is doubtful whether it is even admissible as evidence; for this section does not mention the return as being any part of the execution of the writ of attachment. Posting a copy in case there be no occupant, and filing a copy with a description of the property attached with the Recorder, are the acts, and the only acts, necessary to create the lien. If these are performed, the lien becomes perfect, irrespective of a return, and may be proved like other facts, whether a return has been made or not.

We offered evidence to prove that all the acts specified in sub. 1 of sec. 125 had been strictly performed by the Sheriff. The Court rejected such evidence, on the ground that the Sheriff's return was the only admissible proof; whereas the Court ought to have permitted such evidence to be given.

As a preliminary observation before entering on the somewhat desultory argument which follows, we remark that a distinction is necessary to be made between the various decisions which have been made touching the point in dispute. These decisions are divided into six different classes: 1st. Where the return of the officer is offered in evidence against *strangers* to the suit; 2d. Where it comes up as between the parties to the proceeding in which the return is made, or their privies; 3d. Where the question arises in a suit or proceeding against the *officer himself*; 4th. Suits in which the rights of *purchasers, under the*

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process are involved; 5th. Where the question as to the right of the officer to *amend* his return arises; and 6th. What kind of evidence is admissible to *prove the return* of the officer.

Now, the decision in one of these classes cannot be taken or considered as decisive of any question arising in either of the other classes; and it will be found that the apparent contradiction and diversity between the various decisions have arisen from the neglect to make the proper distinction between the different classes of cases.

It requires but a little explanation to show that this case belongs to the fourth class above enumerated. The return is not offered in evidence *against strangers* to the suit, but is claimed to be the only evidence as against a party to the suit. This case does not then belong to the *first class*. The return does not come up *between parties* to the suit in which the return was made, nor *their privies*; for the plaintiffs were not parties nor privies to the *attachment* suit. The case, then, does not belong to the *second class*. Again: this suit is not against the officer who executed the writ of attachment, and therefore cannot come under the *third class*. It must consequently belong to the *fourth class*; for it is palpable that it cannot be brought under either the *fifth* or *sixth class*.

The defendants in this suit, then, are to be regarded in the light of *purchasers*. This action having been instituted to *prevent them from becoming purchasers*, they in fact, stand in a more favorable position than if the sale had been permitted to take place, and they had in fact become purchasers, and their title had then been questioned. For the plaintiff is obliged not only to make out the strict rule of law in his favor, but he must in addition to this show that he has some positive ground of equity upon which he may interfere in advance and prevent the sale. So that we may at least assume that the defendants stand in as favorable a position as purchasers: that is, as those who belong to the fourth class above mentioned.

The case of *Wheaton v. Sutton*, (4 Wheat. Rep. 503) is decisive of the point.

In Tennessee, also, it has been decided that the purchaser's title cannot be made to depend on the return (*Mitchell v. Lipe*, 8 Yerg. 179.) The same in New York, in which State the settled doctrine is,

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that it is enough for the purchaser that the officer had authority to sell, and did sell; (Jackson, *ex dem.* Kane v. Sternberg, 1 Johns. Cases, 153; and see Ingersoll v. Sawyer, 2 Pick. 279, 280) see also to same effect, Allen on Sheriffs, page 58, edition 1845.

Again, the case of Jackson v. Walker (4 Wend. 463) is, in principle, decisive of the case at bar. There it was held that the identity of property sold under execution might be shown by parol.

The whole doctrine is stated in Jackson v. Sternberg (1 Johns. Cas. 153, 155).

We offered to show that the Sheriff had authority to sell; that he had performed every act necessary to such authority; and consequently, under the above authorities, he should have been permitted to go on and sell and give a deed to the purchaser, irrespective of any return made or to be made. For his right to sell depends, not on his *return*, but on his *acts* which he has, in fact, performed.

It will be necessary to notice two cases decided in this Court. The one is Egerly & Hinckley v. Buchanan *et al.* (5 Cal. Rep. 53). That case does not control ours, for it belongs to the third class of cases above enumerated, it being a proceeding against the Sheriff himself, and his sureties; and as above stated, the rules applicable to these different classes are widely different.

The other case is Newhall v. Provost, (6 Cal. R. 85) the *principle of which*, when closely examined, will be found to be decisive of the present case, *in our favor*. It was there held that the Sheriff, after having made his return, could not amend it so as to affect the rights of parties which had been acquired before such amendment. It follows as a corollary from that decision that, if the Sheriff could not, by an amendment made under the direction of the Court, affect rights acquired before such amendment, he cannot by an original return affect rights which have been acquired before such return is made.

According to the principle of this decision, the rights of both parties to this suit must be ascertained by the state of facts existing before the return was made.

In that case the referee excluded the affidavits and evidence offered on behalf of the plaintiff, on the ground that such evidence tended to impeach the return of the Sheriff: just as in our case the Court over-

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ruled the evidence which we offered, on the ground that it tended, if not to impeach, yet to supply defects in the return of the Sheriff. This Court decided in *Newhall v. Provost*, that the evidence rejected was admissible; and it follows therefrom that the evidence offered in our case and rejected, ought to have been received. See *Watson Treatise on Sheriffs* (pp. 72-7, Law Library, 52, 53, 72 and 73.)

John Satterlee for Appellants.

It is the *service* and *execution* of an attachment which gives the attaching creditor his lien or *security*, and not the *return* of the Sheriff.

The proper *service* of an attachment gives the attaching creditor a security which the Sheriff has not the power to divest him of, by a defective or false return.

The plaintiff's lien or security depends upon the *service* of the writ and not on the Sheriff's *return*. Prac. Act, sec. 125.

The Sheriff may *release* property attached after receiving from defendant an undertaking. Prac. Act, sec. 123.

But the statute does not say or imply, that he may or can release or discharge property by a defective or false return. All property "seized and held under attachment in the action, shall be liable to execution." Cal. Statutes of 1854, p. 62, sec. 24.

The attachment in this case was in fact perfectly executed, as to every body, on the thirteenth of November, 1854. There was no occupant of the lot.

A copy of the writ was posted in a conspicuous place on the lot.

A copy of the writ, with a description of the property attached, was filed with the Recorder of the county.

The mortgage under which the plaintiff claims, was executed and recorded, and the consideration therefore loaned, December 9th, 1854. At that time the Sheriff had made no return. The mortgagee had notice of the attachment. A copy of the writ, with a description of the lot attached, was on file with the County Recorder.

The Sheriff's return did not mislead the mortgagee. It (the return) was not made or filed until December 18th, 1854.

The filing of the copy of the writ, with a description of the property, with the County Recorder, as to subsequent purchasers or mortgagees, is a sufficient service of the attachment.

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The service of a copy of the writ on an occupant, or posting a copy of the writ on the lot, is to give the occupant or owner notice. They are the only persons who can complain of the Sheriff's neglect to do this.

The Sheriff's return is not the only evidence of the service of the attachment. If the return be defective, the attaching creditor or the purchaser are the only persons who suffer inconvenience therefrom. They may be subjected to the trouble and expense of proving service by other evidence. A subsequent purchaser or incumbrancer is not wronged. His information is obtained at the County Recorder's office.

The return is not the only evidence, nor is it the highest evidence, unless the statute of California makes it so.

Nowhere by our statute is the *return* to any process made *evidence*, and least of all the *only evidence*.

The only provision of the statute as to Sheriff's return to an attachment, is to be found in the Prac. Act, sec. 141. "The Sheriff shall return the writ of attachment, &c., with a certificate of his proceedings endorsed thereon or attached thereto."

Under this section, we contend that the return of the Sheriff was sufficient of itself; that he returned all that he was required to return, and that whatever he returned beyond this was mere surplusage.

He is not required to state all the *steps of his proceedings*, nor the manner, nor *course of his proceeding or proceedings*.

Under the old system, the Sheriff was also required to return his proceeding on a *fi. fa.* He did this simply by the words "*nulla bona*" or "*satisfied*" or "*satisfied in part*," and "*nulla bona as to the residue*."

Here the Sheriff returns that he had "*attached*" the property. This is a certificate of his "*proceedings*," and all that was necessary.

If the statute had intended to require the Sheriff to certify fully the *manner* of his executing an attachment, it would have used the language of the statute of 1851, p. 191, sec. 6, with reference to returns to process generally, to wit: "A Sheriff to whom any process, writ, order or paper shall be delivered, shall execute it, &c., &c., and return it without delay to the proper court or officer, with his certificate endorsed thereon, of the manner of its service, &c."

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The difference between the phraseology of these two statutes should be noticed; the one requiring a "certificate of the *proceeding*," and the other "a certificate of the *manner of the service*, &c."

If we are right in this construction, then the return itself of the Sheriff was sufficient proof, and the Court ought to have found in favor of the defendants upon the evidence actually admitted.

The cases decided in Massachusetts, cited by plaintiff's counsel, are cases in which the Courts there decided that purchasers at Sheriff's sales, under a *fi. fa.*, in a peculiar kind of proceeding unknown in California, derived title from the Sheriff's return to the execution, and that certain defects in the return were fatal to purchaser's title.

Judge Satterlee discussed the points raised in the record, at great length, and referred to the following authorities. *Ingersoll v. Sawyer*, 2 Pick. 279; Cowen & Hill's N. Phil. ed., 3 vol., 2 part, N. 741, pp. 1092 and 1093; 6 Comyn's Dig. 233; 5 Coke, 90; Cro. Eliz. 209, 238; 1 Salk. 318; 2 N. Y. Stat. revised ed. 1836, pp. 288, 358; Stat. of Cal. p. 191, sec. 6; Prac. Act, sec. 141; 2 Caine's Cases, p. 63; 1 Burrill's Prac., ed. 1846, p. 304.

J. B. Hart for Respondent.

The acts necessary to make the attachment are, by leaving a copy of the writ with the occupant of the real estate, if there be one; if not, then by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the Recorder of the county.

The return is simply, that he had attached the property, not stating how: this I think is bad. It is well settled that the truth of the return of a Sheriff cannot be questioned by parol, and is conclusive against him. (*Paxton v. Steckel*, 2 Penn. State, 93; *French v. Stanley*, 21 Maine, 512; *Haynes v. Small*, 22 Maine, 14; *Denny v. Willard*, 11 Peck, 519.)

To permit a Sheriff to make his return to an attachment in a careless and reckless manner, and then after rights of third innocent parties have intervened, to prove by parol the act necessary to make the attachment good, "would be opening the door to infinite laxity and fraud, and mischiefs incalculable." The fact of leaving a copy of the

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writ with the occupant of the property, or posting a copy in a conspicuous place, if no occupants, is an act that renders the attachment good by being public, and calculated to give notice to the world of it, and enable parties to be on their guard in dealing for the property attached; and to omit it, renders it void as to third innocent parties. Now doing the thing the law requires, would give to third parties notice of the lien, and prevent them from dealing in regard to it. The return on the attachment is the record evidence of the fact, if it had been done; and its not having been so recorded in the return, the return itself is bad, and the attachment void for want of a proper record of the facts or acts that render the attachment perfect. If the truth of these important acts may depend upon the recollection of deputies, the acts of a Sheriff will always be made good, and frauds easily perpetrated in that way.

The rights acquired under the law of attachments are the creations of statute. The law should be strictly performed; and the return of the officer should show it.

The attachment confers rights upon the creditor so soon as executed and the return of it made; the property attached is held to pay the debt that may be recovered; it is like the equitable writ of sequestration; in that proceeding the property is taken possession of by the Court, through its officer, the change of possession is notorious; in that way the public are put upon their guard. Upon the vendi the property is ordered to be sold, and the acts of an officer on a vendi are like the proceeding on sequestration, public. The law of the English writ of *elegit* requires that the Sheriff should set out in his return every act necessary to show affirmatively that all the personal property (except the beasts of the plough) of the debtor was taken; a jury empaneled, who made inquiry of the goods and chattels of the debtor and appraised the same, and if not enough to pay the debt at the appraisement, then to inquire as to the land; and upon such inquisition that he delivered all the goods and chattels, (except the beasts of the plough) and a moiety of the lands to the plaintiff. The reason given why such particularity is required in the return is, that the inquisition and return constitute the title of the plaintiff to the

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property given him by the Sheriff. 3 Bacon, title Execution, article C., sec. 2, p. 688; 2 vol. Jacob. Dec. 371. The rule in regard to this writ is different from that applicable to the writ of *fi. facias*, because the return is not evidence of title to the purchaser, the sale and Sheriff's deed are sufficient evidence of title. If the purchaser can show that the Sheriff had authority to sell, it is enough; he need not look further. 5 Cow. Rep. 529. The proceedings on the writ of *elegit* operates a transfer of title by appraisement, from debtor to creditor of personal property, and transfers to creditor possession of moiety of real estate as tenant.

The *fi. fa.* takes from the debtor his personal property, and by the Sheriff it is sold to any one who may choose to become purchaser; this is a transaction between Sheriff and stranger; the other is between creditor and debtor. Through the agency of the Sheriff the lien of the attachment is intended to be given by acts that are public and notorious, and evidenced by the return; and without those acts appear affirmatively to have been done, there is no lien created.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — BALDWIN, J., concurring.

The objections to the validity of the attachment are:

1st. That the return does not state with sufficient particularity the acts which constituted the levy.

2d. That the return is contradicted in an important respect by the copy filed in the Recorder's office.

Upon the first point it is contended that every act which is, under the statute, requisite to the validity of an attachment of real estate, should be affirmatively shown by the return; and that inasmuch as it is shown in this case that the levy was made by posting a copy of the writ on the premises, the return should show that the premises were at the time unoccupied, in which case only could a valid levy be made in the manner stated.

Our statute prescribes the manner in which real estate may be attached; but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return, and we think the rule contended for was not contemplated by the Legislature.

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lated, but whether there was unreasonable delay in obtaining it." (Selton v. Slade, 7 Vesey, 265; Colton v. Wilson, 3 P. Wms. 190.)

It would seem that this reasoning is as applicable to show that it would be as inequitable to hold the delay in applying for the title under the circumstances set forth here, as a ground to defeat the plaintiff's right to a title. No material injury is shown to have been done the defendant by this delay. From the terms of the contract, taken in connection with the payment of a portion of the purchase money to Hobart, Carlton's administrator, and the handing of the notes to him by the parties, and the want of any title in Vaughn except what he got, or was to get, from the administrator of the estate, it is fairly inferable that it was the understanding of these parties that the title was to be procured by Vaughn from the administrator before he made his deed to the plaintiff; and but a short period elapsed after it was so procured before it was demanded by the plaintiff. We see nothing in the recent case of Green v. Covillaud, 10 Cal. 317, which militates with this view. Indeed, in that case we studiously sought to exclude the presumption that the decision embraced cases of this sort.

The decree of the Court below is affirmed.

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The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the County Recorder.

Such lien cannot be divested by the failure of the Sheriff to make a proper return of the writ.

Nor is it necessary, where the levy is made by posting a copy of the writ on the premises, that the return of the Sheriff should show that the premises were at the time unoccupied.

Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained.

The deposit in the Recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. A mistake in the date of the Sheriff's return may be corrected at any time.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

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This was a proceeding to enjoin the sale of certain real property under execution.

It appears that an attachment was levied on the premises on the thirteenth day of November, 1854, and a copy of the writ deposited in the Recorder's office on the same day, with the following return endorsed upon it:

"By virtue of the within writ I have, this thirteenth day of November, 1854, attached all the right, title and interest of the within named defendants, Isaac M. Merrill and Russel Warren, in and to all that piece or parcel of land, situated in the city and county of San Francisco, and marked and numbered on the official map of said city and county as one hundred vara lot No. 195; also, water lots 514 and 515, together with all improvements thereon."

The return to the attachment, which was filed in the Clerk's office on the eighteenth of December, 1854, is the same as the above, (except the date) with the addition of the words: "and being on the corner of Washington and Drumm streets, by posting a copy of the within writ on the above described land, and registered the same in the office of the County Recorder." This return is dated October 30th, 1854.

Plaintiff claims title under a mortgage executed and recorded December 9, 1854, and the question presented is whether the proceedings under the attachment constituted a valid levy, and created a lien on the premises prior to the plaintiff's mortgage.

The objections to the validity of the attachment are:

1st. That the return does not state with sufficient particularity the acts which constituted the levy.

2d. That the return is contradicted, in an important respect, by the copy filed in the Recorder's office.

Plaintiff had judgment, and the defendants appealed to this Court.

Nathaniel Bennett for Appellants.

Did the acts of the Sheriff before the ninth day of December create a lien in favor of the attaching creditor? The answer to this must depend entirely on the statute. The first subdivision of sec. 125 of the Practice Act is as follows:

"Real property shall be attached by leaving a copy of the writ with

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the occupant thereof; or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the Recorder of the County."

There is nothing here about the return of the Sheriff being necessary to create the lien. The lien exists as soon as these several acts are performed, and the plaintiff is driven to maintain the position that the failure of the Sheriff to make sufficient return destroys a lien already acquired under the attachment. The statute does not specify what evidence shall be required to prove the several acts necessary to be performed by the subdivision above quoted; and in the absence of any particular species of proof being required by statute, these acts may be proved the same as any other acts in *pais*.

The return of the Sheriff is nowhere made evidence, much less the sole evidence, of the performance of the acts mentioned in the first subdivision of sec. 125. It is doubtful whether it is even admissible as evidence; for this section does not mention the return as being any part of the execution of the writ of attachment. Posting a copy in case there be no occupant, and filing a copy with a description of the property attached with the Recorder, are the acts, and the only acts, necessary to create the lien. If these are performed, the lien becomes perfect, irrespective of a return, and may be proved like other facts, whether a return has been made or not.

We offered evidence to prove that all the acts specified in sub. 1 of sec. 125 had been strictly performed by the Sheriff. The Court rejected such evidence, on the ground that the Sheriff's return was the only admissible proof; whereas the Court ought to have permitted such evidence to be given.

As a preliminary observation before entering on the somewhat desultory argument which follows, we remark that a distinction is necessary to be made between the various decisions which have been made touching the point in dispute. These decisions are divided into six different classes: 1st. Where the return of the officer is offered in evidence against *strangers* to the suit; 2d. Where it comes up as between the parties to the proceeding in which the return is made, or their privies; 3d. Where the question arises in a suit or proceeding against the *officer himself*; 4th. Suits in which the rights of *purchasers, under the*

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process are involved; 5th. Where the question as to the right of the officer to *amend* his return arises; and 6th. What kind of evidence is admissible to *prove the return* of the officer.

Now, the decision in one of these classes cannot be taken or considered as decisive of any question arising in either of the other classes; and it will be found that the apparent contradiction and diversity between the various decisions have arisen from the neglect to make the proper distinction between the different classes of cases.

It requires but a little explanation to show that this case belongs to the fourth class above enumerated. The return is not offered in evidence *against strangers* to the suit, but is claimed to be the only evidence as against a party to the suit. This case does not then belong to the *first class*. The return does not come up *between parties* to the suit in which the return was made, nor *their privies*; for the plaintiffs were not parties nor privies to the *attachment* suit. The case, then, does not belong to the *second class*. Again: this suit is not against the officer who executed the writ of attachment, and therefore cannot come under the *third class*. It must consequently belong to the *fourth class*; for it is palpable that it cannot be brought under either the *fifth* or *sixth class*.

The defendants in this suit, then, are to be regarded in the light of *purchasers*. This action having been instituted to *prevent them from becoming purchasers*, they in fact, stand in a more favorable position than if the sale had been permitted to take place, and they had in fact become purchasers, and their title had then been questioned. For the plaintiff is obliged not only to make out the strict rule of law in his favor, but he must in addition to this show that he has some positive ground of equity upon which he may interfere in advance and prevent the sale. So that we may at least assume that the defendants stand in as favorable a position as purchasers: that is, as those who belong to the fourth class above mentioned.

The case of *Wheaton v. Sutton*, (4 Wheat. Rep. 503) is decisive of the point.

In Tennessee, also, it has been decided that the purchaser's title cannot be made to depend on the return (*Mitchell v. Lipe*, 8 Yerg. 179.) The same in New York, in which State the settled doctrine is,

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that it is enough for the purchaser that the officer had authority to sell, and did sell; (Jackson, *ex dem.* Kane v. Sternberg, 1 Johns. Cases, 153; and see Ingersoll v. Sawyer, 2 Pick. 279, 280) see also to same effect, Allen on Sheriffs, page 58, edition 1845.

Again, the case of Jackson v. Walker (4 Wend. 463) is, in principle, decisive of the case at bar. There it was held that the identity of property sold under execution might be shown by parol.

The whole doctrine is stated in Jackson v. Sternberg (1 Johns. Cas. 153, 155).

We offered to show that the Sheriff had authority to sell; that he had performed every act necessary to such authority; and consequently, under the above authorities, he should have been permitted to go on and sell and give a deed to the purchaser, irrespective of any return made or to be made. For his right to sell depends, not on his *return*, but on his *acts* which he has, in fact, performed.

It will be necessary to notice two cases decided in this Court. The one is Egerly & Hinckley v. Buchanan *et al.* (5 Cal. Rep. 53). That case does not control ours, for it belongs to the third class of cases above enumerated, it being a proceeding against the Sheriff himself, and his sureties; and as above stated, the rules applicable to these different classes are widely different.

The other case is Newhall v. Provost, (6 Cal. R. 85) the *principle of which*, when closely examined, will be found to be decisive of the present case, *in our favor*. It was there held that the Sheriff, after having made his return, could not amend it so as to affect the rights of parties which had been acquired before such amendment. It follows as a corollary from that decision that, if the Sheriff could not, by an amendment made under the direction of the Court, affect rights acquired before such amendment, he cannot by an original return affect rights which have been acquired before such return is made.

According to the principle of this decision, the rights of both parties to this suit must be ascertained by the state of facts existing before the return was made.

In that case the referee excluded the affidavits and evidence offered on behalf of the plaintiff, on the ground that such evidence tended to impeach the return of the Sheriff: just as in our case the Court over-

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ruled the evidence which we offered, on the ground that it tended, if not to impeach, yet to supply defects in the return of the Sheriff. This Court decided in *Newhall v. Provost*, that the evidence rejected was admissible; and it follows therefrom that the evidence offered in our case and rejected, ought to have been received. See *Watson Treatise on Sheriffs* (pp. 72-7, Law Library, 52, 53, 72 and 73.)

John Satterlee for Appellants.

It is the *service* and *execution* of an attachment which gives the attaching creditor his lien or *security*, and not the *return* of the Sheriff.

The proper *service* of an attachment gives the attaching creditor a security which the Sheriff has not the power to divest him of, by a defective or false return.

The plaintiff's lien or security depends upon the *service* of the writ and not on the Sheriff's *return*. Prac. Act, sec. 125.

The Sheriff may *release* property attached after receiving from defendant an undertaking. Prac. Act, sec. 123.

But the statute does not say or imply, that he may or can release or discharge property by a defective or false return. All property "seized and held under attachment in the action, shall be liable to execution." Cal. Statutes of 1854, p. 62, sec. 24.

The attachment in this case was in fact perfectly executed, as to every body, on the thirteenth of November, 1854. There was no occupant of the lot.

A copy of the writ was posted in a conspicuous place on the lot.

A copy of the writ, with a description of the property attached, was filed with the Recorder of the county.

The mortgage under which the plaintiff claims, was executed and recorded, and the consideration therefore loaned, December 9th, 1854. At that time the Sheriff had made no return. The mortgagee had notice of the attachment. A copy of the writ, with a description of the lot attached, was on file with the County Recorder.

The Sheriff's return did not mislead the mortgagee. It (the return) was not made or filed until December 18th, 1854.

The filing of the copy of the writ, with a description of the property, with the County Recorder, as to subsequent purchasers or mortgagees, is a sufficient service of the attachment.

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suing the corporation, as we are entitled to against any other private individual.

Treasury warrants, from their nature, must be considered as negotiable instruments. They are always drawn in payment of an outstanding debt or demand, and they are taken as payment. They have all the incidents of a bill of exchange.

The power to draw the warrants is expressly conferred by the Charter of 1851.

In every case in which this question has arisen, these securities have been governed by the same rule as bills of exchange, and no case can be found to the contrary.

The following cases are directly in point: *Crawford v. Wilson*, 2 English's (Arkansas) R. 219; *Kelly v. Mayor of Brooklyn*, 4 Hill, 265; *Steel v. Davis Co.*, 2 Green (Iowa) R. 469.

The authorities cited by appellant to show that if one count is bad it vitiates the judgment, are inapplicable to this case. That doctrine is only applied where there is a verdict, either upon an issue, or upon a writ of inquiry after default. The reason of it is because it cannot be ascertained if the finding is upon the good or bad count.

But in cases where there is only a simple default, it is a confession by defendant of all the counts; and if there is one good count, it must be held sufficient to support the judgment.

Shafters, Park & Heydenfeldt on reargument.

The Court, in its opinion delivered in the above cause, says:

1. That it is doubtful whether the general counts in *assumpsit* will lie against a defendant in any case.

That point was made in *Ruiz v. Norton*, 4 Cal. 355, and it was decided that the common counts would lie, and the published reports show how largely that decision has been acted on.

This has never been a contested point since the organization of this Court, and hundreds of recoveries in this State rest upon similar pleadings.

In *Jourdan v. Reynolds* (6 Cal. 108) this Court said: "Where the entire performance of a special contract has been prevented by one

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of the parties, or where its terms have been afterwards waived by agreement of both parties, the action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract."

In *Reina v. Cross*, (6 Cal. 29) opinion by Terry, C. J., there was a count for money had and received; no objection was taken to it as a common count *per se*, but it was held bad because it did not aver a demand.

In *Lorraine v. Long* (6 Cal. 452) this Court said: "Our practice, while it enlarges the field of remedy, does not take any pre-existing remedies by implication."

Under the New York Code, from which ours was mostly derived, the same construction has been given as here contended for. In the case of *Allen v. Patterson*, (3 Selden, 476) the Court of Appeals commences its opinion by referring to the requisition of the Code, that the complaint shall contain a plain and concise statement of facts, and it decides the common count in *assumpsit* in that case to be good.

If now, this declaration or complaint be tested by any rule, either of the statute or common law, as to the sufficiency of its averments, we apprehend that it will stand the test. It avers, first: That the defendant was indebted; second, the consideration for so much money paid, laid out and expended for said defendants at their request, for work and labor done and performed for defendants and at their request, for goods, wares and merchandise sold and delivered to defendants and at their request. It avers the amount of indebtedness, the promise to pay, the demand of payment, and the neglect and refusal to pay. If any statement of facts could by possibility be plainer and more concise, your petitioners lack the education and ability to detect it.

In the opinion of the Court, while it is admitted that *indebitatus assumpsit* lies against corporations generally, it is denied that it lies against a municipal.

We humbly suggest that the Court has fallen into an error in failing to recognize the two-fold character of a municipal corporation. It is evident, at a glance at the construction and purpose of these artificial creations, that they have two capacities: one that of a government, and the other that of a person; and this distinction has been twice

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specifically recognized in the decisions of this Court, and as a primary proposition it would seem not to be a subject of dispute.

In the case of *Holland v. The City of San Francisco* (7 Cal. 361) this Court held: "A municipal corporation, from the nature of the ends intended to be accomplished by its creation, is a compound being, acting in different capacities.

"In addition to this government power, it also possesses the capacity to own and dispose of property like an individual.

"So also it follows that the city, in the proper form, could make the same binding admission not prejudicial to the rights of others that individuals could make."

The same doctrine is maintained by elementary writers: Angell on Corporations, p. 31.

And so it was said by Nelson, C. J., in *Moodalay v. E. India Co.*, Brown Ch. R. 469.

In *Poultney v. Wells*, 1 Aikin, (Vt. R. 180) and in *North Whitehall v. South Whitehall*, (3 Serg. & Rawle, 116) the liability proceeded upon certain conditions fixed by statute. *Indebitatus assumpsit* was brought and the remedy held appropriate.

The citations from Kent in the opinion of the Court in this case, go to the question of the powers of a corporation, and not the question presented here, which is purely a question of pleading. We do not pretend that the city can enter into a contract without an ordinance, but having made the ordinance to borrow my money, or to obtain my labor, and having thus become indebted to me, I must of course bring *assumpsit*, for I have no other remedy; and this must be *indebitatus assumpsit*, unless there was a special contract, or in case of a special contract after its performance. The whole dispute resolves itself into a question of evidence, and cannot be tortured into a question of remedy; so when I bring my action of *indebitatus assumpsit*, the corporation may deny the authority for creating the liability — but that is matter of proof — and it is upon the proof I must fail or succeed, and not upon the pleadings. Surely, it will not be contended that I must set out the authority of an ordinance in the complaint.

The issue is simply one of indebtedness, and I must prove every thing which is necessary to sustain the affirmative of that issue; and we

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know of no case and of no class of cases in which one is required to set out all the proof in the pleadings.

Having, as we think, established the validity of the remedy as far as the first count is concerned, we think it entirely unnecessary to enter into the consideration of the soundness of the second count. It may be, as has been held by the Court, defective for want of particularity in description of the warrants; but if we have one good count, that is all sufficient upon a judgment by default to support the judgment.

The authorities cited by the other side, to the effect that after verdict the judgment will be arrested if there is a bad count, has no application to a case of default. The reason for the doctrine alluded to, as given by the author cited, is because the Court cannot know whether the jury found on the good or the bad count. But in case of judgment by default, no such difficulty occurs, because by the default the defendant confesses to all the counts, and if there is a good one, it is well confessed to, and will support the judgment.

This case was originally argued and decided at the January Term, 1858: Chief Justice TERRY delivered the opinion of the Court, and BURNETT, J., concurred. The opinion of the Court as then delivered was to the effect, that the allegations in the complaint were not sufficient to sustain the judgment. At the October Term following, a reargument was had, and the following opinion rendered:

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Judgment was taken by default in this case upon several of the common counts, and also a count in these words: "And the plaintiff further shows that said warrants came to and vested in said plaintiff by assignment, and that he became and is the legal owner and holder thereof, and that he has demanded payment of the City Treasurer of the same, who has neglected and refused to pay the same; of all of which said defendants had due notice."

It is assigned for error, on appeal from this judgment by the appellant, that this last count is fatally defective, as showing no cause of action; and therefore, the judgment by default is erroneous. It is

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also assigned that the judgment is erroneous, because default cannot be taken against a municipal corporation on the common counts.

We think there is nothing in this last objection. We have held that the common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons. (See cases cited on respondent's brief.) And we cannot see either the necessity or propriety of holding a different rule in respect to corporations of whatever kind. The rules of pleading are general. They were designed to embrace all persons, natural or artificial, capable of suing or of being sued. No exception is made of corporations by the statute, and we have no authority to interpolate any upon our system. If we were to make exceptions in their favor in the rules of pleading, we do not see why we might not, with the same propriety, make similar exceptions in the rules of evidence. This would be to break the harmony of the system, and to exercise legislative functions. This question was, in effect, decided in the case of the Gas Company v. The City of San Francisco. (9 Cal. Rep. 456.)

The other point is urged with more confidence. Assuming that the count set out on the warrants is fatally defective, the question arises whether the default and judgment on the money counts, or for the amount of them is erroneous. It will be observed that the money counts are each of them for the amount for which judgment was taken.

The appellant's counsel contends that where a verdict, on issue joined, or on a writ of inquiry of damages, is given upon several counts, one or more of which is bad, no judgment of the finding can be sustained on error; and that the same rule obtains where judgment is entered on default in like cases, under our Practice Act. The principle is unquestionably true in the cases of verdict, as the counsel has shown by the authorities cited; but this doctrine does not hold in regard to judgments where the law determines the fact and the amount of the recovery on default. The reason of the rule contended for in cases of verdict is, that it is not certain upon what basis, or upon which of the counts, the jury rests its finding. For all that appears, the jury may have found its verdict upon the bad count; and thus the defendant may be compelled to pay a judgment based upon no legal cause of action. But this reasoning does not hold

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where the law itself, upon an admitted cause of action, fixes the result. As we have often held, a default confesses all the issuable facts of the several causes of action counted upon. The default amounts, in this case, to a confession of indebtedness for the causes, and on the accounts, alleged in the complaint — one of which here is for money had and received, and another for goods, etc., furnished the defendant. The defendant cannot say, in answer to, or avoidance of, the effect of the admission, that it had also admitted an indebtedness for a cause which the law did not recognize as a sufficient basis for a judgment. It could not be heard to say, if it were in open Court — “I confess that I owe the plaintiff so much money, on a good cause of action — and also, so much on a bad, or badly stated cause of action; but no judgment can be rendered against me on this admission of the good cause, because I have also admitted an indebtedness on a bad or badly stated cause.” The several counts are distinct causes of action; and the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated.

There can be no difficulty in regard to the effect of the judgment; for as it is by operation of law that the judgment is rendered, the law itself determines the causes of action upon which it rests; and these are, in this instance, the good counts, or those which in law justify and authorize the finding. The cases cited by counsel for appellant do not militate against this view.

Judgment affirmed.

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KEWEN v. JOHNSON.

EXECUTION, PROPERTY NOT LEVIABLE.

Property in-custody of the law not subject to execution.

APPEAL from the District Court of the First Judicial District, County of Los Angeles.

This was a motion made to the Court below, for an order to compel the defendant, as Clerk of the District Court, to pay over certain moneys in his hands to the plaintiff.

The motion was based on the following facts:

Goodwin & Co. commenced suit in the District Court of Los Angeles County, by attachment, against Lewis Glazer, to recover a sum of money. The attachment was levied by the Sheriff of Los Angeles County, on a stock of goods or merchandise, and also on two several promissory notes of five hundred dollars each. The goods being perishable property, were sold under the order of Court, and the proceeds of such sale, \$1,222.55, were paid into Court, subject to the suit. On the twenty-first day of July, 1857, a second attachment was issued in said suit, and directed to the Sheriff of San Bernardino County, who levied the same on a stock of goods in that county. On the third of August, 1857, one Charles Glazer brought an action of replevin against the Sheriff of San Bernardino County, to recover said last mentioned stock of goods. A receiver was appointed in this suit, to take charge and sell the goods. The receiver sold the goods, and on the fifteenth of March, 1858, paid into Court the sum of \$5,343.22, the proceeds of such sale. The defendant in the replevin suit subsequently obtained judgment, from which the plaintiff appealed to the Supreme Court, where the same was still pending at the time of the plaintiff's motion. No bond staying execution was given. On the eighth of April, 1858, Goodwin & Co. recovered judgment against Lewis Glazer, for the sum of \$5,343.22 debt, and \$358.31 costs; from which judgment Glazer appealed to the Supreme Court, and gave bond in the sum of three hundred dollars for the payment of cost, and recited in said bond that Charles Glazer had deposited in Court, on the part of appellant, the sum of \$5,343.22, (this appears to be the same money paid into Court by the receiver) in the case of Charles Glazer v. The Sheriff of San Bernardino County.

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The two promissory notes were sold by order of Court, and brought the sum of five hundred and forty-three dollars. On the seventh of May, 1858, the judge of said District Court made a chamber order, requiring the clerk to issue execution in the case of Goodwin & Co. v. Lewis Glazer, and to apply the deposit of \$5,343.22 thereon: from which order Lewis Glazer appealed.

On the fifth day of March, 1858, Lewis Glazer, for value received, assigned to Kewen, the plaintiff, the sum of \$1,222.55, with power to demand, receive and acquit for the same. Kewen made demand of defendant, Johnson, for this sum, which was refused, on the ground that said amount was in his custody as Clerk of the Court, and was subject to the attachment lien of Goodwin & Co. Kewen thereupon made his motion, which was based on notice and affidavit, to the District Court of Los Angeles County, for an order requiring the defendant, as such clerk, to pay over to him the amount, which was denied, and he appealed therefrom to this Court.

Geo. Cadwalader for Appellant.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., concurring.

There is no error in the judgment. By the record it appears that the greater part of the money in the hands of the defendant, under the attachment in the case of Goodwin v. Glazer, 10 Cal. 333, is claimed by a third party, who has instituted suit to recover it, which suit is now pending and undetermined. If this suit should be determined in favor of the claimant, the sum in the hands of the defendant will be sufficient to satisfy the judgment.

Judgment affirmed.

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HUNT v. ROBINSON *et al.*

T commenced suit against J by attachment; the writ was levied upon certain personal property by the plaintiff H, as Sheriff. M J, wife of J, claimed the property as a sole trader and brought her action of replevin for the property and obtained possession of the same by the delivery of an undertaking as required by sec. 102 of the code. The undertaking was executed by defendants R & S. The replevin suit was decided February 5th, 1855, in favor of H. T obtained judgment in the attachment suit against J, November 30th, 1854. On the eighteenth of February, 1855, executions in favor of other creditors of J, coming into the hands of H as Sheriff, he levied them on the same property and subsequently sold the property and paid the proceeds into Court. H then brought this suit against the sureties in the replevin bond: *Held*, that the lien of T's attachment continued after the replevy of the goods by M J.

When the same property came into the hands of H, as Sheriff, the condition of the replevin bond, to return the property, was fulfilled.

The primary object of the replevin suit is, the recovery of the thing itself. The value is received only in the alternative, that the property is not returned.

The possession obtained by the plaintiff in replevin is only temporary. It does not divest the title or discharge the lien.

In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

This was an action against the sureties on a replevin bond. The facts as detailed in the opinion of the Court are as follows:

Treadwell commenced suit against David Jones, by attachment, which was levied upon certain personal property by the plaintiff, Hunt, as Sheriff of Sacramento county. Mary Jones, wife of David Jones, claimed the property as a sole trader, and commenced her action of replevin, and obtained possession of the property, upon delivering an undertaking as required by the 102d section of the Practice Act, executed by defendants, Robinson & Skinker. The replevin suit was decided on the fifth of February, 1855, in favor of Hunt, and a motion made for a new trial by Mrs. Jones, which motion was pending until ninth March, 1855, when it was overruled. Treadwell obtained judgment against David Jones, November 30th, 1854, for \$4,300. On the eighteenth of February, 1855, certain executions in favor of *other* creditors of David Jones, being in the hands of the plaintiff, Hunt, were levied by him upon the same property, and the property sold about the last of February. The Sheriff, being in doubt as to which of the several creditors were entitled to the proceeds of the sale, paid

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the money into the Sixth District Court, and filed his bill of interpleader, making Treadwell and the other creditors, parties. Upon the hearing, the District Court decided that the second class of creditors were entitled to the proceeds. From this decision no appeal was taken by any party. On the seventeenth of March, 1855, Hunt issued his execution upon the judgment obtained by him in the replevin suit, which was returned by the Coroner unsatisfied. The Sheriff then brought his suit against the sureties in the replevin bond, and obtained judgment against them for the assessed value of the property replevied, and for costs, and the defendants appealed to this Court.

The main question arising in this case, is whether the lien of Treadwell's attachment continued *after* the replevy of the goods by Mrs. Jones.

Robinson, Beatty & Botts, Clark & Gass for Appellants.

Mrs. Jones, as determined by the result of the replevin suit, had no title to the furniture, and therefore could not have conferred title upon a purchaser. She could not confer what she did not herself possess.

In the language of the Chief Justice in the case of *Burckle v. Luce*, 1st Comstock, on p. 171, she had a mere temporary right of possession, which expired upon the termination of that suit against her, and this is the only right which she could have transferred to a purchaser.

But, says respondent's counsel, our law looks upon the possessor of personal property as its owner.

It is true, possession is *evidence* of ownership, but it is *prima facie* only, not conclusive evidence. Mrs. Jones was in possession and for the time being entitled to the possession of the furniture; she could confer upon a purchaser no higher title than she possessed.

The case of *Lockwood v. Perry*, 9 Metcalf, 444, is directly in point, and establishes two of the points contended for by appellants:

1st. That Mrs. Jones could not sell the property attached, and make a title thereto, during the pendency of the action of replevin; and if she could not sell, she certainly could not give it away in payment of debts not her own, as that would be a fraud upon her sureties.

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2d. That Hunt, the real owner, or having all the interests of the real owner, could not *lawfully* disturb her right of possession during the pendency of the action of replevin, and therefore could not levy upon it in favor of other creditors of David Jones.

We further contend on behalf of the appellants, that the lien of the first attachments still remained upon the property; and that although bonded upon the statute, it was still in the custody of the law, and could not be levied upon by any officer, nor sold by her.

In 1st Barnes Chy. 427; in 2d Dallas, 68; in Acker v. White, 25th Wendell, 614, and in some other cases, the Court, it is true, says the lien is discharged upon the execution of the replevin bond; while in Rives, &c. v. Owen, 6th Alabama, 46; Hagan v. Lucas, 10th Peters, 400; McRea, &c. v. McLean, 3d Porter, 138, and various other cases in Kentucky, Missouri, &c., it is held that notwithstanding the execution of the bond, the lien of the attachment still exists, and that goods so replevied cannot be levied upon or sold to satisfy other debts.

This peculiarity, however, will be observed in all the cases cited and relied upon by respondent's counsel, that although the Courts say the lien is gone, yet they arrive at the same conclusions to which those Courts arrive who hold that the lien continues; while following the language in 1 Brown's Chy., that the lien is gone, and thus yielding *nominally* to the authority of that case, they avoid the consequences of fraud and corruption to which that doctrine would necessarily lead, as is fully exemplified in this case, by holding that the plaintiff in replevin is substituted to all the rights of the Sheriff, and that the property thus replevied is not subject to levy and sale under any other execution.

In that case, White, claiming title, replevied the property out of the possession of Hillyer, Sheriff.

In this case, Mary Jones, claiming title, replevied the property out of the hands of Hunt, Sheriff.

In that case, after judgment, but pending a motion for a new trial, Acker, as Sheriff, under an execution against Jessup upon another judgment, levied upon the same property.

In this case, after judgment, but pending a motion for a new trial,

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Hunt, as Sheriff, under an execution against David Jones upon another judgment, levied upon the same property.

The only difference between the two cases thus far, is this: that in the case of *Acker v. White*, the second execution was levied by a different officer; while in this case the two levies were made by the same officer, who must therefore have had actual notice of the first levy when he made the second.

Now, if Hunt could acquire no new title to the goods, by virtue of his second levy, he could only sell and dispose of the same in one of two ways; either, 1st, by virtue of his first levy, and in satisfaction of the debts to secure which that levy was made; in which event the condition of this bond would have been substantially complied with, and no action for a return could have been maintained upon it; or 2d, he must have sold them in his own wrong. The law permits no man to take advantage of his own wrong, and in neither event therefore can any suit be maintained upon the bond for a return of the goods.

But according to the third proposition of the Court in *Acker v. White*, and according to every principle of law and justice, if the appellants are compelled to pay the value of these goods, they will be entitled to the goods themselves. It is conceded, however, that they cannot get the goods, the respondent having sold them; and therefore, should the judgment of the Court below be permitted to stand, they would be compelled to pay for the goods and never enjoy the benefit of them.

Another case cited and relied upon by respondent's counsel, is the case of *Burckle v. Luce*, 1st Comstock, 163, and in this case we apprehend the counsel is more unfortunate even than in *Acker v. White*.

In this case Mrs. Seitz sued Luce in replevin for certain goods which he had levied upon as the property of Burckle. Upon giving the requisite bond, the goods were placed in her possession. A verdict was found for defendant, Luce, which was set aside and a new trial ordered. Before a new trial was had Mrs. Seitz died, and defendant, Luce, repossessed himself of the goods, and claimed to hold them by virtue of his first levy. Burckle and another, the executors of Mrs. Seitz, brought a second action of replevin against Luce for the goods; and upon the trial of this second action, asked the Court to instruct

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the jury, "that the execution of the writ of replevin brought by Mrs. Seitz, destroyed the lien of the *fi. fa.*, and the defendant had no right to retake the property;" but the Court refused to give the instruction, and judgment went for the defendant, which on appeal was affirmed—thus denying the doctrine, that the lien of the levy is gone upon the execution of the bond in replevin.

In this case of *Burckle v. Luce* the Court reviews each of the cases cited by respondent's counsel, to wit: *Bradyll v. Ball*, 1 Bro. Chy., 427; *Waglam v. Cowperthwaite*, 2d Dallas, 68; *Frey v. Lupee*, 2d Dallas, 131, and *Acker v. White*, 25th Wendell, 614.

In further support of this position we refer the Court to the case of *McRea v. McLean*, 3 Porter, 138.

That portion of the argument of respondent's counsel (in favor of the position that the lien is gone upon the execution of the replevin bond) which is drawn from our attachment law, is exceedingly lame and unfortunate.

It is true, that under our attachment law, upon the execution of certain bonds by the defendant in attachment, the law provides that the property shall be released from the attachment. This provision of the attachment law is founded upon the same principle which controlled the decision of *Bradyll v. Ball*, *Waglam v. Cowperthwaite*, and other cases cited by respondent's counsel, in which the lien was held to be discharged upon the execution of the replevin bond, to wit: that the defendant in attachment is the general and real owner of the goods. In suits by attachment there is no controversy as to the ownership of the attached property; and therefore, upon giving other and adequate security for the payment of the debt, the goods attached are released—the only question being whether the defendant is or not indebted to the plaintiff.

But in the action of replevin an entirely different issue is presented—the title to, or the right to the possession of personal property—and the whole object of our statute in relation to the claim and delivery of personal property is to retain the control of it, that upon the determination of the suit the rightful owner may be placed in possession. While the object of an attachment is simply to secure the payment of a debt, which object is as well or better obtained by a deposit of money

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in the Court, the action of replevin is more in the nature of proceedings *in rem*, the chief object being the delivery of the property itself to the rightful owner, and only looks to the alternative of payment of its value when such delivery cannot possibly be made.

Respondent's counsel attempts to draw a distinction between the bond given in this case, and the bonds under consideration, in the cases relied upon by us, and says that two kinds of bonds have obtained in different States. One, a bond dissolving the attachment, and conditioned for the payment of such judgment as shall be recovered in the suit. The other, a bond variously styled a delivery, forthcoming or replevin bond, conditioned for the redelivery of the property to satisfy the execution, or more generally in the alternative, to redeliver the property or to pay the judgment.

In Drake on Attachment, we find that chap. 13th treats exclusively of these two kinds of bonds. He says: "In many of the States provisions exist, authorizing the attachment to be dissolved, upon the defendant giving bond, with approved security, for the payment of such judgment as may be recovered in the attachment suit" (Section 290.) This bond does not provide for a return of the property, but that the sureties will pay the judgment; and in section 297 he says "the obligation of this bond cannot be discharged by a surrender of the property attached," and therefore it is that the execution of such a bond dissolves the attachment. This is the kind of bond provided for in our statute, in cases of attachment—"that the sureties will on demand pay to the plaintiff the amount of judgment, &c.," not that they will return the property or pay the judgment. (Secs. 136, 137, Practice Act) Drake on Attachment, secs. 299, 303.

J. P. Treadwell for Respondent.

Property attached and replevied out of the hands of the officer, by a third person having no property in it, remains, after so replevied, liable to be seized on subsequent executions against the defendant in each attachment, he being owner thereof before forfeiture of the replevin bond; and in such case, the lien of the attachment on the property was discharged, when it was taken out of the hands of the officer on the writ of replevin.

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The process of mesne attachment, as security for final judgment, is unknown to the common law. It is a new statute remedy and is to be strictly construed. The lien of an attachment has just the extent given to it by the statute providing for it, and no other, and cannot be extended to cases not provided for by the Act. 1 Cal. 163; 3 Cal. 365; 2 Cal. 24; 15 Mass. 205. The extent and duration of the lien in this State depend then on our own statute, to be strictly construed, and are not helped by any general principles.

Our statute provides that "personal property capable of manual delivery shall be attached by taking it into custody;" Prac. Act, sec. 125; and this is usually required whenever mesne attachments are allowed. And the attachment can be preserved only by keeping possession—must be actual, though it need not be the hand of the officer himself. He may substitute a third person to be his custodian, servant or bailee, to keep this custody for him.

The attachment on property delivered to him, is preserved only so long as the bailee keeps the actual custody; for if the bailee permit the goods to go back into the hands of the defendant in the attachment, as is usually the case, and the custody thereby be lost, the lien of the attachment is lost and the goods become liable to a fresh attachment, or seizure at the suit of another creditor of the owner. Drake on Attachment, secs. 315, 328; 14 Mass. 190.

But a means is provided by statute everywhere, where mesne attachments are allowed, for the defendant to regain the possession of his goods, on giving security, without waiting final judgment. One of two different courses of public policy is adopted in providing for this in the statutes of each State: *either*,

1. A bond dissolving the attachment, and conditioned for the payment of the amount of such judgment as shall be recovered in the attachment suit; or,

2. A bond variously styled a delivery, forthcoming, or replevin bond, conditioned for the redelivery of the property to the officer to satisfy the execution, or when the Court may direct; sometimes in the alternative to redeliver the property or pay the judgment in the attachment suit. And it is also given to enable an execution debtor to retain possession of his property levied upon until the day of sale;

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the condition being in such case for the redelivery to the officer at the time and place of sale. A bond of the first description is provided for by the statutes of *California, Maine, Massachusetts, New York, Louisiana, &c.*; of the latter description, on the other hand, by the statutes of *Alabama, Missouri, Virginia, &c.* In each case the goods attached are released from custody; in the first, the attachment is released; in the latter, the custody only for the goods levied on or attached, the lien of the attachment usually continuing. But this difference depends, not on the difference in the words of the conditions of the bond, but upon the intent and object of the statute in each case in providing for the proceeding.

Only one of these two different courses of statute policy pertains in any one State; and there can be no mistaking which California has adopted. A defendant may apply for "the *discharge* of the attachment on filing an undertaking to pay the judgment;" and "if the application be granted, all the property attached shall be released from the attachment and delivered to the defendant." Laws, C. 543, sec. 136.

It will only be necessary to show that we are not mistaken in the character of the decisions so cited and relied on by the other side. The opinion of the majority of the Court in *M'Rea v. M'Lean*, 3 Port. 138, is: "That the giving a replevin bond *under the attachment law of Alabama* does not discharge the lien first acquired under the attachment;" and this is there put on the ground that "there is no difference in principle between the Act of 1818, under which the case arose, and the Act of 1833, which goes farther, and directs the Sheriff to suffer the property attached to remain in the possession and at the risk of the defendant." The other determinations in that Court relied upon are of the same character; but the case, 6 Alabama, 45, had decided the same point differently. The case of *Lord v. Ramsey*, 3 Mun. 417, was merely constructive of the intent of the statute of Virginia, in providing that property levied on might be retained by the owner, on giving bond for its forthcoming on the day of sale. *Evans v. King*, 7 Mo. R. 413.

The decision in *Hagan v. Lucas*, 10 Pet. 400, relied upon by appellants, was upon a statute of Alabama, and governed by the above

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noticed case of *M'Rea v. M'Lean*, the case, 3 Mun. 417, being cited in aid. The Court says: "In a late case (3 Pet. 138) the Supreme Court of Alabama *decided the same question which is made on this bond*, on a bond given for the delivery of property under the attachment law of that State. They decided that the giving of the bond did not release the goods from the lien of the attachment. A contrary decision had been given by the Court in a similar case; but on further examination, and more mature reflection, two of the three Judges made the above decision. This adjudication being made on the construction of a statutory proceeding, and by the Supreme Court of the State, forms a rule for the decision of this Court." "In fact, the bond under the Alabama statute is substantially a forthcoming (and not a replevin) bond." "*The object of the Legislature in requiring this bond was to insure the safe-keeping and faithful return of the property to the Sheriff, should its return be required.*" The cases in 12 Sunder and M. and 6 Ala. 45, were also under the same statute.

The decisions are wholly inapplicable for the appellants. Admitting that they are the true expositions of the several statutes upon which, and in accordance with the policy of the States where they were made; yet they are of no weight against the corresponding provisions of our own law for the delivery of attached property to the defendant, that the attachment "shall be discharged."

It is nowhere contemplated by — the legislation of Alabama and Missouri finds no favor in — our statutes, that the lien of an attachment in any case survives a moment after the property passes by any means whatever out of the custody of the attaching officer. The contrary is everywhere implied.

If the levy of Mills and others be sustained, Treadwell and Argenti are sustained in this resort to the replevin bond against those who have enabled the property to be taken from the hands of the officer on a false claim; if it be decided that the lien of the first attachment continued after and *must be pursued*, then Mills and others have been successfully imposed upon by a secret lien or mortgage.

Dormant executions have ever been rigorously proscribed, and the priorities of their liens denied by the Courts as constructively fraudu-

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lent by mere delay, even where there is no concert or fraudulent intent. *Kellogg v. Griffin*, 17 J. R. 277; *Knower v. Barnard*, 5 Hill, 377; *Kimball v. Mungor*, 2 Hill, 364; *Rice v. Serjeant*, 7 Modern, 37.

It seems adjudged so early as 7 H. 4, (28) that where goods lawfully distrained for rent, and replevied, are seized and sold under execution against the plaintiff, this is a sufficient answer to call on the defendant to gager deliverance. *Vid. Vine*, 18, p. 588, (H.) *Gager on Withernam*.

Bradyll v. Ball, 1 Brown's Ch. R., 427, a leading case on the point now pursued, was decided on the unanimous opinion of the King's Bench, upon much consideration, and after argument by eminent counsel. The goods of a tenant were distrained for rent; he replevied them, giving a replevin bond, and pending the replevin suit he became a bankrupt, and the goods passed into the hands of his assignee. The landlord, the defendant, afterwards recovered a judgment in the replevin suit for a return of the goods. The goods had been sold by the assignee; and the landlord now brought a suit in equity against him, insisting that he retained a lien upon the goods by the distress after they were replevied, and when they went into the hands of the assignee, and had an equitable lien for a return, or the payment of the value of them out of the assets of the bankrupt. The Court of Chancery decided that there was no lien in equity if not at law, and directed an action at law against the assignee for money had and received to be brought, retaining the bill. The suit was brought accordingly; and the King's Bench were unanimously of opinion that the plaintiff had no lien upon the goods after they were delivered upon the writ of replevin, and that he was left to his remedy upon the replevin bond; and upon this the bill was dismissed.

"If the landlord distrain and the tenant replevy the goods, and afterwards becomes bankrupt, and the goods are sold by the assignees, and the defendant in replevin afterwards have judgment for a return, his only remedy is on the replevin bond, for he has no lien on the goods in the hands of the vendee." *Brady on Distresses*, p. 123; cites *Cooke R.* 219, 220; *Waglam v. Cowperthwaite*, 2 Dal. 68.

In *Fry v. Leeper*, 2 Dal. 131, this last decision is relied on; and the same Court decides: "The lien on the goods is discharged by the

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security given to the Sheriff; and as soon as they are delivered back to the plaintiff in replevin they are open to execution or distress." Buel v. Davenport, 1 Root R. 261.

In Acker v. White, 25 Wend. 614, it is said: "The replevin puts no end to the lien. * * The bond is substituted for the goods. * * Although the lien of the execution is gone, according to the cases cited, (1 Br. R. 427; 2 Dal. 68) it is because the bond is regarded as an equivalent security for satisfaction of the judgment to the extent of the value of the goods."

These decisions are stated and acquiesced in, though not the precise point before the Court, in Burckle v. Luce, 1 Comstock, 163; and 6 Hill, 557.

The opinion in this case was rendered at the October Term, 1857. Subsequently a reargument was had, and at the July Term, 1858, the Court refused to recede from its former opinion.

BURNETT, J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

The property having been attached as the property of David Jones by the Sheriff, the questions arising in this case are different, in some respects, from those arising in ordinary actions of replevin. In ordinary cases the property is not in the custody of the law by virtue of process, but in the possession of one of the claimants, each party claiming in his *own* right. In this case the Sheriff did not claim the property in his personal, but in his official capacity. He traced his only right to the property through Treadwell's attachment.

In the case of Brady v. Ball, 1 Brown's Ch. R. 427, it was held that where goods had been taken in distress for rent, and replevied by the tenant, the defendant in the suit and the owner of the goods, the distrainer had no lien on the goods, but was left to his remedy on the replevin bond. The decision was concurred in by the unanimous opinion of the Court of King's Bench.

So in the case of Waglam v. Cowperthwaite, 2 Dallas, 68, it was held by the Philadelphia Court of Common Pleas that the landlord, after the goods had been replevied by the tenant, had no lien upon

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them, but the sureties upon the replevin bonds were substituted in the place of the goods. The same point was held in a subsequent case, page 131.

In the case of *Acker v. White*, 25 Wend. 614, it appeared that Hillyer, as Sheriff, had levied upon certain goods as the property of Jessup, the defendant in the execution. White claimed the property as his own, and sued out a writ of replevin, executed the necessary replevin bond, and the property was delivered by the Coroner to White, who permitted Jessup to continue in the possession of it. Afterwards Acker, as Sheriff, levied upon the same goods under another execution against Jessup. White then sued Acker, and it was held that White had the right to the property. The Court decided that the lien of Hillyer's execution was lost, by the replevin suit in the case of *White v. Hillyer*; but that White possessed all the interest that Hillyer had under the execution, and if that was sufficient to defeat the subsequent levy by Acker, then it must equally inure to the benefit of White. The plaintiff in replevin, White, by virtue of replevin bond, was substituted to the rights of Hillyer, the Sheriff.

It will be perceived that the facts of that case are very similar to the circumstances of the case now under consideration. They are substantially the same, except in one important respect. In the case from Wendell the second levy was made *against* the will of the claimant in replevin, while in the present case, the levy of the second class of executions was made *with* the consent of the claimant.

If then, the lien of Treadwell's attachment was lost by the replevin suit of Mrs. Jones against the Sheriff, then she had the right to permit the second levy, and the Sheriff must seek his remedy upon the replevin bond. It must be conceded that this case of *Acker v. White* is a direct authority for the plaintiff, if it be admitted that the laws of New York were then substantially the same as the provisions of our Practice Act.

But in the subsequent case of *Burckle v. Luce*, (1 Com., 163) the Court of Appeals seem to have virtually overruled the decision in the case of *Acker v. White*. At least it would seem clear, that in the case of *Burckle v. Luce*, the Court lays down principles, that if legiti-

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mately applied, must overrule the position that the lien of the writ was lost by virtue of the undertaking in replevin.

The defendant, Luce, as Deputy Sheriff, levied upon certain property under an execution against Burckle. Mrs. Leitz claimed it, and brought replevin and obtained possession of the property. Before the replevin suit was finally determined, Mrs. Leitz died, leaving a will appointing the plaintiff as her executor. It was held that the suit abated by the death of Mrs. Leitz, and the lien of the execution revived.

"In my opinion," says Jewett, C. J., "the proceedings upon the writ of replevin conferred upon Mrs. Leitz a mere temporary right of possession, which expired with the abatement of the suit by her death, and that, when that event occurred, the lien of the execution revived: especially as the rights of no third person had intervened, under her, and the defendant was at liberty to retake the property by virtue of his former levy."

The learned Chief Justice refers to and approves of the opinion in the case of *Lockwood v. Perry* (9 Metcalf, 440).

In that case it appeared that Lockwood was in possession of two colts, which he claimed as his property. Barnes also claimed them, and brought replevin, and gained possession of the property. Lockwood ultimately prevailed in the replevin suit; but while it was pending, Barnes sold the colts to Perry. Lockwood brought suit against Perry and recovered the property, as it was held that Perry acquired no property by his purchase from Barnes, who had no title himself; and in the opinion of the Court it is said:

"It is doubtless true that the plaintiff in replevin has, by virtue of his writ, acquired the right of possession pending the action of replevin, and that the real owner cannot lawfully disturb that right during the pendency of that action, nor institute an action against a third person who may become possessed of the goods. And this is precisely the extent of the right exercised by force of a writ of replevin."

In the case of *McRea & Augustin v. McLean* (3 Porter, Ala. R. 138) the authorities were very fully considered. Watson attached certain slaves, the property of Thomas J. Augustin, and he replevied the property by giving the usual bond, with the plaintiffs as sureties,

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conditioned for the return of the goods, or the payment of any judgment rendered in the case. Suit was brought upon the bond, and the defendants in the Court below pleaded that while the Sheriff held the said slaves in his possession, at the suit of sundry other creditors against said Thomas J. Augustin, commenced by attachment, the defendants requested and notified the Sheriff to retain the slaves in his custody under the attachment of Watson, and that the Sheriff afterwards delivered the slaves to one Josiah Haice, who elained and removed them from the state." The case was twice argued before the Supreme Court of Alabama, and it was finally held that the sureties were discharged, upon the ground that the giving of the attachment bond did not destroy the lien of the writ of attachment, and therefore, the Sheriff was bound to have retained the slaves under Watson's attachment. The Judge who delivered the opinion of the Court holds this language:

"That the property is to be at the risk of the debtor and his sureties pending the suit, I admit. That they should then have the privilege of returning it, the bond expressly stipulates; and that no principle of law, which will permit any other disposition of it, inconsistent with the lien, is to be tolerated, I do not hesitate to maintain."

The Chief Justice dissented from this opinion, but the principle was afterwards affirmed in the case of *Rives & Owen v. Wilbame*, 6 Ala. R. 45.

In the case of *Evans v. King* (7 Mo. R. 411) it was held, that where property of a defendant, attached in the hands of a third party, is retained by that person by giving bond and security for the forthcoming of the property, the attachment continues to be a lien on the property.

In the case of *Hagan v. Lucas*, 10 Peters, 400, it appears that several executions against Bynum & McDade were levied by the Sheriff upon certain slaves, on the 10th of October, 1833, and that Lucas claimed the property as his own, and gave bond and security to the Sheriff, for the forthcoming of the slaves if they should be found subject to the executions, and for all costs and charges for the delay, &c. The slaves were then delivered to Lucas, and the proceedings were returned to the Circuit Court of Montgomery county, Alabama.

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An execution was afterwards issued against Bynum & McDade, upon a judgment against them in the District Court of the United States for the Southern District of Alabama, and levied upon the same slaves, still in the possession of Lucas, on the 19th of February, 1834. It was held by the Supreme Court of the United States, that the lien under the first execution continued, and that the property was still in the custody of the law, and not subject to a second levy, to the prejudice of the first. Mr. Justice McLean, in delivering the opinion of the Court, said: "On giving the bond the property is placed in the possession of the claimant. His custody is the custody of the Sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond of its delivery to the Sheriff, the property is as far from the reach of other process as it would have been in the hands of the Sheriff."

In this case, it is true, the Court places its decision upon two grounds: 1st, upon its own view of the law; 2d, upon the ground that the construction of a statute of a State by the Supreme Court thereof forms a rule of decision for the Federal Courts.

The result of the authorities is very accurately stated by Mr. Drake, in his late work on Attachments, sections 290, 299, 303.

"In many of the States," he says, "provisions exist, authorizing an attachment to be dissolved, upon the defendant giving bond, with approved security, for payment of such judgment as may be recovered in the attachment suit."

Such, in substance is the bond required by the 137th section of the Practice Act. This is the bond to be given by the *defendant* in the attachment suit, not by the *claimant* of the property.

The author then treats of another class of bonds, and says, "this description is variously styled delivery, forthcoming or replevin bond. It is usually conditioned for the delivery of the property to the officer, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the Court may direct. Sometimes the alternative is embraced, of the delivery of the property or the satisfaction of the judgment recovered in the action."

In speaking of this description of bond, he says: "It differs, too, from that given for dissolving an attachment, in that it does not dis-

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charge the lien of the attachment, since the very object of the bond is to insure the faithful return of the property, if its return should be required."

It will be readily seen that this description of bonds, and the bond required in replevin suits prosecuted in this State, are substantially the same; the condition of the latter being "for the prosecution of the action, for a return of the property if return thereof be adjudged, and for the payment of such sums as may from any cause be recovered." The judgment in a replevin suit follows the verdict of the jury and the condition of the undertaking, and is in the alternative "for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for the detention. Either party may or may not, claim damages for the detention of the property." Sections 177, 200. The execution on the judgment commands the Sheriff, first, to deliver the possession of the property, if it can be found, and if not, then to make the value of the property out of the personal and real property of the party against whom the judgment is given. Sec. 210.

That the effect of a replevin bond under our statute is not to divest either the title or the lien of the other party, would seem to be clear. The contest itself is about specific personal property. The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit. The value is recovered only as an alternative, when delivery of the specific property *cannot be had*. The property is required to be particularly described in the execution.

Now, if the title could be divested by the delivery of the replevin bond, the primary object of the suit could be defeated. The unsuccessful party could always make his election to keep the property or pay the value. But this advantage was never intended to be given by the statute, to the party confessedly in the wrong.

The effect of the replevin bond is simply to give the party the possession of the property pending the litigation. The title is not changed. No sale made by the party in possession, and who afterwards turns out to have no right to the property, can convey any title to the purchaser. And if the title is not changed, as was held in the cases already cited, especially in that of *Lockwood v. Perry*, neither

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could the lien be affected in any way. The language of our statute is very strong. The Sheriff is commanded to deliver the possession of the property particularly described in the execution, and if a delivery *cannot* be had, then to make the assessed value. There is no reservation anywhere in favor of innocent purchasers. The property remains in the custody of the law, and all parties must take notice. It is certain that the unsuccessful party may deliver the property and discharge himself from so much of the judgment as is made up by the assessed value. The very reason why he may do this, is because the suit is about that specific property, and because the title is not affected by the replevin bond. But where property attached is released upon *the bond of the defendant*, he cannot discharge himself, or his sureties, by a delivery to the Sheriff of the same property, for the reason that the lien is gone. In the case of *Nickerson v. Chatterton et al.*, 7 Cal. 568, we held that "when the plaintiff or defendant in the original suit obtains judgment for the delivery of the property, or if it cannot be found, then for its value, the title in the property vests in the party against whom the judgment is given, subject to the right of the successful party, to take it in discharge of so much of the judgment as is made up by the assessed value of the property."

If the title did not vest in the unsuccessful party until the judgment in the replevin suit, of course it did not vest in him upon the delivery of the replevin bond. And although the title vests upon the rendition of the judgment, the property is still subject to be taken by the successful party, until he makes his election to sue upon the undertaking in replevin. He may sue without issuing execution. But at any time before suit be brought, the successful party may take the property if to be found, and so too, the unsuccessful party may return it.

If the theory that the lien of the attachment is lost by virtue of the undertaking in replevin be taken as true, then it follows that the same property remains liable to seizure under any subsequent process against the same defendant. The claimant and his sureties, who have stipulated for the return of the property, would then be left to pay the judgment in the replevin suit, while, at the same time, they would not get the property to compensate them for the judgment. This would certainly place the claimant of property seized by an officer in

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a worse condition than that of an ordinary trespasser. When A takes the property of B, and the latter obtains judgment for the value of the property, if A pays the judgment he is entitled to the property. The law gives him the property for the judgment. But if the theory of the plaintiff be true, the unfortunate claimant must pay the judgment, and still lose the property. In claiming the property he assumes a double responsibility; while the defendant in the attachment or execution may be fortunate enough to obtain double the value of the property seized by the officer. In reference to such a theory Mr. Justice McLean, in the case of *Hagan v. Lucas*, already referred to, makes these forcible remarks:

“If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond; for a levy takes the property out of the possession of the claimant, and renders the performance of this bond impossible. Can a result so repugnant to equity and propriety as this be sustained? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the forfeiture? This would indeed be a reproach to the law and to justice.”

But the theory that the possession obtained by virtue of the writ of replevin is only temporary, and does not divest the title or discharge the lien, is the most logical, and at the same time, the most just to all parties. The party ultimately entitled to the property has a double security; while the party who replevies it does not incur the extraordinary risk of having to pay the judgment and also to lose the property. And the defendant, in the attachment or execution, has no opportunity to obtain two prices for his property.

If these views be correct, the lien of the attachment continued, and when the same property came again into the hands of the Sheriff, the condition of the replevin bond, to return the property, was fulfilled. The property was then liable to a second levy, but such second levy was subject to the levy under the prior attachment.

For these reasons the judgment of the Court below is reversed, and that Court will enter up judgment in favor of the plaintiff for the costs of the replevin suit, and also for costs in this suit, and the defendants will be entitled to the costs of this appeal.

Linhart v. Buiff.

LINHART v. BUIFF *et al.*

A Justice of the Peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications.

APPEAL from the County Court of El Dorado County.

The facts sufficiently appear in the opinion of the Court.

Hall & McKune for Appellant.

T. H. Williams for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

This case, which comes here on appeal from the judgment of the County Court of El Dorado, to which Court it had been taken from a judgment of a Justice of the Peace, must be dismissed, for want of jurisdiction. It does not appear, from the papers, that the value of the subject of the controversy, exclusive or inclusive of costs, was two hundred dollars. The amendment of the complaint in the Justice's Court shows only that the plaintiff did not think the value of the claims was over two hundred dollars. But how much less than that sum, or what the real value, is not shown. But for this defect we should have felt compelled to reverse the judgment of the County Court, dismissing the proceeding for want of jurisdiction in the Justice. We think the Justice has the right to allow the complaint to be amended in all respects, so that the case may be determined on its substantial merits; and this, whether the defect be in the statement of jurisdictional or any other facts. The greatest liberality and indulgence should be extended in all such applications.

But we cannot now remedy this error of the County Court.

Appeal dismissed.

Bours v. Zachariah and Wife.

BOURS *et al.* v. ZACHARIAH AND WIFE.

The certificate of acknowledgment of a Notary Public to a deed is not an act *in pais*, which he may exercise by virtue of his office at any time while in office. A Notary derives his power to take and certify acknowledgments to deeds from the statute. He acts as under a special commission for that particular case — clothed with limited statutory power. He is to take the acknowledgment, and certify it as part of the same transaction. After taking the acknowledgment, and making and delivering the return, his functions cease, and he is discharged from all further authority, and cannot alter or amend his certificate.

APPEAL from the District Court of the Fifth Judicial District, County of San Joaquin.

This was a cross action to a bill to foreclose a mortgage. The facts are as follows:

The defendants, Zachariah and wife, executed and delivered to the plaintiffs two separate promissory notes, and two mortgages of different date to secure the payment of the notes. The first mortgage was to secure the payment of \$1,000, and the second of \$2,000. On the twelfth day of July, 1854, the first mortgage was acknowledged before a Notary Public, who entered the following certificate thereon:

"STATE OF CALIFORNIA, }
County of San Joaquin. }

"On this twelfth day of July, A. D. 1854, before me, came J. Zachariah, and M. A. Zachariah, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they executed the same of their own free act and deed, and for the purposes therein mentioned; and M. A. Zachariah, being examined by me, after being made acquainted with the contents of this instrument, did acknowledge to me that she executed the same freely and voluntarily, and that she does not now wish to retract the execution of the same.

[L. s.] In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year above written.

"J. G. JENKINS, Notary Public,

"San Joaquin County."

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After the endorsement of this certificate on the mortgage, it was delivered by the Notary to the plaintiffs, who had the same recorded on the eighteenth day of July following. Subsequently, the plaintiffs becoming satisfied that the certificate of acknowledgment was defective, again presented the mortgage to the Notary, who endorsed a second certificate thereon in the form prescribed by law, which was also recorded on the fourteenth day of December, 1854.

The second mortgage was acknowledged before another Notary, on the twenty-third day of August, 1854, and he endorsed thereon the following certificate:

“ STATE OF CALIFORNIA, }
County of San Joaquin. }

“ On this twenty-third day of August, A. D. 1854, before me, came J. Zachariah and M. A. Zachariah, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they executed the same of their own free act and deed, and for the purposes therein mentioned.

[L. s.] In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year above written.

“ B. G. WIER, Notary Public.”

This mortgage was also delivered to the plaintiffs, and they had the same recorded. After it was recorded, at the request of the plaintiffs, the Notary endorsed a second certificate thereon, which was also recorded.

The defendants set up a right of homestead in a portion of the mortgaged premises, insisting that the original certificate of acknowledgment could not be amended *nunc pro tunc*. The defendants had judgment, and the plaintiffs appealed.

The only question in this case is, whether a Notary Public or other officer, taking the acknowledgment of a married woman, and making an erroneous certificate of such acknowledgment, could be permitted, during his continuance in office, but *after* the deed has passed from his possession, to correct the mistake and make the certificate conform to the facts as they originally existed.

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A. C. Baine for Appellants.

On behalf of the appellants, we insist that the Notaries who took the acknowledgment of Mrs. Zachariah had the right to correct their certificates of her acknowledgment, so as to make them conform to the facts; and that such correction and amendment was done and made by the endorsement of the other certificates on the mortgages, by the Notaries, during their term of office.

The certificate of acknowledgment of a conveyance is an act "*in pais*," which may be corrected or amended by the officer who made it, at any time during the term of his office. (*Jordan v. Corey*, 2 Carter, Ind. R. 385; *Elwood v. Block*, 13 Barb. Sup. C. Rep. 50; and see 3 S. & M. Rep. 364.)

The case of *Jordan v. Corey* drew in question the validity of a deed, in the execution of which three married women had joined with their husbands in conveying lands in which the wives had an interest by descent. The certificate was defective in not stating that the wives were examined by the officer without the hearing of their husbands. Upon the question whether the officer who took the acknowledgment should be permitted to amend the certificate, on the trial in the Court below, the Court, by Judge Blackford, says: "We think the officers had the right, and indeed, that it was their duty to correct at any time any mistake in their certificate." The certificate of the officer is but a written statement of his official acts in taking the acknowledgment, which our statute requires the officer to make on, or attach to the instrument; but our statute is not imperative as to the time when it must be done. Nor does the certificate, when made, become matter of *record* and conclusive, but simply "*prima facie*" evidence of the facts therein stated. (Comp. Laws of Cal., page 518, sec. 31.)

Why may not a mistake in this certificate be corrected by the officer who made it, during his term of office, as well as the certificate of a Sheriff of his official acts after they have been endorsed by him?

The cases relied on in the Court below, by the respondents, are distinguishable from this. The decision in *Elliott v. Piersoll*, 1 Peters R. 338, was controlled by a statute of Virginia, which the Court said "was in force in Kentucky," and which required in express terms a record of her acknowledgment to make a deed binding upon a *feme*

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covert and her heirs. The acknowledgment, certificate and recording became part and parcel of the instrument, and necessary to its validity as a deed between the parties thereto. But see Tucker's Commentaries, vol. 1, page 268, where it is said that "that statute refers to acknowledgments taken in open Court, and which were omitted to be entered on the record of proceedings, and not to acknowledgments before Justices '*in pais*.'"

So with the cases to be found in the Connecticut Reports, of which the case of *Pendleton v. Burton* is a leading one: in it the Court says: "It is provided by statute that no deal shall be accounted complete in law to convey real estate, but such as is *written, witnessed, acknowledged* and recorded; the acknowledgment to be recorded must be in writing, and such is the invariable practice." In these cases as in *Elliott v. Piersoll*, the decision turns upon the statutory provision, making it essential to the validity of an instrument as a conveyance between the parties to it, that it should be acknowledged and *recorded*. The due recordation (which could not be legally done without a proper certificate) of the instrument being the last of a series of acts necessary to constitute the *deed*, must have the *assent* of the *grantor* to it, as much as any other one of the acts constituting the deed. But could it be said, if the Recorder, in endorsing his certificate of record on such a deed, should make a mistake, that the Recorder could not correct it? We apprehend not.

Under our statute, the recording of a deed is not essential to its validity in any case, as between the parties. (Comp. Laws of Cal. p. 516; sec. 19, p. 517; sec. 24; *Hastings v. The City of Benicia*, 5 Cal. R. 315.)

There is no obligation resting on the mortgagee to have his mortgage recorded. (*Rose v. Munie*, 4 Cal. R. 173.) The facts — that the recording of the mortgages in this case is not essential to their validity between the parties, and that the mortgagees were under no obligation to record their mortgages — distinguish this case from *Elliott v. Piersoll* and the cases in the Connecticut Reports. And the act of spreading the mortgages upon the book of records in the Recorder's office of the county was nugatory, and had no effect one way or the other upon the rights or liabilities of the parties thereto; nor upon

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the right—yea, the duty—of the Notaries to correct the mistake they made in their certificates of their official acts, in taking the acknowledgment of Mrs. M. A. Zachariah. These corrections were made in the other certificates endorsed on the mortgages by the officers who made the first, during the term of their office; and the facts therein stated not being contradicted by any evidence adduced on the part of the respondents, are proof of the execution and due acknowledgment of the mortgages in question by Mrs. M. A. Zachariah.

There is no provision in that statute requiring the *acknowledgment to be certified* or the mortgage to be recorded, to defeat this homestead exemption right. The Court can require no other act to give validity to the wife's waiver of her exemption right than the statute specifies. She conveyed no title by the mortgages, for she had none in the land, and claims none except under the Homestead Act. Section 15 of article 10 of the Constitution only authorizes the *exemption from forced sale of the homestead and other property*. It does not authorize the change of title of property by legislative enactment. Hence, Mrs. Zachariah conveyed no title by the mortgages, but assented to the mortgages of her husband, and assented thereto in the manner required by statute to waive her exemption right, *vis*: by signing and duly acknowledging them separately and apart from her husband. Will the Court go beyond the statute, and impose the further condition, and say that the acknowledgment must be *certified*, and *certified at the time*, and that too beyond the power of the officer to correct a mistake that he might make in the *certificate*? and this, not to pass title to real estate from her, but merely her *assent* to the act of her husband.

Thos. Sunderland for Respondents.

The Appellants contend that the Notary had a right, and that it was his duty to correct the certificate after it had been recorded; and they cite and rely entirely on the case of *Jordan v. Corey*, 2 Carter Ind. Rep. 385, in support of said position.

It is therefore necessary to examine the case with some attention.

The nature of the action, the facts in the case, and the points decided, were all radically and essentially different from the case now before this Court.

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It bears indeed but a slight analogy to this case; and the only point in which it does resemble it, is more in the nature of a collateral issue, than in the substance of the action.

The action was not for the foreclosure of a mortgage, but was assumpsit on a promissory note. The note had been given for purchase money of land, with covenants of warranty.

The defense set up was, that the title to three-tenths of the land bought was defective, and therefore the note was without consideration, *pro tanto*.

The question about the validity of the conveyance of the married women, and the regularity of the acknowledgment, and the power of the Notary to amend the certificate, all came up collaterally.

The married women, themselves, were not before the Court, claiming the property and relying on the defective execution and acknowledgments and certificate.

It does not appear that there had been any eviction of defendants, and the Court might, perhaps equitably, have allowed an amendment in order to make the consideration for the note free from the difficulty set up.

But in this State, and by the rulings of this Court, no such defense could have been set up or allowed. No question about the validity of the acknowledgment could have been made, as long as the party remained in possession.

In *Jackson v. Norton*, 5 Cal. Rep. 262, it was held that the promise to pay and the warranty were independent covenants, and that until an eviction, the purchaser could not resist the payment of the purchase money; nor could he claim a *pro rata* deduction for a failure of title for part of the land sold.

It is now contended that if this case could be considered an authority on the question, that in one material respect it supports and sustains the case of respondents. In this respect it agrees with the decisions of other Courts.

In all other respects it is unsupported by any authority; it is inconsistent with, and repugnant to itself; it totally misapplies and perverts the case of *Elliott v. Piersoll*, which is cited to sustain it, and the principal points decided have been ruled directly contrary, not only by

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some of the most respectable of the State Courts, but by the Supreme Court of the United States.

Let us now analyze this case of *Jordan v. Corey* more minutely:

1st. There was no proof that the deeds had ever *been recorded*; and from the language of the case as reported, and the reasoning of the Court in rendering its decision, it would seem that they had *not* been recorded at the time of trial; nor is the opinion of the Court consistent with a different hypothesis. The plaintiff offered to prove at the trial that the acknowledgments were taken correctly in point of fact, but that, by a mistake, the officer had omitted to certify it correctly.

In the case now before the Court, there was no proof of any mistake, and no motion made at the trial to be allowed to amend the certificate.

The case of *Jordan v. Corey* was reversed solely on the ground that proof of a mistake should have been received, and the officer allowed to amend the certificate *nunc pro tunc*.

In this case there is no such error alleged, and there is no such ground of reversal.

In *Jordan v. Corey* it was not pretended that the officer had power to affix a *new certificate* at the request of the grantee; but only that he might *amend the old one*, on proving, in open Court, that there was a *mistake in it*.

In this case the appellants rely entirely on the second certificate, made six months after the mortgages had been recorded, to contradict the first certificate, made at the time of acknowledgment and before the recording thereof.

2d. The case of *Jordan v. Corey*, as far as it is a sound authority, is in favor of the respondents. The Court, on page 387, says:

"There can be no doubt that the certificate of the acknowledgment of a married woman as to her execution of a deed, must show by the facts stated in it, that she had been examined in the manner prescribed by the statute, or the deed as to her will not be valid. The certificates in question are defective for not showing that the married women were examined without the hearing of their husbands."

According to this, both the acknowledgment and certificate are a

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necessary part of the deed, and without which the deed will not be valid. The certificate was defective in one point, precisely as this certificate is, and the Court held, that as to the wife the conveyance would be *void*.

3d. The case of *Jordan v. Corey* is inconsistent and repugnant to itself. Whilst it decides that the certificate itself must show all the facts, it also holds that all the facts may be proven by parol evidence. Now, if one material fact, without which the certificate would be invalid, can be shown by parol evidence, why could not all the facts be made out in the same way?

The certificate in *Jordan v. Corey* did *not* state the material fact of an examination separate and apart from and without the hearing of the husband. The way the difficulty was gotten rid of was to allow the officer to prove that it was a *mistake*, and to correct it. If he could correct a mistake in this respect, he might in all other respects. He might, in fact, if there had been no certificate at all, have made out by parol evidence that there had been an acknowledgment, but that he had omitted or forgotten to certify the same.

Is not such a ruling in direct violation of the fundamental law of evidence, that written instruments cannot be altered by parol evidence? Is it not clearly manifest, that if a certificate to a formal written instrument can be altered by having words or sentences interpolated into it by showing a mistake, that this is allowing *written* evidence to be altered by *parol* evidence?

4th. The case of *Jordan v. Corey* is not supported by any authority, and is overwhelmed by opposing authority. In *Elwood v. Klock*, above cited, page 55, 13 Barb., (and a junior decision by two years) the Court says:

"I think the conveyance by a married woman can only become operative upon her private examination before a proper officer, duly certified by him; and that it cannot be established by parol evidence. A deed duly acknowledged may be read in evidence, without further evidence of its execution. But I apprehend, if the certificate omitted to state essential facts; as for instance, that the officer knew the grantor; that it could not be helped out by evidence of the fact omitted, so as to entitle the deed to be read in evidence in virtue of the

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certificate thus forfeited. The acknowledgment is a nullity unless properly certified."

The slightest examination of the case of *Elliott v. Piersoll*, 1 Pet. 328, will show that it is *directly contrary* to the doctrine laid down in *Jordan v. Corey*.

The Court says, page 341: "Had the Clerk the authority to alter the record of the certificate of the acknowledgment of the deed at any time after the record was made? We are of the opinion *he had not*."

But the Court, in the case of *Jordan v. Corey*, cited this case as an authority for saying he *had*. A more palpable and outrageous perversion of an authority cannot be found in all judicial annals than this.

The same doctrine was held by the Supreme Court of Connecticut in the case of *Stanton v. Button*, 2 Cow. 527.

The Court says: "A deed of land without a proper certificate of parties' acknowledgment, is inadmissible as evidence of title."

"An omission in the certificate cannot be supported by intendment or construction."

In the case of *Pendleton v. Button*, 3 Conn. 406, the Court says: "The acknowledgment of a deed must appear on the deed, and cannot be proved by parol evidence."

This is a leading case, and has been followed in numerous cases in the same Court. (See note at bottom of pages.)

Again, in the case of *Hayden v. Westcott*, 11 Conn. 129, the Court says: "The acknowledgment of the deed must appear *on the deed*; and no defect in the certificate can be helped by *parol evidence*."

The same doctrine has been held in numerous cases by the Supreme Court of Pennsylvania.

The case of *Watson v. Bailey*, 1 Binn. 470, is the leading case; *Evans v. Commonwealth*, 4 Sergeant & Rawle, 271; 6th Sergeant & Rawle, 48, *Watson v. Mercer*.

Another important case decided by the same Court is that of *Jordan v. Jordan*, 9 Serg. & R. 270.

This was a defective acknowledgment in the same point. As in this case, there was no separate examination of the wife; or if there was, the certificate of the magistrate did not show that fact. They offered at the trial to prove by the *magistrate* that there was such privy

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examination. The evidence was excluded at the trial, and held inadmissible.

On appeal, the Supreme Court says: "The Act directs the examination of the wife to be separate and apart from the husband; and that they were separate must appear on the face of the certificate, and not otherwise. I am, therefore, of opinion that the certificate of acknowledgment was defective. But it was attempted to supply the defect by parol evidence of the magistrate before whom the acknowledgment was made."

"The evidence was also rejected, and in my opinion with great propriety."

"There would be no certainty in titles if this kind of evidence was permitted."

The case of *Elwood v. Klock*, 13 Barbour, 50, cited by the appellants, contains no such doctrine as they contend for, but directly the contrary.

The case from the 3d Smed. & Marsh. 364. cited by appellants, was in respect to a notarial protest on a *promissory note*, and has not the most remote application to this case.

The next case relied on by appellants is that of *Hastings v. City of Benicia*, 5 Cal. Rep. 315. In this the rights of a *married woman* were not involved.

The case was first decided at the January Term, 1858 — Justice BURNETT delivering the opinion of the Court, and FIELD, J., concurring. The opinion of the Court at that term was to the effect, that where the rights of third parties had not attached, the officer making the certificate of acknowledgment might correct a mistake in his certificate at any time during his continuance in office. At the subsequent October Term a reargument was had, and the Court rendered the following opinion — BALDWIN, J., delivering the opinion of the Court — FIELD, J., concurring.

This controversy involves a lot of land claimed as a homestead by the wife, and the validity of which claim rests upon a single question raised by a single fact. The question is as to the power of a Notary

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Public, who has taken the acknowledgment of the wife to a deed for land; made a certificate on the deed; and after the deed and certificate have passed from him and been recorded, to make and record a new certificate of acknowledgment—the first being fatally defective. The fact in connection with this principle is, that defendants, Zachariah and wife, made a paper, in form a mortgage, on a lot in Stockton, the homestead of these parties, to secure a debt due by Zachariah to the plaintiff below. This paper purports to have been acknowledged by the female defendant before one Weir, a Notary Public, about the time of its date; and a certificate of her acknowledgment is endorsed, by the officer, on the deed. But this certificate omits to state the fact that the wife was examined separately and apart from her husband and out of his hearing, and further, that in such examination she acknowledged that she executed the same freely and voluntarily, without fear or compulsion, or under undue influence of her husband, and that she did not wish to retract the execution of the same. Some six months afterwards a new certificate was made by the officer, and recorded.

It is not necessary to go into a review of the long list of cases which, in this State and elsewhere, hold the necessity of a compliance with all the substantial requirements of the Act regulating the manner of conveyances by married women, in order to give validity to such acts. The law, knowing the necessity of strictly guarding the wife from the influence of the husband, as indispensable to the existence of such a thing as a separate estate or a right of property in her, has, by a uniform and consistent policy, thrown safeguards around the acts of disposition of such estate, and exacted a strict respect to them. Our statute is explicit in this regard. The wife is protected from the influence of the husband and secured in the enjoyment of the freedom of her will, by the provision that she is to be examined by the officer apart from her husband, and that the officer shall state this fact in his certificate. It is contended, however, that this certificate may, when completed and recorded, and after it has left the hands of the officer, be altered or amended, or an entirely new certificate be made, and this, we presume—for we see no limitation to the principle—at any distance of time, at least, so long as he continues in office. The statute seems to contemplate but one certificate. It speaks of but one. That cer-

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tificate is evidence for certain purposes; but what would be the effect if several certificates were allowed, some qualifying or contradicting the rest, might not be so easy to determine. If two could be given, why not a dozen?—if within six months, why not within six years? If the certificate amendatory of the former—why not in contradiction of it—denying all acknowledgment of the deed? If in respect to one class of deeds, why not to all? And what would this lead to, but the putting all land titles in the power of unscrupulous Notaries, or leaving them to the mercy of their memories? These certainly are serious questions. We should have some very strong reasons or weighty authorities to sustain a proposition out of which such results may grow. We have been furnished with only two cases which seem to approach the principle contended for by the appellants. This, itself, is no inconsiderable argument against the pretension. Very many controversies have grown out of the alleged defective acknowledgments, and most of these have been, perhaps, in consequence of misprision, or fault of the Notaries, or other officers certifying. Some of these have been hard cases upon purchasers. The rights of the wife have often, indeed, in most of the cases, been recognized and maintained. If the sense of the profession and the Bench had not been decidedly against the power of the officer to amend the certificate, it is very strange that the attempt had not been made to amend it; especially, as will be shown hereafter, as it has been frequently attempted to prove the facts omitted by parol; and that, too, by the evidence of the Notary. By how much speedier a process could all this have been effected, if a Notary's certificate could at once have been amended, or a new one made out.

The ground upon which the power in question is rested is, that the certificate of a Notary is an act, *in pais*, which he may exercise by virtue of his office, and at any time while in office; and that the amending of his acts is in pursuance of the same general authority which enables him to do them. But we think this is not correct. A Notary derives his power from the statute over these subjects. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is, in other words, acting as under a special commission for that case—clothed with a limited statutory power. He is

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to take the acknowledgment, and certify it, as parts of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. He has exhausted his whole power over the subject, as much as a special commissioner created for a particular purpose after the adjournment; or a Court, after the lapse of the term. If we were to look to analogies, we see nothing which upholds this pretension. If, as in some of the States, particular officers clothed with authority to take depositions, return them to Court, it would scarcely be contended they had the power, months afterwards, to amend them, or to make return of new facts not appearing on the return, when they closed the commission; nor could any other officer, except by virtue of some statutory power, after he had made return of his proceedings; nor officers charged with special inquisitions.

Elwood v. Block (13 Barb., S. C. R. 50) is a case not dissimilar to this, both in the facts and principles involved. Mrs. Elwood executed a quitclaim of the premises in dispute, but the acknowledgment was defective in the same respect as this mortgage. On the trial below, the defendant offered the Commissioner to prove — and he did — that he took the acknowledgment of Mrs. Elwood, and that the same was done in compliance with the provisions of the statute. The admissibility of this proof was the matter before the Court on appeal. The Court reviews the statutes of New York on this subject, and shows the various changes made in them. By the Act of 1771, it was provided that no estate of a *femme covert* should pass by her deed without a previous acknowledgment, made by her apart from her husband, and a certificate thereof purporting that she had been examined privately, endorsed on the deed, and signed by the officer, etc. The same provision was re-enacted in 1788, in 1801, and 1813. The Court says that, in the revision of the laws in 1830, the same provision was substantially re-enacted. That statute is given, which is almost identically the same as ours. It provides that no estate of a married woman shall pass by any conveyance not acknowledged as required by the Act; and that the officer who shall take acknowledgments shall endorse a certificate thereof, signed by himself, on the conveyance; and in such certificate shall set forth the matters therein before required to be done.

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take the acknowledgment of *femmes covert* — the law being substantially the same as that of California as to the requisites of acknowledgments, etc. Some time afterwards, Elliott moved the County Court to amend the certificate endorsed on the deed, and for the deed and certificate, as amended, to be recorded — which motion was granted, and the new record made. The question of the validity of the deed to pass the estate of the wife arising on this state of facts, the Supreme Court of the United States, on appeal, affirmed the judgment below in favor of her title. The Supreme Court held that the County Court had no jurisdiction, and its order was void, for the reason that the statute had given this power to the Clerk, and the Court had no supervision over him in this respect. The appellants insisted that the order of the Court could be disregarded, and that the amendment stood as the act of the Clerk, having a right to amend his certificate on the back of the deed and make a record of it. The Court says:

“Had the Clerk authority to alter the record of his certificate of the acknowledgment of the deed at any time after the record was made? We are of opinion he had not; we are of opinion he acted ministerially and not judicially in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the Clerk to make and record a certificate of the acknowledgment of the deed was *functus officio* as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable; and the remaining powers and duty of the Clerk were only to keep and preserve the record safely.

“If a Clerk may, after a deed, together with the acknowledgment or probate thereof, have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

“The doctrine that a Clerk may at any time, without limitation, alter the record of the acknowledgment of a deed made in his office, it would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this Court.”

This language is relied on by appellant, as establishing the propo-

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sition that the mere taking of the acknowledgment is an act *in pais* and subject to be amended by the officer. But the words of the text must be altered before such a construction can be given; for, after the record by the Clerk in Elliott's case was made, the power of amendment ceased; the certificate was insufficient to entitle the deed to record as to Mrs. Elliott; yet it was recorded, and after the record it was held the Clerk's power over the subject ceased. Where is the difference between the Clerk's power ceasing on his recording the deed and certificate, and the Notary's power ceasing after the recording by the Clerk? The Court means no more than this; that while the deed and acknowledgment are in possession of the Clerk, and his office of properly certifying the acknowledgment and recording the papers unaccomplished, the matter was *in fieri*, and he might go on at any time before he finished the business, to complete it, just as in this case, if the Notary had retained the papers, and had, in attempting to write the certificate, made a mistake, he might have rectified it at any time before he discharged himself of the business; or delivered the papers for record, or possibly before they had been recorded. But it is not intimated that after the papers had gone from his to another officer's possession, and been delivered for record, or actually recorded, he still could control them. In such case "by the exertion of his authority the authority itself becomes exhausted." The whole reasoning of the Court, in the section quoted, is direct to show that the Notary could have no such authority; for all the evils which are so well stated would follow as well from permitting alteration of the record to be made by amendments of the Notary as of the Clerk. This singular result, too, would follow. Under our statute the Clerk can take the acknowledgment as well as the Notary. The Notary may amend the certificate, and therefore, the record, after the deed and certificate are recorded; but the Clerk, by the direct language of the decision cited, could not. The decision in 1 Peters, therefore, only amounts to this: that the act is *in pais* until some decisive act is done, showing that the officer has exercised his authority over the subject; such as recording the papers or the like; but after that, like other cases of special authority, the power once exercised is exhausted.

We do not deem it necessary to criticize the case of Jordan v.

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Corey, in 2 Carter's Ind. Rep. 385. That case we think wholly unsupported by authority. (See also 2 Conn., 527; 3 *Ib.*, 406; 11 *Ib.*, 129; 1 Binney, 470; 9 S. and R., 270.) In this last case it was attempted to supply the defect by the evidence of the magistrate taking the acknowledgment. But the Court overruled the point, saying, "there would be no certainty in land titles if this kind of evidence were admitted." But if the principle contended for be true, why not suggest to or permit the officer, while denying him permission to state the facts validating the deed on oath, to certify them to the Court?

The fact that in some of the cases cited the statutes construed require the recording of the deed to give or complete the title, does not make the cases less authoritative; for the reasoning of the Judges does not rest upon this circumstance.

We decided at this term that the homestead must be conveyed in the same manner as the separate estate of the wife, so far as the certificate of acknowledgment is concerned.

The judgment of the District Court is affirmed.

LAWRENCE v. KNIGHT.

Where a lease contained the usual covenants for payment of rent, and re-entry for non-payment, and provided for the appraisement of improvements erected by the lessee, and payment of their value by the lessor at the expiration of the term, and the lessor re-entered for non-payment of rent: *Held*, that the lessee could not maintain an action upon being evicted, for the value of his improvements.

If the lessee has any remedy, he must wait till the expiration of the time fixed by his contract. He cannot by his own default change the terms of the contract in his own favor.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

The facts upon which this case is made may be briefly stated thus: The defendant, in 1853, leased a lot in San Francisco to one Allen for a term of seven years; the contract provided that Allen should pay a ground rent of three hundred and fifty dollars per month; also,

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that lessee should erect certain buildings; these, at the end of the term, were to be appraised, and their value to be paid by the lessor. The interest of lessee was assigned and came to the hands of the present plaintiff. A clause of forfeiture for non-payment of rent was in the lease; and this condition having been broken by lessee or his assignee, the lessor re-entered.

The bill is filed by the plaintiff for the value of these improvements. The defendant demurred, and the Court below sustained the demurrer, and plaintiff appealed.

Heydenfeldt & Perley for Appellant.

1. The defendant, Knight, having terminated said lease by his own voluntary act, (in serving notice to that effect) is now estopped from denying the consequences of that act; that the "*term*" is at an end, and the proper remedy is by bill in equity. *Humphreys v. Holtsenger*, 3 Sneed, 228; *Alston v. Boyd*, 6 *Humph.* 505; *Ridley v. McNary*, 2 *Humph.* 174; *Herring v. Bird*, 4 *Humph.* 362; 6 *Humph.* 324; *King v. Thompson*, 9 *Peters*, 204; *Ewing, Adm'r. v. Handloy*, 4 *Littell*, 371; *Bright v. Boyd*, 1 *Story*, 494; *Hall v. Delaplaine*, 5 *Wisconsin*, 206; *Berry v. Executor of Van Winkle*, 1 *Green Ch. (N. J.)* 269; *Copper & Colbath v. Wells & Hoe, Saxton*, pt. 1, p. 10; 4 *Edward's Ch. Rep.*; and see *Van Rennselaer heirs v. Peniman*, 6 *Wendell*, 569.

2. "Term" is from the Latin "*terminus*," or end, and is the duration or continuance of the *estate*, and not of the *time* mentioned in the lease. A term of two years may be put an end to in one year or any less time, by forfeiture or otherwise. As to the signification of "term," see *Taylor's Landlord and Tenant*, sec. 16; 1 *Hilliard on Real Property*, 198, 201; 2 *Story*, sec. 1316.

3. The "term" being thus ended by his own act, prior to the time agreed upon by the parties for its termination, he is liable at once for the value of the improvements, as stipulated in said lease, in the same manner as if he had permitted said lease to expire by its own limitation. He cannot claim the benefits resulting from such termination of the lease, to wit: the possession of the improvements and their rents, relieved of its burthen; but must take it subject to the

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payment for the value of the improvements. *Baroillhet v. Battelle et al.*, 7 Cal. R. 450; *Gaskill v. Trainor*, 3 Cal. R. 334; *Gaskill v. Moore*, 4 Cal. 233.

4. The sixty days mentioned in the lease, as the time when said appraisers were to be appointed prior to the end of said term, not having elapsed between the time when Knight gave notice that he intended to claim a forfeiture and the time of his re-entry into possession of said leasehold premises, said plaintiff is thereby released from the performance of such *impossible act*, the defendant having put it out of plaintiff's power to comply with such condition.

5. The appointing appraisers was an act to be done by defendant, the same being a benefit to him. Because it was only upon condition that said appraisement be made, that said defendant was entitled to an extension of time for the payment of said appraised amount.

Shattuck, Spencer & Reichert for Respondent.

The demurrer raises the following questions: *First*, Can a lessee, who has forfeited the lease by the non-payment of rent, and that forfeiture has been judicially declared, maintain an action on the covenants of the lessor, to be performed only when the *term* is to be complete and ended?

Second. If such an action can be maintained, can it be done when the term is ended by the default of the lessee in refusing to pay rent, or only when the term has expired by limitation?

These are questions of practical importance, and if new, might be interesting; but they have both been settled by this Court in *Whipley v. Dewey et als.*, 8 Cal. R. 38.

This lease, as the times changed, bore a high ground rent. It had years yet to run. The lessee, or assignee, refuses to pay that rent. The landlord, after waiting for months in vain for his rents, declares a forfeiture by its terms, and re-enters, thereby losing his high rent for the balance of the term.

The buildings are newer, and therefore, are worth more now than they will be at the end of the term.

It is also supposable, that at the end of the term building material

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and labor will be cheaper than at present, and the building, therefore, worth less than it is now, irrespective of its age.

Now, if the lessee can, by his own wrong, terminate a lease, and then take advantage of that wrong and have his building valued in its newer state, and compel his landlord, not only to pay him this extra price, but to pay him this years before the time contracted for, it would be a wonderful way to rid one's self of a lease that, by the change of times, had become onerous.

Third. We submit, that having forfeited the lease on his part, and rendered it void as to time, the lessee cannot afterward sue upon it. It is dead as to him, and he cannot invoke its aid.

This suit is founded on a contract rendered void as to the plaintiff by its own terms and by his own showing. It cannot be sustained, and the demurrer is properly interposed. The plaintiff cannot now, or at any future time, sustain a suit upon this dead contract.

If he has any rights, they are at the end of the term, and in equity, not in law. If, at the end of the term, he can show that the building is worth more to the landlord than he has lost in rents by the default of the plaintiff, an account can then be taken; but not *now*, for the reason that it cannot *now* be ascertained what the building will be worth *then*, nor how much the landlord will lose in the way of rents.

Fourth. In reviewing briefly the points taken by the appellant, we may observe as to the *first*, that the proposition is *wrongly stated*.

Knight did not terminate the lease "by his own voluntary act." He was satisfied with it; did not wish to terminate it, but the appellant would not comply with its terms; refused to pay rent; and to re-enter was the landlord's only remedy. It is an abuse of terms to call that a *voluntary act* for which he should suffer; that was forced upon him by the bad conduct of the lessee. *Second.* The cases cited to support the proposition are inapplicable.

Those decisions point to two classes of cases:

1. Where one has contracted for the purchase of land, and under such contract has gone into possession and made improvements, increasing the value of the land: upon a rescission of the contract, the value of the improvements shall be set off against the rents and profits.

2. Where one has placed a relative in possession of land, under the

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idea that it will be donated, and valuable improvements are made with this expectation, if the donation fails, the value of the improvements shall be paid for.

All this is reasonable, but none of the cases or principles apply to this.

The explanation of the word *term*, under the *second* head or point, is likewise erroneous. "A *term* signifies, not only the limitation of *time*, but the estate and interest that pass for such time." Taylor's Landlord and Tenant, sec. 16.

To limit it, therefore, to the *estate* is erroneous. *The end of the term*, as found in the lease, evidently means the end of the *time* mentioned therein: the *time* when the lease expires by its *terms*, and not the ending of the *estate* by the default of the lessee.

The *estate* may be forfeited, but the *time* when the lease ends, and when the landlord is to perform his covenants, is certain and fixed by the lease.

The authorities cited do not sustain the *third* proposition of the appellant. Baroillhet v. Battelle, 7 Cal. R. 480, decides that where the lessee mortgages the building for the payment of rent, the landlord may foreclose such mortgage for rent in arrear; nothing more. Gaskill v. Trainor, 3 Cal. R. 334, simply shows that the non-payment of rent will not work a forfeiture of the lease, unless the rent be demanded as at common law. Gaskill v. Moore, 4 Cal. R. 283, only decides that a mechanic's lien upon a leasehold estate is not destroyed by a forfeiture of the lease and a subsequent improvement by the landlord.

It is submitted that neither of these cases supports the proposition; much less is it supported by its own reasoning.

The *fourth* and *fifth* propositions of appellant are sustained by no authority, and seemingly are not sound.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

We think the demurrer was rightly sustained. The argument of the respondent we think conclusive, to show that the plaintiff or his assignee can be in no better situation, after having violated the con-

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tract of lease, than if they had complied with it. If they had complied with it, the buildings would have been appraised at the end of the term and at their then value, which probably would have been very different from the present value. The only remedy of the lessor for the recovery of his rent was the re-entry. This remedy was secured to him by contract. Because he has availed himself of his clear right, he does not subject himself to an entire change of the contract, both as to time of payment and amount. If this were so, all a lessee would have to do, under a contract of this sort, to rid himself, at any time, of a bad bargain, would be to refuse to pay his rent, and claim at once payment for his improvements; an operation by which he might make, and could not lose.

If the plaintiff has any remedy, he must wait until the time expires which the contract has fixed. He cannot, by his own default, change in his own favor the terms of the contract, and fix upon the lessor a contract he never made.

Judgment affirmed.

SCRIBER v. MASTEN.

Where the defendant contracted with a factor who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property.

A notice of the ownership of the goods which would put the defendant on inquiry is sufficient.

In such a case, no demand is necessary previous to bringing suit.

APPEAL from the District Court of the Fifteenth Judicial District, County of Butte.

This was an action to recover damage for the wrongful taking of certain goods, the property of plaintiff.

The cause was tried in the Court below without a jury, and from the finding of the Judge, the following facts appear:

Abel & Monty were commission merchants, doing business in Oroville, Butte county, and were also doing a general mercantile business,

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buying and selling on their own account. In February, 1857, the plaintiff, Scriber, left at their house a lot of merchandise to be sold on commission. In May, 1857, Abel & Monty became embarrassed, and their goods in the store were attached by Stewart & Co. On the eleventh day of May, defendant, Masten, being also a creditor of Abel & Monty, made an arrangement with them and with Stewart & Co., to the effect that Abel & Monty should give their notes, with Masten as endorser, to Stewart & Co. for about \$2,100, and Stewart & Co. should dismiss the attachment, and Abel & Monty should make a transfer of the goods to Masten. This was done; during the negotiation, Monty informed Masten that there were some goods in the store left them on commission. On the same day Masten took possession of the goods, and on the next day removed them, together with those left by plaintiff to be sold on commission. Abel & Monty were present when the goods were removed, and objected to the removal of certain articles belonging to plaintiff; but their objection was not heeded by Masten; whereupon Scriber brought this action against Masten to recover the value of the goods left by him with Abel & Monty. No demand was made of Masten previous to the bringing of suit. Plaintiff had judgment in the Court below, and defendant appealed.

Messick & Sweesey for Appellant.

The Court erred in rendering a judgment for the plaintiff:

1st. Because the Court finds that there was no demand and refusal shown.

2d. Because Abel & Monty were not technical factors, and the notice given to Masten at the time of the transfer, "*that there were some goods in the store left them on commission,*" without stating what they were or where they were, was insufficient to render his possession of the goods tortious. 7 Term R. 360; 6 Cal. R. 383; 5 Cal. R. 404.

3d. Because the findings show that the defendant took possession of the store and all the goods, under such insufficient notice, and had possession of the same a day before Abel & Monty objected to the removal of the butter and cheese.

4th. The transfer was good, at least to the interest Abel & Monty

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had in the goods left on commission, for storage, commissions, etc., and Masten had a right to take possession.

5. Masten having taken possession of the store and the goods of the plaintiff, intermixed with those he purchased, it was his duty to exercise ordinary care in the protection and preservation of the same; he therefore was not liable in any action, though he removed them, without a demand and refusal, so long as no actual conversion is shown.

6. To enable the plaintiff to recover, he should have averred and shown that he had discharged all lien or claim of the factor, to either the factor, his transferee or pawnee, or that he had made tender thereof. 5 Durnford & East, 644.

Winans for Respondent.

The only question in this case is, whether a demand and refusal was necessary, under the facts set forth in the findings of the Court, to fix defendant's liability. The proposition of defendant's counsel, that it was necessary to make a tender of commissions before plaintiff's right of action could accrue, being entirely novel and utterly unsupported by any authority in the books, we shall not discuss. Undoubtedly, a factor has a lien on his principal's goods for his commissions, but it is for the factor to assert that lien where it exists.

It is contended that as the property was delivered to defendant on the day before he undertook to move it, and was ordered not to remove it by Monty, therefore he came rightfully in possession, and a demand and refusal were necessary to constitute a conversion. To this we answer, *first*, he did not come into the possession of it; and *secondly*, if he did, a subsequent removal after notice of plaintiff's ownership was *per se* a conversion of it.

First. We contend that there was no delivery to defendant of the goods in question belonging to plaintiff.

The Court simply finds that Abel & Monty delivered to defendant all "the goods." What goods? Why, the goods they sold to him. What goods did they sell to him? All the goods in the store belonging to them.

Defendant therefore, in fact, never had any delivery to him of plaintiff's goods, and therefore, in taking possession of them, committed

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a tort. But assuming that he did come into possession by delivery to him from Abel & Monty; the very assumption of that possession by defendant was a conversion. Abel & Monty had no right to sell their principal's goods, and defendant, knowing that they were the goods of another party, had no right to buy them. His very purchase, under such circumstances, was tantamount to a conversion. Cowan's Treatise, vol. 1st, p. 231; see same authority, pp. 340, 341, 342, 343; Durell v. Mosier, 8th Johnson, 445; Evrard v. Coffin, 6th Wendell, 603.

"The assuming a right to dispose of property, or exercising a dominion over it to the exclusion or in defiance of plaintiff's right, is a conversion. Bristol v. Burt, 7th Johnson, 254, and cases there cited; Reynolds v. Shuler, 5th of Cowan, 323; and see as particularly applicable to the present case, Connah v. Hale, 23d Wendell, 462.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This appeal is without merit. The unlawful assumption by defendant of the ownership or dominion of the plaintiff's property, was a conversion of it. If the defendant did not know, at the time he contracted with the factors, his debtors, that plaintiff owned the goods he knew it before he removed them. If the factors had a lien for commissions, under the circumstances, the defendant, who took away the goods, and subjected the plaintiff to the cost and trouble of getting them back or recovering their value, had not. There was no necessity of any demand against a conscious wrong doer.

Whether the notice given by the factors to the defendant was so precise as to identify, with exactness, the goods in controversy, it was certainly enough to put the defendant on inquiry, and this inquiry would have easily given him the proper information. If he chose to proceed without making inquiry, and to remove all the goods, he is responsible for the consequences.

Judgment affirmed.

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MONTGOMERY v. TUTT *et als.*

An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. The general rule of Courts of Equity in foreclosure suits is, that all persons materially interested should be made parties, in order that complete justice may be done and multiplicity of suits avoided.

It is not, however, absolutely essential in all cases to make subsequent incumbrancers, prior to suit of foreclosure, parties to the suit. If not so made, they are not bound by the decree; but they are not necessary parties to a decree as between the mortgagor and mortgagee; and in many cases where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so.

Their equity of redemption from the foreclosure, if not made parties, continues, and this they can assert at any time within the period allowed by the Statute of Limitations.

The equity of redemption of a subsequent incumbrancer who has been made a party and had his day in Court, is by the decree taken away, leaving only the statutory right.

In an action of foreclosure of mortgage, when there are several subsequent incumbrancers, who have been duly served with process and suffered default, and one who was not served, and when it appears that the property has not been sold under the decree for a sum less than the amount due upon the mortgage, and no question as to the regularity or fairness of the sale is made, the defendants so served are not in the position to complain that their co-defendant was not properly served.

In an action against the maker of a note or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay.

The failure to make presentment at the place named would not discharge the debt, but could only be pleaded in defense as to the question of costs and damages. *Wild et al. v. Van Valkenburgh* (7 Cal. 166) overruled.

APPEAL from the District Court of the Fifteenth Judicial District, County of Colusa.

This was a suit to foreclose a mortgage executed by the defendant, Tutt, upon certain premises situated in Colusa County, to secure the payment of his promissory note to the plaintiff. The note bears date on the fourth of February, 1856, and is for the sum of \$6,900, payable to the plaintiff or order, one year from the seventh of March, 1856, at the banking house of D. O. Mills & Co., at Sacramento city, with interest at the rate of three per cent. a month, to be paid at its maturity, with four hundred and twenty dollars for the use of the interest in the meantime. The mortgage bears the same date, and was duly acknowledged and recorded. The complaint sets forth the note and mortgage, and alleges the maturity and non-payment of the

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note, and the non-payment of any interest thereon, and that since the execution of the mortgage the defendants, Wilson, Jordan, Middlemass and Page, administrators of the estate of Coonce, "have acquired, or claim to have acquired, some interest in the premises," and are therefore made parties; and concludes with a prayer for a personal judgment against the defendant, Tutt, and for the foreclosure of the mortgage and sale of the mortgaged premises, and execution against his property for any balance of the judgment remaining unsatisfied out of the proceeds; and for general relief.

The defendants, Tutt, Jordan, Wilson and Page were personally served with summons; and the Sheriff's certificate states that service was made on the defendant Middlemass "by an acknowledgment from him." Page demurred to the complaint, and his demurrer being sustained, the suit was discontinued as to him. The default of the other defendants was taken, and a personal judgment rendered against the defendant Tutt for the sum of \$12,339.27, with a decree directing a sale of the mortgaged premises, the application of the proceeds to the satisfaction of the judgment, the surplus to go to the mortgagor, and execution to issue for any deficiency, and adjudging that the defendants be barred and foreclosed of all equity of redemption in the premises from and after the delivery of the deed to the purchaser at the sale.

From this judgment and decree the appeal is taken. Pending the appeal, the defendant Tutt has filed a release of errors. The other defendants assign as errors, 1st. The want of proof of service of summons on the defendant Middlemass; 2d. Want of entry of the default of the defendants; 3d. Excess in the personal judgment against defendant Tutt, and its rendition without proof of the amount due; 4th. The foreclosure of their equity of redemption; and 5th. Want of any averment in the complaint of a presentation of the note for payment at the banking house in the City of Sacramento, where, by its terms, it is made payable.

P. L. Edwards & L. Sanders, jr., for Appellants.

All of the appellants were necessary parties. The complaint directly avers their interest in the subject of the controversy; and the "general rule is, that for the purpose of effecting an equitable adjustment among

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all persons interested in the mortgaged property, *all parties in interest* shall be made also parties to the suit. * * When all parties in interest are before the Court, the decree will be made such as to satisfy all their mutual and respective equities." 2 Hilliard on Mortgages, 110. To the same in effect, but more *in extenso*, is 1 Daniell's Chan. 240. The former authority is among the latest, if not the latest, upon the subject.

It is, however, insisted for the respondent, that the authorities are very conflicting upon the point, and *of course*, that their weight preponderates in his favor. From a careful examination of the collation cited in Story's Equity Pleadings, section 193, and the notes appended, we have been *forced* to a different conclusion. In fact, it would appear that Justice Story conceived his first doubts in view of Mr. Calvert's authority.

It will also be observed that Mr. Calvert's views were only expressed in regard to questions arising between an elder and younger mortgagor, and can have no direct application to other cases. Here it is not averred that the appellants are mortgagees, and it is to be taken most strongly against the pleader. They are to be taken not as mortgagees, and in fact, were not. But even regarding them as such, the case is not within the purview of any of the authorities cited. There may be, and are, cases in which a subsequent mortgagee is not a necessary party; and there may be, and are, cases in which, from the existence of particular facts, he is an *essential* party.

Regarding the appellants as severally holding younger mortgages, whether they are of equal or diverse execution and effect, justice cannot be dispensed without having all in Court. Each has the right of redemption, and is subject to contribute towards the redemption of the whole, according to the equities of all. *A fortiori*, it is palpably inequitable to bring in some of such younger mortgagees, and leave others out, so as to throw the whole burden upon the former.

In Daniell's Chan. 261, it is said, that "The mortgagee is entitled to insist that the whole mortgaged estate be redeemed together; and for the purpose that all the persons interested in the several estates or mortgages should be made parties to a bill seeking an account or

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redemption." And he adds, that the owner of a part of an estate mortgaged for the same sum must bring in the owner of the remainder.

In a late case, Vice Chancellor Bruce held that even subsequent judgment creditors are necessary parties. Cited in 2 Hilliard on Mortgages, 115, 116.

So, if the right of redemption, as in this case, become "severed after the mortgage," all must be made parties. *Ibid.* 118.

So it is irregular to proceed against one alone for a foreclosure, when another is in possession under his claim; and here such possession is averred. *Ibid.* 119.

We think it unnecessary to encumber this argument with citations of other authorities. We believe that a plain and common sense application of these elementary propositions will unmistakably take this case without the range of those cited for the respondent.

The New York cases of *Cox v. Wheeler* and *Andrews v. Wolcott*, cited by the counsel, have no application. In neither were the facts even remotely like these. The first was the case of foreclosure *in pais*, under the statute of that State. In both the mortgages had been given to secure debts to become due by instalments. Sales had been made to enforce payment of the first instalments; and the principal question was whether the purchasers took subject to the incumbrances for the secured instalments, or relieved therefrom. In neither is the question of parties mentioned otherwise than incidentally, and the head notes give no intimation that such a question was before the Court.

It is said that Middlemass is not prejudiced; for the decree is void as against him for the want of service of process. We reply, that he is prejudiced. He had a right to be in Court, and to be there by regular process. He cannot rightfully be subjected to the costs of that and of this Court. If any decree at all was taken, he had a right to exact an adjustment of all equities between himself and all the others, and that none should be taken which did not adjust such equities.

All Courts, and especially those of equity, aid in bringing litigation to an end, and are averse to the unnecessary creation of costs. It is said that the other appellants are not prejudiced, for they had both the equitable and statutory right to redeem. We reply, all the considerations applied to Middlemass; and further, we insist that they were

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prejudiced by a decree which was null as against Middlemass, which determined their right of redemption, and failed to adjust any of the equities between him and themselves.

This case does not stand as if the respondent had sued the mortgagor alone. He sued all, and averred the interest of all in the property. They had a right to expect and demand that he should proceed regularly against all; that they should not be bound by the decree, unless all the interested of all were bound. There is a marked difference between a case which omits the mention of other parties or the statement of facts showing that others are interested, and one in which the bill itself charges the interests and parties.

Robinson, Beatty & Heacock for Respondents.

That as to the first assignment of error, we admit that there was no sufficient service of process on the defendant, Middlemass, and as to him, the said decree must be reversed or reframed. Whether the reversal of the decree as to Middlemass will affect the validity of the decree as to the other defendants, depends on several propositions, which we will proceed to discuss.

The first of these propositions is, whether subsequent incumbrancers are *necessary parties* to a bill of foreclosure, or only *proper parties*?

On the first proposition, we admit the authorities are conflicting.

Many of the books say, all subsequent incumbrancers are *necessary parties*. A much larger number says, they are not necessary but *convenient parties*. The authorities are collated by Story in his work on Equity Pleading, section 193, and the notes thereto. Story, in his last note to this section, (fifth edition of the work) quotes approvingly from Mr. Calvert's work on Parties in Equity. Calvert concludes from a review of all the authorities, that subsequent mortgagees are *not necessary parties*. It must be admitted that it has been the almost universal practice in this State, not to make subsequent mortgagees parties. There is certainly no adjudication in this State determining that they are necessary. If the Court were now to render such a decision, it would disturb a large amount of property, and no beneficial result would be attained.

But if we examine those authorities which say they are necessary

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parties, we will find that term needs qualification. Some of the cases go to this extent, that the Chancellor, if he discovers from the pleadings that there are subsequent incumbrancers who are not parties to the suit, will order them to be brought in, and will refuse to proceed with the case until they are made parties. These cases are quoted to show that subsequent incumbrancers are *necessary* parties. But it may well be, that the same Court which would, before decree, require the parties to be brought in, would not reverse the decree nor set it aside after it had been rendered and a sale made under it. We apprehend that few, if any, cases can be found, which have gone this length; and if any have gone to this length, it is because the decree has been so drawn that it might be dangerous in its operation to the party or parties not before the Court.

In this case we propose to show that no injury could accrue to Middlemass, by letting the decree stand as to the other defendants.

In *Cox v. Wheeler*, 7th Paige's Rep., page 250, Vice Chancellor Denio, in giving his opinion, says: "The purchaser would acquire by the sale all the title which the mortgagor had at the time of the execution of the mortgage, discharged from the incumbrance of the mortgage; or in other words, the purchaser would acquire the whole estate and interest of the mortgagor and of the mortgagee."

The Chancellor and other Vice Chancellors seem to have concurred in this view.

In 16th Barbour's Rep., page 25, in the case of *Andrews v. Wolcott, Gridley, J.*, says: "It is a mistake to say that the purchaser only takes the title of the mortgagor. He takes the title of both the mortgagor and mortgagee united. If there be any covenants, they run with the land and become vested with the purchaser at the mortgage sale, and he may maintain an action upon them."

Then it appears to us that the effect of a sale under this decree would be the same as to title, whether any of the defendants except Tutt were or were not before the Court. It would pass all the title which either Tutt or Montgomery had the day the mortgage was executed, and nothing more. As to the other defendants except Middlemass, they, having been served with process, would be barred the equity of redemption, unless they should come in within the statutory

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time and redeem. In regard to Middlemass, he would stand on the same footing as if he had not been made a party. He would be allowed the statutory time to redeem, after being brought properly before the Court.

The next question is, can the decree in its present form (it being corrected, so far as it bars the right of redemption of Middlemass) injure Middlemass? If the purchaser under that decree either brings ejectment, or asks the Court leave to sue out a writ of assistance against Middlemass, if he has or claims a title distinct from and superior to that of Montgomery and Tutt, he can defend under it. He is not barred or estopped by the decree. If he acknowledges holding under the mortgagor or mortgagee, he can, if it is attempted to turn him out, file his bill to redeem and ask a stay of proceedings: and the Court would allow him to redeem, even giving him time within the statutory limit of six months, on a proper showing.

As to the other defendants who have been served, they admit the truth of the allegations in the bill. They hold, as their silence admits, in subordination to the mortgage title. All the interest they can have in this litigation arises from their right to redeem. They have been brought before the Court and notified of what is being done. They have two methods of redeeming. One is, to come into Court with the money, make the redemption under the supervision of the Court, and pray for a proper decree fixing their respective rights. Or failing to do this, they may make the statutory redemption at any time within six months after the sale. Failing to answer, they waived their right to pay into Court. The statutory redemption is a thing done without the interposition of the Court, and the fact as to whether or not Middlemass was before the Court, could neither aid nor hinder the other defendants in exercising their rights.

The next assignment of error is, that no default was taken against the defendants. To this we have two answers.

1st. There was a default taken: and

2d. It would make no difference if there was no default.

The entering of a default is only to take away the right of filing an answer, which can be done at any time before the default is taken

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or judgment rendered. No answer was filed before the signing of the decree. That would be as good as if forty defaults were taken.

FIELD, J., after stating the facts, delivered the opinion of the Court — BALDWIN, J., concurring.

The first assignment of errors is well taken. An acknowledgment of service is only sufficient when reduced to writing and subscribed by the party. (Prac. Act, sec. 33.) A verbal acknowledgment to the Sheriff will not suffice. The decree is, therefore, invalid as against Middlemass. Over him the Court never acquired jurisdiction. So far as he is concerned the decree must be reversed. This disposition of the case as to Middlemass raises the inquiry, how far the reversal as to him can affect the decree as to the other defendants; and this involves a consideration of the question whether he was an indispensable party to the foreclosure. It does not appear what was the nature of the interest he possessed or asserted in the mortgaged premises, whether that of subsequent purchaser or incumbrancer. The complaint simply alleges that he and the other defendants, since the execution of the mortgage, have acquired, or claim to have acquired, some interest in the premises. The brief of counsel speaks of him as a subsequent incumbrancer, and we will assume this to be the fact in the consideration of the case.

The general rule of Courts of Equity is, that all persons materially interested in the subject matter of the suit ought to be made parties. in order that complete justice may be done, and a multiplicity of suits avoided; and this requires subsequent incumbrancers, existing at the filing of the bill, to be made parties in a suit for a foreclosure of a mortgage. They are interested in the property, and unless made parties, their rights will not be affected by the decree; and to this extent they are necessary parties. This is the view taken by this Court in *Whitney v. Higgins*, 10 Cal. R. 547. The purchaser, under the decree, takes a title only as against the parties to the suit; and that it may possess stability and security, all persons interested in the estate, at the time suit is instituted, whether purchasers, heirs, devisees, remaindermen, reversioners, or incumbrancers, should be

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made parties. And it is the general practice, when it appears before decree that there are such persons not made parties, for the Court to order the case to stand over until they are brought in; but the practice is not imperative. It was remarked long ago, by Lord Alvanley, in the *Bishop of Winchester v. Beavor*, (3 Ves. 317) that it was the usual and common practice, almost without exception, to make all incumbrancers parties; but he hoped the Court was not "*bound to insist upon all incumbrancers being parties.*" It is true, the language of many of the adjudged cases would seem to indicate that subsequent incumbrancers are necessary, in the sense that they are indispensable parties; but, as is justly observed by Mr. Justice Story, "perhaps the solicitude of Courts of Equity to make a final settlement of the rights of all persons interested in such a suit, has carried them to an extent scarcely justifiable in point of principle or convenience." (Story's Equity Plead., sec. 193, note 2.)

The cases are not easily reconcilable. That subsequent incumbrancers are proper parties is clear; that they are necessary parties to a complete adjustment of all interests in the property is equally clear; that the Chancellor would be justified in ordering them to be brought in when not made parties, is also clear; but we do not think they are in all cases indispensable parties to a decree determining the rights of the parties before the Court as between themselves. The property mortgaged may be insufficient to cover the debt secured; the incumbrancers may be so numerous and their claims so large, that the parties possessing the latest liens could, by no possibility, receive any portion of the proceeds of the sale. It would be not only a great inconvenience, but a great hardship, to compel the mortgagee in such case to bring in all such persons who have acquired, without any fault of his, liens upon the property. As the foreclosure suit is prosecuted for his benefit, the expenses of making the subsequent incumbrancers parties must fall upon the estate, and in instances within our experience would have exhausted its entire proceeds. We do not think, then, that subsequent incumbrancers are indispensable parties. If not made parties, their rights cannot be affected; they are not bound by the decree; their equity of redemption from the purchaser continues, and this they can assert at any time within the period allowed by the

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statute of limitations. (*Whitney v. Higgins*, 10 Cal. 547; *Haines v. Beach*, 3 Johns. Ch. 459; *Ensworth v. Lambert et al.*, 4 Johns. Ch. 605.)

It appears from the allegations of the complaint, which are to be taken as confessed by the defendants who were properly served and suffered default, that the plaintiff sold the property in controversy to Tutt, and took at the time the mortgage in suit as security for the purchase money, and that the interests of the other defendants were acquired subsequently. It appears also that the property has been sold under the decree for a sum less than the amount due upon the mortgage, and no question as to the regularity or fairness of the sale is made. Those defendants are not, therefore, in a position to complain that their co-defendant was not properly served with process. They set up no defense under or in connection with him to defeat the decree, or lessen the amount found due on the mortgage; and the decree does not undertake to determine any rights as between the defendants.

The next assignment of errors is the want of any entry of the default of the defendants. To this there are two conclusive answers. 1st. That the default was entered, and the counsel of the appellant is mistaken in his statement; and 2d. It would be of no consequence if it had not been entered. The entry of the default only cuts off the right to answer, and this is as effectually done by the decree.

There is an excess of two hundred and twenty-three dollars in the amount of the personal judgment against defendant, Tutt. The error arose from allowing interest at the rate of ten per cent. a year upon the amount of interest due at the maturity of the note. Interest upon interest already due cannot be allowed, except in pursuance of a written engagement of the parties. (Act to reg. Int., Wood's Dig. 551.) The interest upon the note should have been calculated at the rate of three per cent. a month from its date to the date of the entry of the decree, and then added to the principal. The amount thus found due, added to the four hundred and twenty dollars, with interest at ten per cent. a year from the maturity of the note, would have made up the true amount for which judgment should have been rendered. The error is not one, however, of which the defendants can take advantage. The defendant, Tutt, has released all errors. The

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defendant, Middlemass, is not bound by the judgment; and in case he should seek to enforce his equity of redemption, the true amount to be paid by him can then be ascertained. The other defendants have lost their right of redemption. Their statutory right is gone from the lapse of six months since the sale under the decree; and their equitable right, as distinct from their statutory right, is gone, for they have had their day in Court, and it is barred by the decree. (*Whitney v. Higgins*, 10 Cal. 554.)

The decree recites that the case was considered "upon the pleadings and evidence." This is sufficient to show that the requisite proof was presented to the Court of the amount due, even if any proof had been necessary upon the default of the defendants. But even were this otherwise, the presumption would be indulged to support the proceedings that the Court below was informed of the matter in a proper and regular manner. (*Crane v. Brannan*, 3 Cal. 192.)

The clause in the decree foreclosing the equity of redemption of the defendants is an useless formula, which does not enlarge the effect of the decree, or any rights of the purchaser under it. (*McMillan v. Richards*, 9 Cal. 412.) The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into the statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in Court, and an opportunity of setting up any equities they possessed. After the decree, they stand as to their right of redemption in the same position as ordinary judgment debtors.

The question presented by the last assignment of errors, is, whether any averment in the complaint of the presentation of the note at the place where by its terms it was made payable was essential. We pass over the objection that the question cannot be raised for the first time on appeal, and upon which we express no opinion, as it is not pressed by counsel, and will consider the question as if regularly taken in the Court below. The question has been frequently discussed in the Courts of the several States, and in the Federal Courts; and at this day it is the received doctrine in the United States, that in a suit against the maker of a promissory note, or the acceptor of a bill of exchange—and there is no distinction between the two classes of cases

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—payable at a particular place, it is unnecessary to aver a presentation for payment at the place in the complaint, or to prove such presentation at the trial. The rule is different in England as to promissory notes, as we shall hereafter observe. The American doctrine proceeds upon the ground that the maker or acceptor is the principal debtor; that the debt is not discharged as to him by the omission or neglect to demand payment when it becomes due at the place where the same is payable; that it is due generally, and will continue due until paid, though the creditor is not present at the time and place designated to receive payment; and that it is matter of defense on the part of the maker or acceptor to show his readiness with the funds at the time and place, and the omission or neglect of the plaintiff to present the paper for payment; and such defense will be only a bar of the damages and costs, and not of the debt.

The question as to the necessity of proof of demand of payment at the place designated arose before the Supreme Court of New York, in 1809, in a suit against the acceptor of a bill of exchange, payable at a mercantile house in London (*Foden et al. v. Sharp*, 4 Johns. 183) and the Court said: "The holder of a bill of exchange need not show a demand of payment of the acceptor any more than of the maker of a note. It is the business of the acceptor to show that he was ready at the day and place appointed, but that no one came to receive the money, and that he was always ready afterwards to pay." In *Wolcott v. Van Santvoord* (17 Johns. 248) the precise question involved in the case at bar was decided. That was an action against the acceptor of an inland bill, payable at the Bank of Utica, and the declaration contained no averment of demand at the bank, or at any particular place, and for want of the averment the defendant demurred. The Court gave judgment for the plaintiff, and Mr. Chief Justice Spencer, who delivered the prevailing opinion, reviews the English cases, and shows their contradictory character on the necessity of the averment or proof. "The non-attendance," says the Chief Justice, "of the holder of the bill at the time and place of payment can produce no worse consequences to him than if he had attended, and the acceptor had also been present and tendered the money, which the holder had refused to accept. Under such a state of facts, what is the legal consequence?

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It is perfectly well settled that when a debt or duty exists, such as the payment of a sum of money, a tender of the money, though it be refused, does not extinguish the debt or duty, but it remains obligatory on the party owing the debt or duty; as if an obligation be for the payment of a less sum, this being a duty and part of the obligation, shall not be lost by tender and refusal; for if he pleads a tender, he shall say *uncore prius*." Com. Dig., tit. Condition, L. 4, Co. Lit. 207-a.) In *Giles v. Hartie* (1 Lord Raym. 254) Holt, C. J., ruled that "though a tender is made, and the plaintiff refuses the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor assumpsit, but in bar of the damages only; for the debtor shall, nevertheless, pay his debt. This is a principle too familiar to every lawyer to require a statement of the numerous authorities to support it. Nor is it necessary, where a regular tender has been made, and a refusal to accept it, for the plaintiff to make a special demand subsequently, and before he brings his action; the action itself is a demand." And in reference to the case of *Bowes v. Howe*, in the Exchequer Chamber (5 Taunt. 30) in which it was decided that in an action against the maker of the note by the payee or bearer, where the place of payment is designated, a presentation at that place for its payment is a condition precedent, and an omission to aver such presentment in the declaration is fatal in arrest of judgment or in error, the Chief Justice remarks: "It is perfectly certain that the Exchequer Chamber did not proceed on the ground that the debt demanded was a collateral obligation or promise. They not only do not say so, but the case did not admit of their saying so, for the action there was against the makers of a note payable at the Workington Bank; and I never can conceive that decision to be law, that a mere failure to present a note at the time and place of payment, and making a demand, shall exonerate the party forever, though the debt or duty remains; the principle of it is that the undertaking was a condition precedent, and that the duty could not be enforced without a strict compliance with the condition; and it goes the whole length of deciding that even a subsequent demand or any other form of action would be ineffectual. For if the condition must be averred and proved, and there has, in fact, been no demand, the holder of the note must be remediless. From such a doctrine I

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entirely dissent, and must think that the time and place of payment are merely *modal*, forming no essential part of the contract; that it is incumbent on the defendant, whether the payee was at the place at the time appointed or not, to show in his defense that he was there ready and willing to pay, and that the payee did not come, etc.; that the consequences of the absence of the payee, under such circumstances, unless he makes a subsequent special demand, and there be then a refusal, are merely that he must be content with receiving the sum originally payable; and if he sue, without having made a special demand, he loses all claim to damages and costs, and will himself be subject to them.

In *Caldwell v. Cassidy* (8 Cowan, 271) the same question arose in a suit against the maker of a promissory note, payable at the Franklin Bank, New York. The defendant pleaded that he was at the time and place of payment mentioned in the note, ready and willing to pay the money, and ever since had been and was then ready and willing to pay at the bank, but that the plaintiff never demanded payment nor presented the note for payment at the bank. On demurrer the plea was held bad in being in bar of the action and not of the damages, and in not showing the defendant was ready by bringing the money into Court, and the plaintiff had judgment. In the opinion of the Court, Savage, C. J., says: "Whatever be the rule in other Courts, the rule of this Court must be considered settled in the case of *Wolcott v. Van Santvoord*; that when a promissory note is payable at a particular place on a day certain, the holder of the note is not bound to make a demand at the time and place, by way of condition precedent to the bringing of an action against the maker. But if the maker was ready to pay at the time and place, he may plead it as he would plead a tender, in bar of damages and costs, by bringing the money into Court."

In *Green v. Goings*, decided in 1850, (7 Barb. 653) the same rule as to the proof of presentation is maintained. In that case the draft was accepted, payable at the Onondaga County Bank, and the Court held that as between the acceptor and endorser, the acceptor was liable without demand of payment, although the draft was accepted payable at a particular place; that in such cases the acceptor is the principal debtor liable without demand, a suit as in other cases of a precedent

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debt or duty being a sufficient demand: citing the cases above from Johnson and Cowan.

The same question came before the Supreme Court of Massachusetts in 1812, in *Ruggles v. Patten*, (8 Mass. 479) in a suit against the maker of a promissory note payable at the Penobscot Bank, kept at Buckstown. The defendant pleaded that he was present at the maturity of the note at the Bank, ready and willing to pay according to the tenor of his promise, in one of the several counts of the declaration, and that the plaintiff was not there ready or present to receive the payment; and on demurrer, the Court held that this was no bar to an action on a promise to pay money, and that the issue tendered was an immaterial one.

In *Carley v. Vance* (17 Mass. 389) the question was again presented in a suit against the maker of a note, payable "at Mr. E. L.'s counting-room, in Cross street, Boston." The defendant pleaded a deposit of the funds before the maturity of the note with E. L. for its payment, and that E. L. was ready with the money to pay the note at his counting-room on the day it became due, but that the plaintiff was not there to receive it; and on demurrer the plea was held bad for want of proffert of the money. The Court, in its opinion, says: "The objection taken in this case to the declaration for the want of an allegation of a demand at the time and place appointed for payment, cannot, we think, be maintained. It is difficult to reconcile all the cases; but the weight of authority is opposed to the objection, and it has no foundation in principle."

The same rule as to the proof of demand of payment was maintained in 1834, in *Payson v. Whitcomb*, (15 Pick. 212) in which the Court observes, that whatever may be considered the law in England on the point, it has been settled in Massachusetts that no such demand is necessary.

In Maine the same rule prevails. (*Bacon v. Dyer*, 3 Fair. 19; *Remick v. O'Kyle et al.*, *Ibid* 340; *McKenney v. Whipple*, 31 Maine, 98.) In *Remick v. O'Kyle*, the Supreme Court of that State held that in an action against the maker of a promissory note, payable at a particular time and place, it is unnecessary to aver a presentment at such time or place; and when such averment is made, the plaintiff

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may recover without offering proof in its support, inasmuch as it may be stricken out, and still leave the declaration sufficient.

The same doctrine is maintained in the Courts of the other New England States. (*Eastman v. Fifield*, 3 N. H. 333; *Otis v. Barton*, 10 N. H. 433; *Hart et al. v. Green*, 8 Vt. 191; *Eldred v. Hawes*, 4 Conn. 465.) .

In this last case Mr. Chief Justice Hosmer, of the Supreme Court of Connecticut, after referring to the diversity and contrariety of opinion expressed by the English Judges on the subject in question, and citing the cases of *Wolcott v. Van Santvoord* (17 John. 248) and *Carley v. Vance*, (17 Mass. 389) observes that the weight of decision appears to be much against the legal necessity of averring a demand at the place appointed for payment, and says:

“On principle, I am led to a similar result. What was the intent and understanding of the parties in rendering the note payable at a certain place? Was it that the debt should be lost if there was not a strict presentment and demand on the day and at the place of payment; or was it only that the debtor should stand excused of damages and costs if he were ready to pay the money at that place according to his contract?”

“In support of the rigid construction, rendering the demand a condition precedent, there are the *words* of the contract only; but that a presentment and demand were not understood to be an essential part of the contract, the *subject matter* and the *effects* and *consequences* make it abundantly manifest.

“It can scarcely be believed that the creditor should agree with his debtor, or that the latter should request an agreement, if through accident or negligence the demand were not strictly made at the time and place prescribed, that an honest debt should be forever lost; and yet, on this foundation rests the defendant’s objection. In subversion of this idea it is indisputably established, where a mere duty is promised to be paid upon request, (and every promissory note presupposes an antecedent debt) that no actual request is necessary. 1 Sand. 32. And although this rule may be varied by an express agreement of the parties, yet such an agreement should appear with unquestionable force.”

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"It may, however, be inquired; if the specification of place in the contract was not intended to form a condition precedent, by binding down the party to a strict demand at the place, what else could it intend? This question proceeds on the supposition that the insertion of the place of payment in the note could subserve no valuable purpose but the one for which the defendant insists. In contravention of this idea, it is very apparent that the mentioning of a place of payment is attended with important uses. It enlarges the privilege of a promisee of a note, by conferring on him a right to expect a reception of his money at a specified place other than that with which the law had invested him. It imparts a privilege to the maker of a note, by authorizing payment at a certain place, and not limiting him to a personal demand; and often relieves him from the risk attendant on keeping a large sum of money in his house. Superadded to this, it confers on him the power, by a readiness to discharge his contract at the place prescribed, to prevent the accumulation of interest or the burden of costs. To assert that this construction of the contract is free from all possible inconveniences, I do not feel myself justified; but it is demonstrably clear that the inconveniences are less to the debtor than the loss of the debt, which attends the other construction, would be to the creditor."

In *Weed v. Van Houten* (4 Halsted, 189) the question was presented to the Supreme Court of New Jersey; and the Chief Justice in his opinion, after a review of numerous English and American cases, expresses his entire concurrence in the rule established by the American decisions, which he is satisfied is most conformable to sound reason; most conducive to public convenience; best supported by the general principles and doctrines of the law, and most assimilated to the decisions which bear analogy more or less directly to the subject.

The same rule is established by the Supreme Court of Pennsylvania, in *Fitler v. Beckley*, 2 Watts & Sgt. 458; by the Supreme Court of Ohio, in *Administrators of Conn. v. Executors of Gana*, 1 Ham. 483; by the Supreme Court of Illinois, in *Butterfield v. Kinzie*, 1 Scam. 445; by the Supreme Court of Tennessee, in *McNairy v. Bell*, 1 Yerger, 502, and *Mulkerrin v. Hannum*, 2 Yerger, 81; by the Court of Appeals of Virginia, in *Watkins v. Crouch & Co.*, 5

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Leigh, 522; by the Court of Appeals of Maryland, in *Bowrie v. Duval*, 1 Gill & John. 181; by the Supreme Court of Texas, in *Edwards v. Husbrook*, 2 Texas, 578; by the Supreme Court of Mississippi, in *Washington v. Planters' Bank*, 1 How. 230; by the Supreme Court of Alabama, in *Irwin, Admr., v. Withers*, 1 Stewart, 234, and in *Evans v. Gordon*, 8 Porter, 142; and by the Supreme Court of the United States, in *Wallace v. McConnell*, 13 Peters, 136.

The ruling of the Courts of Indiana, Louisiana, and of this State, form, so far as we are able to ascertain, the only exceptions to the otherwise uniform current of decisions in the United States on the question under consideration. After the Supreme Court of Indiana had laid down the rule that the presentation at the place of payment must be averred and proved, (*Palmer v. Hughes*, 1 Black. 328) the Legislature, probably finding it worked only inconvenience and injustice, interfered and changed the rule. (Rev. Stat., 1843, p. 711.)

The decisions of the Supreme Court of Louisiana do not present the question in any new light from the earlier English cases. (*Mellon v. Croghan*, 3 Martin, 422; *Warren v. Alnutt*, 12 La. 454; *Frenes y Carrillo v. Bank of United States*, 10 Rob. 533.)

In England, previous to the decision of the case of *Rowe v. Young* by the House of Lords in 1820, (2 Brod. and Bing. 165) there was great diversity and contrariety of opinion on the question among the Judges. In *Callaghan v. Aylett*, (3 Taunton, 397) decided by the Common Pleas in 1811, it was held in an action against the acceptor of a bill payable generally, but accepted payable at a particular place, that the plaintiff must prove a presentation at the place designated.

In the same year the King's Bench held, in *Fenton v. Goundry*, 13 East. 449, that it was unnecessary to aver a presentation at the particular place where by the acceptance the bill was made payable; that the acceptance bound the party generally and universally, and that the action itself was a demand upon the party sued. Previous to this decision, Lord Ellenborough had held at *nisi prius*, in 1808, in *Lyon v. Sundins*, (1 Camp. 423) that the acceptor of a bill payable at a particular place was liable universally; that the place of acceptance formed no part of the contract, and did not require to be set out in the declaration; and in 1810, in *Nicholas v. Bowers*,

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(2 Camp. 498) that there was no necessity of proving, in a suit against the maker of a promissory note, the presentment at the place designated. In this last case, the counsel for the plaintiff stated that he had a witness in Court to prove the presentation at the banker's the day the note became due; but Ellenborough replied that he was afraid to admit such testimony, lest doubts should arise as to its necessity. In *Wild v. Rennards*, 1 Camp. 425, tried in 1809, Bayley, Judge, made a similar ruling.

In *Sanderson v. Bowes*, (14 East. 516) subsequent to the decision of *Fenton v. Goundry*, the King's Bench held on demurrer that a promissory note of the defendants', payable by its terms at their banking house at Workington, must be demanded there to give the holder a right of action if it be not paid. The Court draws a distinction between that case and *Fenton v. Goundry*, in this: that in the latter case the place was not designated in the body of the bill, but only in the acceptance; and in *Dickenson v. Bowes*, (16 East. 112) decided in 1812, the same ruling was made by the Court.

Subsequently to the decision in *Fenton v. Goundry* by the King's Bench, the question again arose before the Common Pleas, in 1814, in *Gamon v. Schomoll*, (5 Taunt. 344) and that Court reiterated its former opinion, and held that the acceptance payable at a particular place was a qualification of the contract, and therefore the presentation of the bill at such place was a condition precedent which must be averred and proved, whether the action be against the drawer or acceptor. (5 Taunt. 30.)

In *Bowes v. Howe*, decided in the Exchequer Chamber, in 1813, it was held, in an action against the maker of a promissory note payable at a particular place, that the presentment at the place must be averred and proved.

These were the principal cases in which the English Judges and Courts had expressed their opinion previous to the decision of *Rowe v. Young*. Between the King's Bench and the Common Pleas there was a conflict of opinion. Whether the decisions of the Court of King's Bench in *Fenton v. Goundry* and *Sanderson v. Bowes*, or of Ellenborough in *Lyon v. Sanders*, and of Bayley, J., in *Wilds v. Rennards*, can be reconciled, we do not propose to consider. In the

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actual conflict between the two Courts, and the seeming conflict of the King's Bench with itself, and with the decisions of its Judges at *nisi prius*, the case of *Rowe v. Young* was brought before the House of Lords. That was an action against the acceptor of a bill payable generally, and accepted payable at a particular place. The principal questions involved were, whether a presentment for payment at the place designated, and the averment of such presentment in the declaration, were necessary; and whether the acceptance was to be considered as a qualified acceptance or a general acceptance, with an additional engagement or direction for its payment at the designated place. The opinions of the twelve Judges were asked on the questions. Eight of the Judges were of opinion that the presentment and averment were unnecessary to hold the acceptor, and four that they were necessary; and yet the judgment was reversed in accordance with the views of the minority, sustained by the opinions of Eldon and Resedale.

To our minds, the prevailing opinion of Lord Eldon is unsatisfactory; and does not meet the arguments advanced in the opinions of several of the law Judges. As to the decision of the highest tribunal in the realm, it is of course binding upon the Courts of England; but as an exposition of the law, in the face of the able opinions of the eight Judges, its weight in this country can be slight, and none as against the general current of adjudications of the American Courts. We have referred to these decisions of the English Courts, because upon their authority the opinion of this Court in *Wild v. Van Valkenburgh* (7 Cal. 166) is based. The decision in this case has never met the approval of the profession, and has been the occasion of constant inconvenience and frequent injustice, and we have no hesitation in overruling it.

Immediately following the decision of the House of Lords in *Rowe v. Young*, it was found expedient, either from the injustice the rule established would work upon past, or the inconvenience it would create as to future contracts, to change the rule by legislative enactment; and by 1 and 2 Geo. IV (ch. 78) it was provided: "That after the first of August, 1821, if any person shall accept a bill of exchange, payable at the house of a banker or other place, without further

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expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill. But if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house, *or other place only, and not otherwise or elsewhere*, such acceptance shall be a qualified acceptance of such bill; and the acceptor shall not be liable to pay the bill, except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place.

The question under consideration is at best only one of construction. What is the meaning of the parties in designating the place of payment in promissory notes, or in the body or acceptance of bills of exchange, according to commercial usage? We are confident that it is not to insert a condition precedent, so that upon failure of the holder to attend at the designated place he shall forfeit his entire demand. No such intention exists, either with the maker or receiver of the note or bill. A note thus framed, or a bill thus accepted, is like any other contract to pay at a designated place. The undertaking of the parties, and the legal effect of such contracts is this: that if ready at the time and place with the funds, the obligor has so far satisfied the contract that he cannot be responsible for any future damages, either as costs of suit or interest for delay; not that he is thereby discharged of the debt. No one would receive an obligation depending upon such a contingency for its ultimate satisfaction. The insertion of the place of payment is usually made for the convenience of one of the parties, and is given and received with that understanding and none other.

It follows from the views we have taken of the questions in this case that the judgment must be reversed as to the defendant, Middlemass, and affirmed as to the other defendants.

Ordered accordingly.

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FUNKENSTEIN v. ELGUTTER.

APPEAL JUDGMENT—Judgment of County Court reversed, with directions to dismiss appeal from Justice's Court.

APPEAL from the County Court of San Francisco County.

This action was originally commenced in a Justice's Court on a promissory note for two hundred dollars. Summons was duly issued and returned served personally on all the defendants, who failed to appear, and judgment was taken against them by default. Defendants appealed from the whole judgment of the Justice, on questions of both law and fact. No statement of the grounds upon which the appellants intended to rely in the County Court was filed with the Justice.

On the calling of the case in the County Court, the respondent moved to dismiss the appeal, on the ground that an appeal could not be taken from a Justice's judgment rendered by default, on questions of both law and fact; which motion was denied by the Court, and respondent excepted.

The County Court allowed the defendant, Newburger, to answer, and ordered a trial anew. The cause was tried without a jury, and judgment rendered for the defendant; from which the plaintiff appealed to this Court.

H. Lee & E. D. Sawyer for Appellant.

1st. The County Court erred in refusing to dismiss the appeal from the judgment of the Justice.

2d. The Court erred in trying the case anew, as there was no issue of fact in the Justice's Court from which defendants could appeal. Nor could the Court try said cause on questions of law, as appellant had filed no statement of the grounds upon which he intended to rely. The People *ex rel.* Jones v. The County Court of El Dorado County, 10 Cal. 19.

FIELD, J., delivered the opinion of the Court — **BALDWIN, J.**, concurring.

Ordered that the judgment of the County Court be reversed, with directions to dismiss the appeal from the Justice's Court, on the authority of *The People v. The County Court of El Dorado Co.*, 10 Cal. 19.

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PEOPLE *ex rel.* FOWLER v. WELLS.

At the general election held in Yuba County in September, 1855, W was elected County Treasurer of that county for two years from the date of his election, and until his successor was chosen and qualified. On the twenty-eighth day of April, 1857, a special Act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh of May, 1857, W resigned, and S P W was appointed by the Board of Supervisors in his stead. At the general election in September, 1857, F received the majority of votes for that office, for the unexpired term of W, and claimed the office: *Held*, that the appointee held for the balance of the extended term, and that there was no vacancy to be filled at the election in September, 1857.

It is a well settled rule of construction, that statutes upon the same subject matter must be construed together, and that a general provision must be controlled by one that is special.

APPEAL from the District Court of the Tenth Judicial District, County of Yuba.

At the general election held in Yuba County in September, 1855, A. F. Williams was duly elected County Treasurer of that county for the term of two years from the time of his election, and until his successor was chosen and qualified. On the twenty-eighth day of April, 1857, a special Act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh day of May, 1857, Williams resigned, and the defendant was appointed by the Board of Supervisors in his stead. At the general election in September, 1857, the relator received a majority of votes for the short term, and having properly qualified, demanded the office of the defendant. This demand being refused, this proceeding was instituted. Judgment was had for defendant, and the People appealed.

T. B. Beardon for Appellants.

I. No proclamation was necessary to the validity of this election. We contend that the election was perfectly valid without any order of the Supervisors; that no notice of such election by the Supervisors was necessary or required.

In the first place, let us inquire in what cases an order or proclamation for an election is necessary, and when unnecessary.

Notice of the election must be given by the Supervisors when the election is a special election, and not otherwise.

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An election is special whenever the time, place and officers are not provided for by law.

Now if the time, place and officers of the election were provided for by law in this instance, then the election at which the relator claims to have been elected was a general election, and good without the order or intervention of the Supervisors. *Vide* People v. Brenham, 3 Cal. R. 491.

The election in question was a general election —

I. Because the time, place and officers were provided for by law.

1st. The time was fixed by law; the defendant had been appointed to fill a vacancy occasioned by a resignation; the law provides that such appointments may be made by the Supervisors, but that they shall expire at the next general election. Wood's Digest, art. 2,884.

Now the law prescribed that the next general election should be held on the second day of September, A. D. 1857; so that defendant's term of office was as well defined as though he had been holding a full term by virtue of a general election; he was an incumbent in office, whose term expired on a day certain, which day was fixed by the statute.

2d. The places and officers of election were the same as those provided for the general election.

II. This was a general election, because it was an election to choose a successor to an incumbent in office whose term had expired by limitation of law, and the law gives notice of all such elections.

It was not to fill a vacancy caused by resignation, death or removal, for the defendant himself had been appointed to fill such a vacancy: now if the law, instead of giving to the Supervisors the power to fill vacancies in county offices — had required that an election should be held for that purpose — then such an election would have been a special election, inasmuch as neither the time, place or officers were provided for by law.

Again: this was a vacancy occasioned by operation of law; because, when Williams resigned and the defendant was appointed to fill the vacancy created thereby, the law expressly limited his term of office till the general election next succeeding his appointment; and the law provided that at such general election the unexpired term should be filled by the people.

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Then where is the difference or distinction between an election to fill a full term and an election to fill an unexpired term, when the law equally prescribes the time when both such elections shall be held?

If notice by the Supervisors is not necessary in the former, why should it be required in the latter?

In the case of *The People v. Porter*, 6 Cal. R., page 26, speaking of the decision in the case of *The People v. Brenham*, 3 Cal. R., 491, Judge Terry says: "I understand the decision to apply only to general elections to fill vacancies occasioned by operation of law; the question involved was the validity of an election held under the Charter of the City of San Francisco, to fill vacancies occasioned, not by resignation, but by reason of the expiration of the term for which the incumbent was elected; the Court properly ruled that the failure of the incumbent to give the required notice could not deprive the people of their right under the law to elect their officers."

In this case the election was not to fill a vacancy occasioned by resignation, but to elect a successor to an incumbent whose term of office had expired by "operation of law."

In what respect was the order of the Supervisors, or a notice by them, necessary or material in this election? Could they have given the electors any other notice than the law had already given them? Could they have conferred upon the electors any other right than they already possessed? Could they have appointed any other time or place for the election? Could they have done anything in relation to the election which the law had not already provided?

For authorities, we refer to Wood's Digest, articles 2, 113 to 2,119; *People v. Brenham*, 3 Cal. R. 480; *Dickey v. Hurlbut*, 5 Cal. R. 334; *Ex parte*, *Heath, et al.*, 3 Hill, 42; *People v. Fitch*, 1 Cal. 520; *People v. Peck et al.*, 11 Wendell, 604; *People v. Porter*, 6 Cal. R. 26.

II. It is argued that there was no vacancy in this office at the date of the general election; that the defendant held over under the Act of 1850, concerning the office of County Treasurer, until the first of January, 1858, or until the expiration of the term for which Williams had been elected.

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We contend that this position is not tenable, and cannot be maintained upon principle or authority.

So much of the Act concerning Treasurers, passed in 1850, as conferred upon the Court of Sessions the power to fill a vacancy in that office, by appointment for the balance of the term, was afterwards repealed. On the eleventh of April, 1850, after the passage of the above named Act, but at the same session, the Legislature passed an Act concerning Offices; and in providing a mode for filling vacancies in county offices, prescribed that the County Judge should order an election to fill the vacancy. See section 53, Act concerning Offices 1850.

In 1851, on the twenty-eighth of April, another Act concerning Offices was passed, repealing the one of 1850; and section 47 of that Act provides that, in case of a vacancy in the office of District Attorney, County Clerk, or *any other* county office, except County Judge, the Court of Sessions shall fill such vacancy by appointment until the next general election.

In 1855, on the eighth of February, it having been previously decided by this Court that Courts of Sessions had no authority to exercise such a power, the Legislature amended the 47th section of the Act of 1851, concerning Offices; and again, on the twentieth day of March, 1855, the Legislature passed an Act to create a Board of Supervisors in the counties of this State, etc., and section 20 of that Act prescribes that, in case of a vacancy in any county office, except that of County Judge, the Board of Supervisors shall appoint some suitable person until the next general election.

Now, although the 4th section of the Act concerning County Treasurers, passed in 1850, has never been expressly repealed, yet we think it beyond question that it is clearly repealed by implication.

In order to ascertain whether or not a former statute has been repealed by implication, we think we can safely follow the following rules of law, supported, as we believe, by an unbroken current of authorities, and founded upon the soundest principles of reason and justice.

1st. If a provision in one statute be inserted in another, but varying in its terms, it shows a different intention in the Legislature. (*Rutland v. Mendon*, 1 Pick. 154-6; opinions of the Justices, 7 Mass. 523.)

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2nd. In construing a statute the Court must consider its policy, and give to it such construction as may appear best calculated to advance the intention of the Legislature. (*Allen v. Parrish*, 3 Ham. 198.)

3rd. When the provisions of two statutes are so far inconsistent that both cannot be enforced, the latter must prevail. (*Ludlow v. Johnson*, 3 Ham. 553.)

4th. A special statute is merged in a subsequent general statute, if the provisions of the two are repugnant. (*Gage v. Courrier*, 4 Pick. 399; 3 How. U. S. C. 636.)

5th. A subsequent statute revising the subject matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, to the extent to which its provisions are revised. (*Commonwealth v. Crowley*, 1 Ashmead, 179; *Dobbins v. Supervisors*, 5 Cal. 414; 11 Mass. 545; *Commonwealth v. Kinsball*, 21 Pick.— conclusion of the opinion; 3 Alabama, 626; 5 Hill, 221.)

6th. A general system of legislation upon the same subject matter should be taken into consideration, in order to aid in the construction of one statute relating to the same subject. (3 Mass. 17, 21; 8 Mass. 418; 1 Pick. 248; 10 Pick. 235.)

Now the policy of the law is evidently to favor the election, by the people, of all officers; and whenever the Courts can advance this policy, without doing violence to a plain provision of the statute, they will certainly do so.

But again: we say that the Supervisors have not the power to appoint in any instance for the balance of the unexpired term; the only authority they have in the matter is conferred upon them by sections 20 and 25 of the Act concerning Supervisors: the first enables the Board to fill the vacancy until the next general election, and the latter gives to it all powers and jurisdiction, other than criminal, before that time conferred by any law upon the Court of Sessions, so far as the same do not conflict with the provisions of that Act (the Act concerning Boards of Supervisors).

Now it will not be pretended that the Board of Supervisors derives its power to appoint for the *unexpired term* from the 20th section; then the question arises; is it authorized to do so under the general saving-clause in the 25th section? We contend not. Because that

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section was only designed to invest the Board with such jurisdiction and power, other than criminal, theretofore conferred upon the Court of Sessions, as might not be in conflict with the preceding sections of the Act. Now section 20 expressly limits their power of appointment, and is in direct conflict with the 4th section of the Act concerning County Treasurer, which enables the Court of Sessions to appoint for the balance of the term.

Then if we are correct in assuming that the 4th section of one Act is in conflict with the 20th section of the other, how can it be contended that the Board of Supervisors had the same unlimited power to appoint in case of a vacancy in the County Treasurer's office as was given to the Court of Sessions in that particular?

An enlargement or extension of such a power beyond the letter of the statute should not be encouraged or allowed.

At best, it is an extraordinary power, and only given to prevent an interregnum in office, and to avoid the inconvenience and expense of special elections.

Messick & Swessey for Respondent.

I. The defendant was lawfully entitled, under the law, to hold the office by virtue of his appointment in any event, until January, A. D. 1858, long after this suit was commenced.

II. But if he could not so hold till January, 1858, still he was entitled and required to hold until some one possessing the right and qualifications to take the office from him, demanded it, and no one demanded it but the relator, and *he* was not entitled or qualified to take it.

III. The first question to arise, as well under our plan of treating the question, as under the assignment of errors by plaintiff is, up to what time did the appointment of Wells give him a right to possess the office?

The Board of Supervisors of Yuba County appointed him under the authority conferred upon them for that purpose by section 20 of the "Act creating a Board of Supervisors in the counties, &c." (Laws, 1855, p. 55; Wood's Digest, p. 696; and see section 25 of same Act, p. 66; Wood's Digest, p. 697.

These statutes, together with the Act of April, A. D. 1857, defining

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the time when the persons elected shall enter upon the office, are *in pari materia*, and as such, must be construed together, so as to harmonize and give effect to each.

Smith, in his "Commentaries on Constitutional Construction," section 639, says: "That several Acts *in pari materia*, and relating to the same subject, are to be taken together, and comprised in the construction of them, because they are considered as having one object in view, and as acting upon one system, has been declared in several cases." See also section 640.

Again, the rule is laid down in the case of the United States v. Freeman (3 Howard, 564) as follows: "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; and it is an established rule of law, that all Acts *in pari materia*, are to be taken together, as if they were one law."

In the ninth volume of Bacon's Abridgment, (edition of 1854) page 243, the rule is laid down as follows:

"It is an established rule of law, that all Acts *in pari materia* are to be taken together, as if they were *one law*."

Also, *Rex v. Locdale*, 1 Burrows, 447; 4 D. & East, (4th Term R.) 450.

Hence, under the rule as thus laid down, if section 4 of the Act concerning County Treasurers, secs. 20 and 25 of the Act concerning Boards of Supervisors, and the Act of April, 1857, be read together as one Act, the soundness of our construction is apparent.

All the power with which the Court of Sessions was endowed, except criminal jurisdiction, was transferred to the Board of Supervisors by section 25 of the Act concerning Supervisors, and the tenure and term of their appointee as County Treasurer, must be determined by section 4 of the special Act concerning County Treasurers, defining the term of his office as such appointee. The special Act referring to his office must control, no matter how the other county officers, not specially provided for, may be affected by the latter part of section 20 of the Supervisor Act. (Sedgwick on Statute and Constitutional Construction, page 123.) Again: it would seem that the Legislature intended all along to except this office from any limitation by a general Act; for

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the same Legislature which passed the Act concerning County Treasurers, and thereby made the office appointive in case of vacancy, passed the Act of 1850, concerning Offices. Laws of 1850, page 209.

The argument that the appointment reached only to election day, proves too much, and leads to much trouble and absurdity.

The case of the People v. Mott, 3 Cal. 504, cited by appellant, has no bearing on this question. That was decided upon the ground that the office was a constitutional office, and the Constitution provides the term of the appointee, by saying that the commission of Mott "should expire" at the next general election.

In the case of Powers v. Hunt (2 Humphrey, 24) the Constitution itself defined the time which the appointee should hold, and declared after a vacancy occurred, and an appointment thereto, "such office shall be filled by the qualified voters at the first election for any of the county officers."

But again: our construction of the law in this matter is sustained by the Act of April, 1857, in that it makes the term of every person thereafter elected to this office, to commence on the first Monday of January following his election. The fact that no exception is made, shows that none was intended to exist. *The fact that by this law every person elected thereto was not to take the office till January following his election, proves that the Legislature did not intend that any person required to take it before, should be elected.*

Again: our Constitution, art. 40, sec. 6, provides that the County Treasurers shall be elected or appointed as the Legislature shall direct; and by sec. 7, that the duration of the office, if not declared by law, shall be held during the pleasure of the appointing power for any term not exceeding four years.

We have shown that the duration cannot be held to be fixed by sec. 20, but is by sec. 4. But suppose it was not so fixed; then of course by the Constitution, Wells would hold during the pleasure of the Board. He was appointed in the place of Williams, resigned, and in default of any steps taken by them to provide another to fill the office before January, 1858, their pleasure must be deemed to have been that Wells hold till that time.

II. But if he could not so hold till January, 1858, still he was enti-

tled and required to hold until some one possessing the right and qualifications to take the office from him, demanded it; and no one demanded it but the relator, and he was not entitled or qualified to take it.

The office of County Treasurer is not simply a franchise in the nature of office, the possession of which is only a matter of advantage to the incumbent, but is a trust charged with duties and responsibilities of great importance to the public which cannot be neglected without serious public inconvenience and detriment.

The custody and preservation of the public funds are with this office.

It will not probably be denied that the incumbent might hold as a *locum tenens* beyond the exact limit of his term; in other words, till his successor was qualified. No person is provided by law to whom he can deliver the office and effects on going out, but "his successor," which more than implies that he shall keep them till a successor is provided, except in case of death, when his legal representatives will take charge of the same, and deliver over to a successor when he appears. Act concerning County Treasurers, sec. 17; Wood's Dig., p. 714, art. 3432.

Even if this were not so, this action being only upon the relation of Fowler, and predicating defendant's liability to *oust* upon *relator's* right to *enter*, is not in the form to oust the defendant simply, and leave the office empty.

But again: if Williams' term was not terminated by election day, but ran to January, 1858, and Wells had no right to hold the balance of the extended term, and there had been any law for electing some one to fill the balance of that unexpired term, we say such an election was a special election. People v. Porter (6 Cal. 38).

Section 30 of the Act concerning Officers (Wood's Dig., p. 559) declares when vacancies occur in office.

Sections 3 and 4 of the Act concerning Elections (Wood's Dig., p. 375) mentions only two kinds of vacancies in office to be filled; one occurring by the expiration of "the full term thereof," and the other by some other means, as death, resignation, etc.

It is clear that every election to fill a vacancy occurring otherwise than by the expiration of "the full term" is, under the Act, a special

election, for the validity of which there must be an order therefor by the Board of Supervisors, designating the office to be filled, and the time of holding the election, (section 9, Act concerning Elections, Wood's Dig., p. 375) and a publication of such order as notice for ten days in the county, (Section 6, Act concerning Elections).

There must have been a time fixed by the proper officers; (section 3) that it may have come on the day for general election, cannot dispense with these requirements. *People v. Porter*, 6 Cal. 28. But none of these things were done, says the report of the Referee.

Hence, unless the period of Wells holding the office was a full term, the election was unauthorized, and the relator could take nothing by virtue thereof.

At the July Term, 1858, BURNETT, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., concurring.

The only question to determine is, whether there was any vacancy in the office at the time of the general election in 1857. It will be remembered that, before the resignation of Williams, the term of his office had been extended by the special Act of April 28th, 1857.

By the provisions of section 4 of the Act of March 27, 1850, concerning the office of County Treasurer, it is provided that vacancies in the office shall be filled by appointment of the Court of Sessions, and that the appointee should hold for the remainder of the term. (Wood's Dig. 712.) By the Act of March 20, 1855, to create a Board of Supervisors, it is enacted that "when a vacancy shall occur in any county or township office, except the office of County Judge or Supervisor, the Board of Supervisors shall appoint some suitable person, an elector of the county, to fill the vacancy until the next general election." And by the same Act it is also provided that "the Board of Supervisors shall have and exercise, in its county, all jurisdiction and powers, other than criminal, conferred by any law on the Court of Sessions, or heretofore exercised by said Court, under any statute, or by any statute provided to be exercised by said Court, when the same does not conflict with the provisions of this Act." (Wood's Dig., pp. 696-7, secs. 20 and 25.)

It is a well settled rule of construction, that statutes upon the same

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subject matter must be construed together, and that a general provision must be controlled by one that is special. (Smith's Com., sec. 639; *The People v. Phoenix*, 6 Cal. Rep. 92; *Lucas, Turner & Co. v. Payne & Dewey*, 7 Cal. Rep. 96.) The provision that the appointee to fill the office of County Treasurer shall hold for the remainder of the term is special, and relates only to that particular office, while the provisions of the twentieth section of the Act to create a Board of Supervisors are general, and must be controlled by the former. The twenty-fifth section of the latter Act merely confers the power of filling the vacancy upon the Board of Supervisors, but does not in any way affect the duration of the term of the person appointed. The *agent* for exercising this power is changed, but the power and effect of its exercise remain as before. (*The People v. Phoenix*, 6 Cal. Rep. 94.) The case referred to fully sustains the view we have taken.

There was no vacancy to fill by election, and no error in the judgment of the District Court.

Judgment affirmed.

FIELD, J., having been counsel in the Court below, did not sit in the case.

A reargument was subsequently granted in this case, and at the October Term, 1858, the following opinion was delivered by BALDWIN, J.—TERRY, C. J., concurring.

The judgment is affirmed on the authority of *People ex rel. McKune v. Weller*, decided at this term (*ante* 49).

THE AMERICAN RIVER WATER AND MINING COMPANY v. THE BEAR RIVER WATER AND MINING COMPANY.

Where there is no properly authenticated statement on appeal, the Supreme Court will only examine the judgment roll.

APPEAL from the District Court of the Eleventh Judicial District, County of Placer.

Hanson v. Barnhisel.

This was an action to recover damages, for the wrongful diversion of water from plaintiffs' ditch, and for an injunction restraining defendants, etc.

Plaintiffs had judgment and the defendants appealed. The record is voluminous, exhibiting the history of the case, but there is no statement of the case as required by our statute.

E. B. Crocker for Appellants.

Catlin, French & Tuttle for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

There is in the record no properly authenticated statement of the case, and our examination must be confined to the judgment roll, which, being regular on its face, the judgment is affirmed.

HANSON v. BARNHISEL.

The Supreme Court will not reverse an order of the Court below, in granting a new trial, where there has been no abuse of the discretion of the Court in granting such order.

APPEAL from the District Court of the Seventh Judicial District, County of Contra Costa.

Currey & Reynolds for Appellant.

H. Allen for Respondent.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., concurring.

The order granting a new trial in this case, was no such abuse of the discretion of the Court below as will warrant a reversal.

Judgment affirmed.

Gray v. Palmer.

GRAY v. GRAY *et al.* AND EATON v. PALMER *et al.*

A motion to amend the judgment of the Supreme Court must be made within the ten days allowed for filing a petition for rehearing.

Section 510 of the Code, which provides that the party who obtains a judgment shall, within two days after the verdict or judgment, file with the Clerk his bill of costs, does not apply to costs on appeal to the Supreme Court.

The costs upon an appeal are properly the costs in this Court and the costs of making up the appeal in the Court below, including the cost of making out the transcript.

Where a case is remanded for further proceedings, and costs awarded in this Court in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit.

MOTION on the part of plaintiff, Eaton, to correct the *remittitur*.

Glassell and Leigh for the Motion.

BURNETT, J., delivered the opinion of the Court, at the July Term, 1858 — TERRY, C. J., and FIELD, J., concurring.

The *remittitur* in this case followed the decision of the Court, and is in strict conformity therewith. If any one or more of the parties had desired a modification of the judgment, as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing.

It is objected on the part of Eaton, who makes this motion, that no bill of costs was filed in this Court, as required by section 510 of the Code. We think that section does not apply to costs upon appeal. The costs upon appeal are properly the costs in this Court, and the costs of making up the appeal in the Court below, including the cost of making out the transcript.

If we were to require a bill of costs to be filed in this Court, the result would be exceedingly oppressive upon members of the bar. The Code requires the bill to be filed within two days after the decision; and as decisions are made from time to time in vacation, attorneys residing out of this city could not file their memorandums of costs within the time limited.

Where a case is remanded for further proceedings, and costs awarded in this Court in general terms, we mean only to include the costs upon appeal, leaving the costs of the former trial to abide the event of the suit.

Motion denied.

Chandler v. Booth.

CHANDLER v. BOOTH.

Where A, who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B a certain amount of money, with directions to B to pay the hands, which B neglected to do, and where there was no evidence showing that the hands agreed to look to B for their money, or that A was indebted to the hands in an amount equal or approximate to the sum in B's hands, and the money was subsequently attached in the hands of B at the suit of C against A: *Held*, that the money was liable to the attachment.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

The facts appear in the opinion of the Court.

Wallace & Rayle for Appellant.

Winans & Hyer for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

Plaintiff in a suit against James Allen attached certain moneys in the hands of defendant. After the judgment against Allen the defendant was examined, and having denied his indebtedness to Allen, this suit was instituted by permission of the Court.

It appears that Allen placed in the hands of defendant a State Controller's warrant for the sum of \$1,600, with directions to sell the same, and pay the proceeds to the "boys in the office," meaning the employes in a printing office conducted by Allen.

It did not appear that any portion of the proceeds had been so paid; that defendant had ever become liable to the hands in the office, by their knowledge of and consent to the arrangement between defendant and Allen, or that Allen was indebted to such hands in an amount equal or approximating to the sum in the hands of defendant.

We think the evidence produced by the plaintiff sufficient *prima facie* to entitle him to a verdict, and that the Court erred in ordering a non-suit.

Judgment reversed and cause remanded.

Hardy v. Hunt.

HARDY v. HUNT.

A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited.

The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal.

Upon the retraction of the wager, the right to the possession of the money is in the agent or bailee, and he may maintain an action for it where the bailor interposes no objection.

Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder with whom it had been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof.

The stakeholder being informed of the rights of the bailor, was bound to protect those rights by resisting, in some way, the proceedings against him as a garnishee, the bailor being no party thereto; nor will he be protected by a judgment improperly entered against him, ordering him to pay the money to the attaching creditor.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

The facts are, that some time in August, 1857, plaintiff gave one O'Brien a check upon a banker, payable to the order of O'Brien, for five hundred dollars. This was done to enable O'Brien to bet that sum with one Harris on the election for Sheriff of Sacramento County. O'Brien undertook to make the bet for plaintiff — the plaintiff charging O'Brien to make the bet in his (O'Brien's) own name, and not disclose the plaintiff's connection with it. O'Brien drew the money on the check and put it in his pocket, together with a small amount of his own, and made the bet. It was agreed that O'Brien and Harris should deposit with the defendant, Hunt, a check on the bank for one hundred dollars each as a forfeit, and the other four hundred dollars should be deposited with Hunt, as stakeholder, on the following Monday. O'Brien then deposited four hundred dollars with Hunt, to be held by him, as stakeholder, in the event that Harris put up his four hundred dollars on the day named. The terms of the bet were reduced to writing — parties appearing to be Harris on the one side, and O'Brien on the other — the paper being signed by both of them.

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Afterwards, and before the election, attachments issuing out of a Justice's Court against O'Brien were served upon Hunt, under the 126th section of the Practice Act. By agreement between O'Brien and Harris, the latter was permitted to withdraw his five hundred dollars from the hands of Hunt. After the attachment was levied upon Hunt, he was informed by O'Brien that the bet was made for the plaintiff, and Hunt replied that he had suspected as much all along. The suits against O'Brien, in the Justice's Court, went to judgment; and upon proceedings supplementary to execution, Hunt was cited before the Justice by whom the judgments had been rendered. At this examination Hardy desired to appear by counsel, but was informed by the Justice that he had no standing in Court. When Hunt appeared before the Justice he was aware of Hardy's position. Upon a statement of the facts, Hunt was ordered to pay over, and did pay over to the judgment creditors of O'Brien, the sum of four hundred and twenty-two dollars and thirty cents, and the balance of the five hundred dollars he paid over to plaintiff, without prejudice to the merits of this controversy.

The questions raised upon this state of facts are these: *First*, can Hardy maintain an action for this money deposited by O'Brien in his own name? *Second*, is Hunt protected by this judgment of the Justice of the Peace in paying over the money?

Winans for Appellant.

1st. No action can be brought by the plaintiff against the stakeholder after the event has been decided. See *Vischer v. Yates*, 11 Johns. 23.

The action was brought by the loser to recover back his deposit, not by the winner.

The decision of Kent, C. J., in that case, that after the event the loser might recover back his deposit from the stakeholder, was subsequently overruled, and the doctrine laid down, that after the event no action could be maintained against the stakeholder by either party. *Yates v. Foote*, 12 Johns. 10, 15; *Ruckman v. Pitcher*, 1 Comstock, 401, 402, 403, *et seq.*; *Bunn v. Riker*, 4 Johns. 428; *Rust v. Gott*, 9 Cowan, 173; *Dewmiton v. Cook*, 12 Johns. 376; *Ball v. Gilbert*, 12 Metcalf, 397; *Corley v. Berry*, 1 Bailey, (S. C.) 593.

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2nd. Defendant's liability to the creditors of O'Brien was established:

I. By his answer to the Constable when garnisheed, that the money was O'Brien's.

II. By the testimony which he gave, and in accordance with the facts was compelled to give, on his subsequent examination before the Justice, under proceedings supplementary to execution; and

III. By the judgment rendered against him on such examination. *Jackson v. Bank of U. S.*, 10 Penn. State Rep., p. 61, and *Drake on Attachments*, sec. 469.

3d. A party who permits another to deal with property as if such property were that other's own, is compelled to lose it if that other person sell it or so dispose of it as to place it beyond that party's reach. *Dyer v. Pierson*, 3 B. & C. 38; *Borson v. Coles*, 6 Maule & Sel. 23, 24; *Williams v. Burton*, 3 Bing. 169.

4th. Plaintiff having instructed O'Brien to simulate ownership of the money, and O'Brien's creditors having been thereby induced to seize it as his property, plaintiff is estopped by his own act from now setting up ownership in himself. *Mitchell v. Reed*, 9 Cal. 204.

5th. There is no privity of contract between plaintiff and defendant.

Plaintiff having drawn his check in favor of O'Brien, which O'Brien endorsed and drew out the money from the bank, thereby made that money O'Brien's own, and O'Brien thus became a debtor to plaintiff for the same; and having, subsequently, deposited it with the stakeholder as his own and not as a special deposit, plaintiff cannot pursue the said money as a fund, nor hold defendant liable for having paid it over to O'Brien's creditors, in obedience to the judgment rendered by the Justice against defendant. The mere casual notice from plaintiff to defendant in the Court room of the Justice, that the money belonged to him, could not create a privity of contract between them. *Argenti v. Brannan*, 5 Cal. 351, 353.

Smith & Hardy for Respondent.

In the case cited by counsel from 12 Metcalf, 397, the Supreme Court of Massachusetts, so far from sustaining his position, decides emphatically that, "in no proper sense can the stakeholder be regarded

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as a party to the illegal contract, or *in pari delicto*. He is a mere depository of both parties, &c." 12 Metcalf, 402, 403.

In Massachusetts the Supreme Court held: "That an action for money had and received would lie for each party for the amount deposited by him." Ball v. Gilbert, 12 Metcalf, 403, 404.

The opinion of Senator Sanford in Foote v. Yates, cited by counsel, 12 Johnson, is a happy commentary upon the *justice* of this plea, and we think with that Senator that the plea "never will be tolerated while common sense and common honesty hold their proper dominion among mankind."

As to defendant's liability to the creditors of O'Brien, we hardly deem it worthy serious consideration.

If O'Brien were the agent of respondent, and by virtue of such agency the deposit could be claimed by respondent, O'Brien's creditors certainly could not attach it.

The fact that O'Brien was in possession of the money, and that he called it his, did not give any rights to persons who were not misled by some act of respondent. Black v. Zachariah, 3 Howard, (S. C. R.) 511.

In "The United States v. Vaughn, 3 Binney, 394," an attachment had been levied on shares of stock standing on the books of the bank in the *name* of the debtor, but the stock belonged to other parties. The decision was that the attachment was improperly levied and therefore was defeated.

In this case there is no pretense of fraud or injury. No suspicion of interest in O'Brien, but simply a naked agency; and no pretense that respondent ever intimated to any one that the money was O'Brien's; respondent never represented it as such. He only told O'Brien to bet for him with his money, and O'Brien never gained credit, nor were the creditors of O'Brien deceived in any way.

It is true, as argued by counsel, that a party who permits another to deal with property as his own, to the injury of another, must lose his property. But the Court below negatives every pretense of injury to the attaching creditors by any permission of respondent.

In the case of Mitchell v. Reed, 9 Cal. 204, the rule was carried to its fullest extent, if the decision did not go beyond the law; but in

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that case, Mitchell had repeatedly represented the property to be Haskell's, and had as often denied that the liquors seized were his own. His declarations were open, express and notorious. Here, the only words importing anything like admission of O'Brien's right was a confidential charge that the bet be made in O'Brien's name; but plaintiff never called it O'Brien's money; never declared that it was not his own but another's; nor did his confidential order to his agent go to the ears of the attaching creditors.* They acted on appearances, not on admissions; nor were those appearances sufficient.

It is urged, last, that there is no privity between Hardy and Hunt, and therefore, that no suit can be maintained. This question is put at rest by the general rule of agency: that, though a contract be made by an agent in his own name, the principal may assume it and sue or be sued on it as if his name appeared; the only question being, Was it the principal's contract?

In *Vischer v. Yates*, 11 Johnson, p. 28, the very case at bar was decided by Chancellor Kent.

In that case the bet was made in the name of the agent, who also bet the money of other parties in the same bet, and all in his own name; and the Court allowed each principal to sue for his own money so wagered.

This doctrine was afterwards affirmed in the Court of Errors of New York, in *Foote v. Yates*, 12 Johnson, p. 10. See also, *Duke of Norfolk v. Worthy*, 1 Campbell, N. P. 337.

This Court adhered to the same rule in the case of the *People v. Wright's Adm'r*, (Houghtaling) 7 Cal. 348.

In Massachusetts, where an agent had bet off money as his own which had been entrusted to him as a carrier, the principal was permitted to and did sue and recover the same from the winner. *Mason v. Waite*, 17 Mass. R. 560.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

There can be no doubt that the wager was illegal and void, as against public policy; the direct effect of such wagers being to affect the purity of elections. This has been often — indeed, we believe, uni-

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versally—held, whenever the question has arisen. If this suit had been to recover a wager of this sort, the action could not be maintained. But this is not the question: The party depositing the money for this illegal purpose, may retract the illegal act. The money is not forfeited for the benefit of the stakeholder. (*Vischer v. Yates*, 11 John. 29.) He holds it as bailee of the depositor, who may resume it at any time before it is paid over to the winner. In this case, it seems, the wager was terminated before the election, by the proceedings taken at the instance of O'Brien's creditors.

It is not necessary to consider the illegal nature of these proceedings further, so far as Hardy is concerned; for the case stands as to him as if this money was placed by him in the hands of O'Brien for a lawful purpose. It would then be the ordinary case of one man putting in the hands of another a sum of money to be used *for a particular purpose*, by the bailee, in his own name; or, as was said by the Chief Justice from the Bench, like the case of an attorney depositing his client's money in bank in his own name, at the request, express or implied, of the principal. In such case, as to third persons, there is no reason for saying that the money is liable for the debts of the attorney. The doctrine of estoppel *in pais* has no application. If A consents, for one particular purpose, that B may use his property as his, A's own, as to that purpose, those dealing with B on the faith that the property is B's, may hold A to this representation; or, if A represents to C that particular property is D's, C may hold this as an estoppel if he deals with D on the faith of this declaration. But this does not authorize others, to whom the representation is not made, especially those who know the true state of facts, to deal with the property or attach or levy on it as the custodian's own. The doctrine of estoppel *in pais* is thus stated by Greenleaf on Evidence, vol. 1st, sec. 204:

“With regard, then, to the conclusiveness of admissions, it is first to be considered that the genius and policy of the law favor the investigation of truth by all expedient and convenient methods; and that the doctrine of estoppels, by which further investigation is precluded, being an exception to the general rule founded on convenience and for the prevention of fraud, is not to be extended beyond the reasons on

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which it was founded. It is also to be observed that estoppels bind only parties and privies — not strangers.” (See note 2 for illustrations, Coke Lit., 302-a.)

Again, in sec. 207, the author says:

“Admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party. For in the latter case the implied declaration may be considered as addressed to every one, in particular, who may have occasion to act upon it. In such cases the party is estopped, on grounds of public policy and good faith, from repudiating his own representations.”

These citations show clearly that there is no such doctrine in the law of evidence as that a casual or other declaration or act, made or done by a party, which another may happen to hear of, which would authorize the latter, without seeking further information, to go on and act as if it were true, and hold the author concluded by it. If this were so, the number of parol estoppels might be so enlarged as to make almost every act or admission an estoppel. It would be scarcely safe to say or do anything in reference to his rights or property, lest he might be held to some estoppel in favor of parties who had no relations with him at the time of these acts or declarations. (See also, *Black v. Zachariah*, 3 How. U. S. 511; *U. S. v. Vaughn*, 3 Binney, 394.)

There is no difficulty in distinguishing this money. The plaintiff did not part with the ownership by allowing it to be used for his benefit, though in the name of another. It was to be used for this one purpose — not invested, or changed, or further dealt with. The money in the hands of the agent remained, as between him and the principal, the money of the principal. Upon the retraction of the wager, if not before, the right to its possession was in the plaintiff. This identical money was, it seems, deposited with the stakeholder. We cannot see why the plaintiff did not have a right of action for it — especially as O'Brien interposes no objections. And so are the authorities (11

Hardy v. Hunt.

John. 28; 12 John. 10; 1 Campbell, 337; 17 Mass. 560; 7 Cal. 348.)

The judgment of the Justice was no protection to Hunt. Hardy was not a party to the judgment. On the contrary, the Justice refused to permit him to contest. Hunt, knowing the facts — if he is to be considered as a garnishee — should have set them up in some way, in resistance to the proceeding; if necessary, perhaps he might have filed an interpleader for his protection; or at least, appealed from this irregular and unauthorized judgment. In *Oldham v. Ledhelter* (1 How. Miss. R. 47) the Court of Errors and Appeals of Mississippi says: "The garnishee is regarded by the law somewhat in the light of a trustee, and is bound to protect, by legal and appropriate steps, the rights of all parties to the goods or credits attached in his hands; and if, after notice, though execution may have been awarded against him, he shall satisfy the judgment, it will be in his own wrong, and constitutes no valid defense to the claim of the assignee. This position is fully sustained by an authority in 1 Washington C. C. R. 425; and in 4 Greenleaf, 435, it was held, etc. The decision in the case of *Prescott v. Hall* (17 Johnson, 290) is in accordance with these authorities." In this case it was held the garnishee should have protected himself by a bill of interpleader; and failing to make the defense, he was held liable. *Yarborough v. Thompson* (3 S. and M. 291) affirms the same general doctrine.

If it be contended that the title to this money passed by a levy of the attachment, the answer is, that if this could be under any circumstances, it did not in this instance, because the money was not the property of O'Brien.

On the whole case, we think the judgment should be affirmed.

People v. Fogg.

PEOPLE *ex rel.* TALLANT & WILDE, v. FOGG, TREASURER
OF CONTRA COSTA COUNTY.

A *writ* will not lie against a County Treasurer to compel him to pay interest due on county bonds.

The Treasurer is not an independent officer in respect to his charge and control of the county funds; but in his disbursements, acts on the warrants of the Auditor on claims audited by the Board of Supervisors.

In such a case, the Treasurer is not, in respect to interest money, placed in any direct relation with the creditors; and he is not intrusted with a mere ministerial duty of holding it or paying it to them on demand.

APPEAL from the District Court of the Seventh Judicial District, County of Contra Costa.

This was an application for a writ of *mandamus* against the Treasurer of the County of Contra Costa. The application is based upon the following grounds:

The County of Contra Costa, having a large outstanding indebtedness in the shape of warrants drawn on the Treasurer, the Legislature of this State, on the fourteenth day of February, 1855, passed an Act to fund such indebtedness, entitled "An Act to fund the Debts of Contra Costa County, and to provide for the payment of the same."

Pursuant to the Act, such warrants were presented to Commissioners therein provided for, and by them examined and determined to be true and correct warrants. That the said warrants were delivered up and surrendered by the holders of them; and bonds with coupons annexed thereto were thereupon issued, as directed by the said Act, and delivered to the holders of the said warrants as a substitute therefor.

The interest, for the payment of which the coupons were annexed, was made payable on the first days of January and July in each year, at the city of New York, without naming any particular place in that city at which, or any person by whom, to be paid.

By the 9th section of that Act, in addition to the ordinary taxes, a special tax, to be called the interest tax, of thirty cents on each one hundred dollars of taxable property, was directed to be collected in the same manner with ordinary revenues of said county, for the payment of the interest upon the said bonds; ~~which tax was to be paid to the Treasurer of the county.~~

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On the fourteenth of April, 1858, there was in the hands of the defendant, as Treasurer, about \$3,000 of this tax. The relators were then, and still are, the holders of a large amount of said bonds, upon which there was then due for interest the sum of \$3,100, and for which they then held coupons for that amount. On that day they presented such coupons to the defendant, at his office in said county, and demanded from him payment of the same, or so much of them as the interest fund or tax in his hands for that purpose would pay; which the defendant then and there refused to do.

It further appears, that the interest on the said bonds had been paid up to January 1st, 1856, in the city of New York; but all the interest accruing and due on the said bonds on the first of July, 1856, and since that time, has not been paid; nor have any funds been sent to that city for the payment of such interest, nor any arrangement there made for such payment.

The writ was denied by the Court below, and the relators appealed to this Court.

Currey & Reynolds for Appellants.

I. It is objected by the defendant that, as County Treasurer, he is not authorized to apply such funds to the payment of the coupons, or to the interest upon the bonds, until the Board of Supervisors shall have first made arrangements for such payment; and then, only upon the warrant of the County Auditor, or the order of the Board of Supervisors.

This objection involves the construction of the Funding Act of 1855, (Laws of 1855, page 9) under which these bonds and coupons were issued.

The bonds issued under that Act were founded upon warrants previously drawn by the Auditor of the county upon the Treasurer, which were then an existing and outstanding indebtedness against the county; and which the Treasurer was bound to pay on demand, without further action by any officer or Board of the county. He was the only officer who could pay them, or upon whom any demand could be made by the holders of them for payment.

The Act for funding this indebtedness was a proposition on the

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part of the county to the holders of these warrants to substitute bonds in their place, with certain conditions and covenants. When the holder of the warrants accepted the proposition, it then became a contract between the parties, binding upon both. Among the conditions, the time of payment of the principal was to be extended to the year 1870, and the interest to be paid on the first days of January and July in each and every year. There are no terms of the Act, or stipulation in the contract, for the exchange of these securities, by which the holders of the warrants were to relinquish any of their former rights. The warrants with interest were to be paid out of the general fund, on demand by the Treasurer. The interest upon the bonds is to be paid at fixed periods out of a *particular* fund, expressly created and to be applied by the Act and the terms of the contract for that purpose. The holder of the warrants received payment directly from the Treasurer, and looked only to him for such payment. That right has never been relinquished by him in the exchange under the Act; and he has, therefore, the right to require the payment of his interest upon his bonds from the same direct source and from the same officer, especially when that officer is made and is, in fact, the only legal custodian of that fund, as of all other funds belonging to the county.

It is true, the Act of 1855 does not in express terms direct who shall pay the interest upon the bonds. The Treasurer is to receive and pay out all the moneys of the county. (Wood's Dig., p. 713, art. 3421.) The 9th section of the Act of 1855 requires that the tax constituting the interest fund shall, when collected, be immediately paid to the Treasurer, to be by him applied to the payment of the interest on the bonds. This officer was required by law to pay the warrants on their presentment, which were his authority for such payment. That officer then being the legal receiver, and the only officer authorized to pay out any of the moneys of the county, was bound to pay the interest on the bonds, on the holder presenting to him the coupons, which are also his authority for such payment.

That the Treasurer must pay this interest upon the presentment of the coupons to him, is further made clear from the 4th section of the Act. That section declares that the Treasurer *shall cancel* the cou-

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pons on their being paid. Now, if he do not pay them, how is he to know they are paid, or to have their possession, so as to cancel them? If the County Judge or any other officer were to pay them, that officer would have the possession of them; and then, in that event, the Act would have directed the officer paying and having their possession to cancel them.

But it is contended on the part of the defendant, that by the 10th section of the Act of 1855, the appellants should have first applied to the Supervisors; and that payment of the coupons could only be made upon their warrant.

This position we deny, and insist that it is against every fair construction of the Act.

If it requires a warrant from the Supervisors, on whom shall it be drawn, or to whom shall it be payable? Certainly not on the Treasurer to give him power to pay, for that power is conferred on him by his general duties and powers as Treasurer. He does not require it to authorize him to pay the coupons, if he be the proper officer to pay; because the coupons themselves are his authority to pay under the Act of 1855, they being a substitute and in the place of the warrants which were payable on presentment, without any further warrant or direction from any source.

On a careful examination of the Act of 1855, it will be found that the Treasurer is the only person to pay these coupons, and that he must pay them to the holder on presentment and demand of payment from the interest fund in his hands, without any further directions or authority from any other officer or Board of the county.

The first part of section 10 of the Act directs that the Supervisors shall make arrangements for the payment of the interest; and the exercise of the power so conferred upon them depends upon certain conditions; and those conditions, which set in operation these powers, can only exist when the tax authorized and directed by the ninth section of the Act is first raised, and is insufficient. By that section, the tax raised and constituting this interest fund is to be paid to the Treasurer, and by him applied to the payment of the coupons; and in the event that fund is insufficient, then the Supervisors are to make the arrangements directed in the tenth section; then the conditions exist

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to set in operation the powers of the Supervisors under that Act. Therefore, then, under the tenth section :

1. The Supervisors are, sixty days before the interest becomes due, to see if there be sufficient of the interest fund in the hands of the Treasurer to pay such interest. If there be, then they have nothing further to do; if not, then they are to make arrangements to have sufficient in that fund for that purpose, and that section points out the way for those officers to proceed.

2. It will be perceived that there are different funds belonging to the county, which are distinct and separate, one from the other, and created for different objects; and so to be kept and disbursed by the Treasurer, although that Treasurer may be one and the same person; and therefore, that officer is required to keep the interest fund wholly separate and distinct from the general fund, in the same manner as if such fund were kept by a different officer or person.

If, therefore, the Supervisors on examination find that the interest fund in the hands of the Treasurer is insufficient to meet the interest on the bonds, they are then required to draw their warrant on the Treasurer of the general fund for such sum as will supply the deficiency of the interest fund; and it is the duty of the Treasurer of the general fund to pay such warrant; that is, as the Treasurer of the general fund, he must, upon the authority of that warrant, transfer the amount of such warrant from the general fund to the interest fund for the payment of such interest. But yet, as the Treasurer of the county, and general custodian of all the moneys of the county, he still holds the same money, it only being transferred from one to the other fund, as required by law.

3. In the event that both of these funds prove inadequate to pay the interest, then the Supervisors are to make such contracts and arrangements, in the name and behalf of and for said county, as may be necessary for the payment of said interest, and the *protection of the faith of the said county*. By this power they may loan the money, or by any other legitimate means may procure the necessary amount to provide for the deficiency of this interest fund, and protect the faith of the county; and when so procured and provided for, the amount must be paid to the Treasurer; and no other officer by any law is

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authorized to have the custody of this, or of any other money of the county, or to pay out or disburse them for any purpose.

The respondent's counsel say that: "It is made the duty of the Supervisors to have first drawn from the County Treasurer all the money in the interest fund to meet the maturing coupons."

The Act nowhere so declares. The directions in the Act to the Supervisors first to draw their warrant, are contained only in the proviso at the end of the tenth section, which is as follows:

"*Provided*, That said County Judge (amended By-laws, 1855, p. 211) shall have first drawn from the County Treasurer such sums as may be in the County Treasury subject to and provided for the payment of said interest by the provisions of this Act."

This proviso applies only to the last clause of that section; to that part which authorizes and empowers the Supervisors to make contracts and arrangements for the protection of the faith of the county, in the event that the interest fund and general fund shall be insufficient. This proviso was added by the Legislature to prohibit them from loaning or otherwise pledging the credit of the county, until they had first exhausted the interest fund and general fund for the payment of the interest; and only in the event that those funds were insufficient, could they proceed to raise any money by loan or contract.

W. W. Theobalds for Respondent.

As against the County Treasurer, this writ of *mandamus* is unauthorized by law and misdirected. "This writ," says Blackstone, vol. 3d, p. 110, Comm., "issues in all cases where the party hath a right to have anything done, and hath *no other specific means* of compelling its performance." It is, in its nature, "a command, directed to any person, corporation or Court, requiring some *particular thing* which appertains to their *office and duty*," and which is "consonant to right and justice." It issues, says our Practice Act, sections 467 and 468, "to compel the performance of an act which the law specially enjoins as a *duty* resulting from an *office, trust or station*," and "in all cases where there is not a plain, speedy and adequate remedy in the *ordinary* course of law." It only lies where there is a "*specific legal right, and no specific legal remedy*." *People v. Olds*, 3 Cal. Rep., p

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171, and cases there cited, particularly the full note in *Fish v. Weatherwax*, 2d Johnson's New York Cases. Officers vested with *discretionary* powers can be forced to *act*, but not directed *how* to *act*. Mere *ministerial* agents can only be compelled to do *specific legal duties*. And the right to demand their performance must be complete and perfect, not inchoate. If there is any other remedy, by *action* or *otherwise*, or any other act or acts or conditions precedent to be performed, these modes and means must first be tried before this writ can issue and compel the performance of a particular act by a subordinate ministerial officer. Only on failure of all other means and remedies, and on the due fulfillment of all conditions precedent, can this writ be legitimately employed. It is purely an exceptional, supplementary and residuary remedy to prevent "a failure of justice and defect of police." As authorities, see cases just cited, and *People v. Trustees of Brooklyn*, 1 Wendell, p. 318; *Boyce v. Russell*, 2 Cowen, p. 444; and *People v. Bell*, 4 Cal. Rep., pp. 178 and 179. Before this writ issued in this case, there should have preceded it the due performance of all the conditions of the law merchant, of the law under which appellants claim, and of the contract on the face of the coupons. The Treasurer is the receiving and disbursing officer of the funds of the county; but only as a *mere ministerial agent* and *special depository*, under the orders and warrants of the *Supervisors* and *Auditor*. (Wood's Digest. p. 713, sec. 6, and pp. 715 and 716, sec. 1, of Act of 1857.) The direction to the Treasurer to pay *on order or warrant* excludes his right to pay *without order or warrant*. Such is the *general law* that prescribes his mode of action, and the duties of his office. But the *special law* that defines what he is to do, as to this claim, and fixes the rights and duties of the coupon-holders, as well as those of the Supervisors, and binds them all, being at once the contract and the law of the contract, *vis*: the Act of February 14th, 1855, obligates the Treasurer, in section 13, to follow precisely and only the mode pointed out in said law — and, while in section 9 it appropriates the interest fund to the coupon-holders, prescribes in section 10 prior duties upon the County Judge, or, as amended by Act of April 30th, 1855, upon the Board of Supervisors, before the Treasurer can be compelled to act. These prerequisites to be observed under the general

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law and under the special law of this case are conditions precedent to the Treasurer's action, and especially to his enforced action by this writ.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

We have felt a strong disposition to reverse this case, and give the relator the relief he seeks; for, upon the transcript, it seems eminently due, as well to the relator as the character of the County of Contra Costa, that the interest on the bonds of the county should be paid according to the contract. But we are unable to see how we can do this consistently with law.

The remedy of *mandamus* against the Treasurer rests upon the idea that he has the control of this money, and is merely charged with the ministerial duty of paying it out to the holders of these coupons on demand. But this is not so. By the Act of 1855, "to Fund the Debt of Contra Costa County, and to provide for the payment of the same," (Acts of 1855, p. 9) it is provided:

"**SEC. 10.** It shall be the duty of the County Judge of said County of Contra Costa, to make certain arrangements for the payment of the interest on said bonds when the same shall fall due, at least sixty days before the time of payment; and in the event that the said interest fund is insufficient, the said County Judge shall draw a warrant on the County Treasurer of Contra Costa County on the general fund of said county for such purpose, and said County Treasurer shall forthwith pay such warrant; and in the event that these funds prove inadequate, the said County Judge is hereby authorized, empowered and required to make such contracts and arrangements in the name, behalf, and for said county as may be necessary for the payment of said interest, and the protection of the faith of the County of Contra Costa; *provided*, that said County Judge shall have first drawn from the County Treasurer such sums as may be in the County Treasury subject to, and provided for, the payment of said interest by the provisions of this Act."

"**SEC. 13.** This Act shall take effect from and after its passage, and it shall not be lawful for the County Treasurer to pay or liquidate any of the indebtedness of said County of Contra Costa, which occurred

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prior to the first day of February, 1855, in any other manner than herein provided."

By an amendatory Act, passed February 14th, 1855, (p. 211) and before, so far as appears, any action of the creditors under the first statute, (sec. 1) it is declared that section tenth of said Act shall read as follows: "It shall be the duty of the Board of Supervisors of Contra Costa County to make certain arrangements for the payment of the interest on said bonds, when the same shall fall due, at least sixty days before the time of payment: and in the event that the said interest fund is insufficient, the Board of Supervisors shall draw a warrant on the County Treasurer of Contra Costa County, on the general fund of said county, for such purposes; and said County Treasurer shall forthwith pay such warrant; and in the event that those funds prove inadequate, the Board of Supervisors is hereby authorized, empowered and required to make such contract and agreements in the name, behalf, and for said county, as may be necessary for the payment of said interest, and the protection of the faith of the County of Contra Costa; *provided*, that the said Board of Supervisors shall have first drawn from the County Treasurer such sums as may be in the County Treasury, subject to and provided for the payment of said interest by the provisions of said Act."

By the general law (Wood's Digest, 713-716) the Treasurer is not an independent officer in respect to his charge and control of the county funds, but, in his disbursements, acts on the warrants of the Auditor on claims audited by the Board of Supervisors. Leaving out of consideration, therefore, the Act of 1858, it sufficiently appears that the Treasurer is not, in respect to this interest money, placed in any direct relation with the creditors, and that he is not trusted with a mere ministerial act of holding it for or paying it to them on demand. It follows, therefore, that a writ of *mandamus* directed to the Treasurer is not the proper remedy. (4 Cal. 178-9.)

The judgment is affirmed.

Moore v. Semple.

MOORE *et al.* v. SEMPLE *et als.*

No errors can be assigned, which this Court will notice, on an instrument not embodied in the statement on appeal, or a bill of exceptions. The omission of the words "be sold" in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment.

APPEAL from the District Court of the Fifteenth Judicial District, County of Colusa.

This was an action brought to obtain a decree of foreclosure upon note and mortgage, and a sale of the mortgaged premises.

Semple and five others made a joint and several note, payable to Moore & Allen on the fourteenth day of July, 1856. Afterward, Semple executed a mortgage to secure the payment of the note, and further agreed to pay attorney's fees. Moore & Allen brought a joint action on these instruments, and Semple filed a demurrer for several grounds. But, before the trial, a stipulation in writing was entered into between the plaintiffs and all the defendants, that a joint judgment should be rendered against all the defendants for the principal, interest and attorney's fee—the attorney's fee being liquidated, and the amount paid; the interest also fixed at a different rate, and a different sum on which said interest should be calculated was also agreed upon. This agreement was not embodied in a statement on appeal, nor was there any bill of exceptions setting it forth, showing in what manner the agreement came before the Court below. The agreement simply forms a part of the record sent up without explanation.

The decree of foreclosure after the entry of the judgment against the defendants, proceeded as follows: "And it is further ordered, adjudged and decreed, that the said mortgage be foreclosed, and that the said mortgaged premises, to wit, all the right, title * * of C. D. Semple of, in, and to" (here follows a description of the premises) at the end of which the words "be sold" were omitted.

The points made by appellants in this Court were:

1st. That the decree differed from the terms of the written agreement of the parties.

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2d. The decree is void for uncertainty, in this: it does not direct the mortgaged premises to "be sold."

D. C. Semple, in person, for Appellants.

J. S. Belcher for Respondents.

FIELD, J., at the April Term, 1858, delivered the opinion of the Court—TERRY, C. J., and BURNETT, J., concurring.

The agreement inserted among the papers forms no part of the record. It is not embodied in any statement or bill of exceptions, and possesses, therefore, no verity upon which any errors can be assigned which this Court can notice. *Gates v. Buckingham*, 4 Cal. 286; *Davis v. Stratton et al.*, and *Flint v. Haight et al.*, January Term, 1856.

The decree is substantially for the sale of the mortgaged premises. It specifically directs judgment for the amount of the note, the application of the proceeds of sale of the premises to its satisfaction, the disposition of any surplus, and execution for any deficiency. The omission of the words "be sold" after the description of the premises, is a mere clerical error, which does not affect the decree.

Judgment affirmed, with five per cent. damages.

FREMONT v. THE COUNTY OF MARIPOSA AND EARLY,
SHERIFF.

A taxpayer cannot enjoin the collection of the tax due the county, on the ground that he has, in former years, paid into the County Treasury taxes assessed on his property, which were illegally assessed and collected.

APPEAL from the District Court of the Thirteenth Judicial District, County of Mariposa.

This was a bill filed by the plaintiff to restrain the collection of taxes by the Sheriff for the year 1856, upon the ground that taxes for the

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years 1851-2-3 and 4 had been illegally exacted of plaintiff and paid by him into the County Treasury; and that the county was insolvent. The bill prays that this amount (some \$13,800) may be adjudged a debt against the county, and so much as necessary set off against the taxes assessed against the plaintiff for the year 1856, and a decree for the balance rendered in his favor. The defendants answered, denying generally that any illegal tax had been exacted of the plaintiff; and also, that the county was insolvent. There was no proof taken, the Court passing upon the motion for the injunction on bill and answer. The Court below granted the injunction and defendants appealed to this Court.

Wade & Flower for Appellants.

C. T. Botts for Respondent.

BALDWIN, J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

If the collection of the taxes of the plaintiff could be enjoined at all, it is clear that they could not be under the facts of this case.

If every taxpayer could interfere in this way to arrest the proceedings of the Tax Collector, upon the pretense that he held an unliquidated claim on the county, it is evident that it would embarrass and confuse the whole fiscal system of the county. No apology could be given for such a proceeding, except that it was necessary to protect the plaintiff from what would otherwise be an irremediable evil. But this could not be, unless the county were shown to be insolvent. This has not been shown in this case; for, though the charge is made, it is denied, and there is no proof of it.

The order for granting the injunction is dissolved, and the cause remanded.

Stephens v. Mansfield.

STEPHENS v. MANSFIELD.

Plaintiff was in possession of a tract of land (a part of the public domain of the United States) under a deed of purchase from another, who at the date of the deed was also in possession, which deed was duly recorded; and after being so possessed for several months, he made a verbal sale of the land to one H, for the consideration of \$600; and H, after remaining in possession for two years, sold the premises to defendant: *Held*, that plaintiff's transfer of the land to H did not amount to an abandonment.

There can be no such thing as an abandonment of land in favor of a particular individual, and for a consideration.

Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same.

Where plaintiff had possession under a deed duly recorded, and the defendant having entered with notice of, and in subordination to, plaintiff's title, cannot be permitted to deny it in an action of ejectment.

APPEAL from the District Court of the Eleventh Judicial District, County of El Dorado.

This was an action of ejectment, for a lot in Placerville.

From the findings of the Court it appears, that in 1852, plaintiff purchased the premises in question from one Jane A. Shearer, who was in possession; that his deed was recorded, and that he remained in possession under it for some months, when he made a verbal sale of the lot to one Alex. Hunter, for the sum of six hundred dollars, to be paid thereafter, with interest at the rate of two or three per cent. per month; that in July, 1853, about three hundred dollars of the purchase money was paid by Hunter, and the balance has not been paid; that Hunter put valuable improvements on the lot and occupied it, claiming to be owner for about two years, when he sold to defendant.

The Court below gave judgment for defendant, upon the ground that the land in dispute was a part of the public domain of the United States, and that the act of the plaintiff in transferring the possession to Hunter amounted to abandonment of his interest in the premises.

Robinson & Beatty for Appellant.

1. The Court below erred in treating a verbal sale of land as an abandonment.

2. The judgment is inconsistent with the facts found, and erroneous.

Sanderson & Hewes for Respondent.

The points upon which respondent relies are briefly as follows:

1. That the verbal contract between Hunter and Stephens conferred a valid title.

2. That if that contract was within the statute of frauds, and consequently void, that Stephens must be presumed to have and actually did abandon all right to the lot long before we became the possessors of it.

The bargain, sale or arrangement made between Hunter and Stephens, transferred Stephens' rights to the lot to Hunter.

The plaintiff cannot deny the recitals of the deed from Jane Shearer; he claims under it. That deed admits the fee of the lot to be in the United States; besides the "Settler's Act" presumes it to be public land; the pleading and proof establish that fact. In 1852, then, Stephens was a mere occupant of the land; had simply the right of possession; was a tenant at will of the United States.

"The occupancy of the public lands of the United States constitutes a tenancy at will." *Duncan v. Potts*, 5 Ala. 82.

"The interest of a tenant at will in real estate is not such an interest as can be assigned; an agreement to transfer such interest is not therefore within the statute of frauds." *Whittemore v. Foster*, 4 N. H. 484.

"A verbal sale of a pre-emptor's claim to improvements, to a purchaser who takes immediate possession, confers a valid title." *Bledsoe v. Cains*, 10 Texas, 455.

The Legislature have treated "possessory claims to public lands" as personal property, and so declared it.

In 1853, the Legislature provided for mortgages "upon possessory claims to public lands, all buildings and improvements on such lands, all quartz claims, and *all other such personal property, &c.*" *Comp. Laws*, 711.

True, that this Court, in *Winans v. Christy*, 4 Cal. R. 70, says that defendants in ejectment are not permitted to show that the fee of the land is in the United States. But in *Anderson v. Parker*, 6 Cal. R. 197, they very clearly intimate, if they do not expressly hold a dif-

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ferent doctrine. And *Winans v. Christy* does not apply to this case; the *defendant* does not offer to show that the fee is in the United States; the plaintiff does that when he introduces his deed.

Again: Hunter and Stephens treated Stephens' interest in the lot as personalty. We conceive that an agreement between parties will be presumed valid, as amounting to a binding contract, if such presumption violates no rule of law.

We submit also, that if the agreement between Stephens and Hunter is susceptible of such a construction, that the subsequently acquired rights to the lot by innocent third persons can be preserved, that that construction will be given to it; and in this connection we are brought to an examination of the second point, or the question of abandonment. The District Judge bases his opinion and decision of the case solely upon this point, and we deem it unnecessary to more than refer the Court to his opinion.

Every circumstance in the case shows that Stephens gave up, abandoned, left (without the intention of returning) the lot to Hunter.

"The inference of abandonment may arise from a single act, and determines the right of property from the day of the act." *Davis v. Butler*, 6 Cal. 510.

"Where a party can show no title but a prior possession, that will fail, if it be shown that he voluntarily abandoned his possession without the intention of returning." *Bequette v. Caulfield*, 4 Cal. 278.

We think that the case of *Moore v. Small*, 9 Barr, 194, recognizes the doctrine, that one *may for a consideration abandon an inchoate right to land*.

This case was decided at the July Term, 1858, but was suspended by a petition for a new hearing, which was denied at the subsequent April Term.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — FIELD, J., concurring.

We think the ruling of the Court below clearly erroneous. Admitting the interest of plaintiff in the premises such as could be divested by abandonment, there can be no such thing as abandonment in favor

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of a particular individual, or for a consideration. Such act would be a gift or sale. An abandonment is "the relinquishment of a right, the giving up of something to which we are entitled." Bouv.

"Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same; for if it were made for a consideration it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift." *Ib.*

Stephens transferred the possession to Hunter for the consideration of six hundred dollars; this fact is entirely inconsistent with the idea of abandonment.

The question as to the ownership in fee of the land in controversy could not arise in this action. Plaintiff had possession under a deed duly recorded, and the defendant, having entered with notice of, and in subordination to plaintiff's title, cannot be permitted to deny it in this action.

Judgment reversed and cause remanded.

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In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action, who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for.

It is only necessary, in such a case, for the plaintiff to sue the party who interferes with his rights.

Where the Court instructed the jury in such action, that "where an abandonment is sought to be established by the act of the party, the intention alone governs; and if such party leave a mining claim, with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years; *provided*, there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:" *Held*, that the question of abandonment was fairly left to the jury.

The purchaser of a mining claim can only acquire, by such purchase, such right or title as his vendor had at the time of sale.

Possession of one partner or tenant in common of a mining claim is the possession of all.

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Where the tenant in common, or partner, goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture.

In order to the enforcement of the forfeiture of the interest in the claim, some appropriate action by suit must be taken to liquidate the demand, and sell the property, or there must be at least clear and unequivocal proof of abandonment.

The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee.

Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

This was an action of ejectment to recover possession of one undivided fourth interest in four mining claims, and also one undivided forty-eighth part of a flume for conducting water to said claims.

The complaint alleges that the plaintiff, on the first day of June, 1857, was the owner and in possession of, and ever since has been and still is, the owner of the following described premises situated in said County of Shasta, to wit: one undivided fourth part of four mining claims situated on Lone Hill, etc., also the one undivided forty-eighth part of a certain flume leading (conducting) water from the Clear Creek Ditch to said Lone Hill, for the purpose of working the mining claims on said hill, etc.; which said one-fourth interest in said four mining claims, and one forty-eighth interest in said flume, was and is of the value of eight hundred dollars. That said defendant, on the first day of July, 1857, "forcibly and unlawfully entered upon, took possession of, and ousted the said plaintiff from the said premises, and that defendant unlawfully withholds the possession of the said above described premises from said plaintiff, who ever since has been, and still is, entitled to the possession thereof; and the rents and profits of said premises have been and are of the value of one hundred dollars per month." The complaint further charges that said defendant now is, and has been for many months past, extracting the gold from said claims, and converting the same to his own use, and that he threatens to continue so to do. It also charges that defendant is insolvent, and prays an injunction, and that a receiver may be appointed, judgment

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for restitution and for damages. The complaint was sworn to. The Court below issued the injunction and appointed a receiver upon the facts set forth in the complaint.

The defendant demurred to this complaint, and assigned three grounds of demurrer:

1. There is a defect of parties defendants in said action in this, that the owners of the other three-fourths of the claims mentioned in said complaint are not named as co-defendants, and that their interests are wholly unrepresented, etc.

2. Several causes of action have been improperly united in this, to wit: 1st. For the possession of the claims; 2d. For the rents and profits arising therefrom; 3d. For damages.

3. The complaint does not state facts sufficient to constitute a cause of action, in this, to wit: as to who the other parties are holding and owning the other three-fourths; that defendant is in possession of only one-fourth interest in the claims.

Complaint does not show that defendant is not entitled to some portion of the claims, or that he is not in possession in common with others. Nor does it state that plaintiff is entitled to the possession by virtue of any title or prior possession, or that plaintiff has complied with the laws, rules and regulations of the mining district in which said claims are situated, or that he holds said claims by virtue of said laws, rules and regulations.

At the time of filing the demurrer, the defendant filed his answer setting up title in himself and others to said claim, and also raised the same points in his answer as those raised by the demurrer.

The demurrer was overruled, and the cause tried by a jury.

The Court instructed the jury in substance, as follows:

1. Prior possession of a mining claim gives prior right to the prior possession, of which the party cannot be divested, except by his own act, or by abandonment or the lapse of time, or by the superior landlord or owner of the soil.

2. An abandonment may be proved by the acts of the parties, or by their declaration coupled with acts. If the jury believe from the evidence, plaintiff was first in possession of the claims, and abandoned them, and while the premises were thus abandoned the defendants, or

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those under whom he claims, took possession, the defendant must recover; but if the jury believe from the evidence, that after plaintiff did abandon them he again returned and took possession, and was in possession by himself or agent at the time the defendant entered, then defendant is a wrongdoer, and plaintiff is entitled to recover.

3d. Where an abandonment is sought to be established by the act of the party, the intention alone governs. If a party leave a claim with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years; provided there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon.

4th. Where a party has once acquired a right by possession to a mining claim, no mining law can divest him of that right unless he assisted in the passage of such law; in which case he would be considered a party to the contract.

Mining laws may be given in evidence to prove a custom in respect to size of claim, or to raise a presumption of abandonment, where such laws have a universal notoriety throughout such district; or if they have not, then proof must be given that the party sought to be bound had actual notice of them.

5. The possession of one tenant in common is the possession of all.

6. A purchaser of a mining claim only acquires such right or title from his vendor as he had at the time of such purchase.

7. The power to occupy for another gives no right to such agent to sell; but there must be a special agency for such purpose.

8. One who might by inquiry ascertain what rights his vendor has, and neglects to make such inquiry, is not an innocent purchaser.

Plaintiff had verdict and judgment, and the defendant appealed to this Court.

Isaac Boggs for Appellant.

I. The Court erred in overruling the defendant's demurrer to the complaint.

There was a non-joinder of parties defendant.

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The plaintiff should have brought his suit against his copartners for his undivided interest in said claims, and for an accounting of the proceeds. *Schelper v. Evans et al.*, 4 Cal., page 212.

Ejectments will not lie for the possession of a mining claim where the facts show that the claim is undivided and held in common by four copartners, three of whom stand by and acquiesce in the sale and purchase by an innocent person in good faith.

If one of the copartners suffer thereby, he must bring a suit against his copartners. An action of ejectment may be sustained on the ground of a prior possession alone; but to continue such possession there must be an actual *bona fide* occupation or *possessio pedis*; a subjection of it to the will and control of the possessor as contradistinguished from the mere assertion of title. See *Plume v. Seward et al.*, 4 Cal. 94.

2d. The evidence shows that plaintiff had abandoned his interest in the claim, and the instructions of the Court on this head were wrong.

"Abandonment may arise from a single act, or from a series of acts; and a party once having abandoned his claim, will not be permitted to come within the time allowed for commencing civil action to re-assert his claim, to the prejudice of those who may have in the meantime appropriated it." *Davis v. Butler*, 6 Cal. R. 510.

Where prior possession is relied upon, it will fail, if it be shown that he voluntarily abandoned his possession. *Bequette v. Caulfield*, 4 Cal. 278.

It cannot be contended in this case that defendant is a trespasser or wrongdoer, because he came into possession of said claims with a full knowledge of three-fourths of plaintiff's copartners by purchase, and with their full knowledge and consent, and under color of title.

Before plaintiff can seek equity he must first do equity. He should first have tendered his proportion of all the expenses of opening up of said claims and of reconstructing said flume.

3d. In the case of *Hix v. Bell*, 3 Cal. 219, this Court has decided the question of the admissibility of miners' laws governing the particular localities. I do not conceive, in the introduction of those laws as evidence, that it is necessary to show when the meeting was held, how many were present, whether each and every person present acquiesced

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in such laws, nor whether the books have been kept in any particular style and form.

It is sufficient to show that there are laws and customs by which the miners are governed; no matter how they are formed, so they are generally acquiesced in by those following the occupation of mining. Upon this point the Hon. Judge erred in instructing the jury.

4th. The mines belong to the General Government, and are free for her citizens to enter and extract the precious metals. The doctrine of tenants in common does not apply to this class of cases, any more than it applies to barter and trade.

R. T. Sprague for Respondent. No brief in the record.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

Ejectment for the recovery of mining claim.

The plaintiff in this suit sues for the recovery of a certain interest in mining claims in Shasta, the title to which he asserts to have been in himself and several others, in certain fixed proportions.

It is objected that the plaintiff cannot recover because he has not joined the other owners or claimants. We do not consider this point well taken. In order to a full vindication of plaintiff's rights, and full investigation of the merits of the controversy, it was only necessary to sue the party who interfered with the plaintiff's property, or did him wrong. The object of the plaintiff in the suit was not a partition of the common property, but to settle the right of the plaintiff, as against an adverse claimant, to his share and proportion; and this object could be effectually attained by the plaintiff in the form adopted. The question of abandonment was fairly left to the jury, as also the right of the defendant under the bill of sale from Julian. The claims, it seems, were held in possession by the partners and associates of the plaintiff; they, as such partners, were tenants in common, and it is well settled that the possession of one partner or tenant in common is the possession of all. The mere fact that one tenant in common, or partner, goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption

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of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. In order to the enforcement of the claim, some appropriate action by suit must be taken to liquidate the demand, and sell the property, or there must be at least clear and unequivocal proof of abandonment.

It is too clear for argument, that the mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. This would be to make title to property pass, not by the act or assent of the owner, but by the silence of his associates.

The plaintiff's right having been fixed by these rules of property, which are a part of the general law of the land, could not be divested by any mere neighborhood custom or regulation, even if there were better proof than appears in the record of the existence of such. Nor do we see anything to prove that, by the mining regulations of the vicinity, the possession and working of the claim by a portion was not a sufficient possession and working for all; or that the mere temporary absence of one partner was a forfeiture of his interest, and that a stranger could then come in and appropriate his share.

On the whole, we think the learned Judge below presented the law fairly and clearly to the jury, and that their finding was in accordance with law and justice.

Judgment affirmed.

McMILLAN AND WIFE v. REYNOLDS.

The affidavit of service of summons must show affirmatively, compliance with all the requirements of the law.

An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action," is insufficient.

Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was at the time of such purchase cognizant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside.

APPEAL from the Twelfth District Court, County of San Francisco.

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This was a bill in equity to quiet title to a lot of land in the city of San Francisco.

The facts are as follows: In 1854 the plaintiffs were possessed of a lot of land in the city of San Francisco, which they occupied as a homestead. In December of that year they executed a mortgage of the premises to Mills and Vantine, to secure a debt of the husband. In April, 1858, Mills and Vantine, by the defendant in this action as their attorney, brought an action of foreclosure upon the mortgage against the present plaintiffs. In that action the only evidence of service of the summons and complaint on Mary B. McMillan, is the affidavit of one J. G. Gould, which is as follows:

"City and County of San Francisco, ss.: James G. Gould, of said city, being duly sworn, says, that on the fourteenth day of July, 1855, he served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof; attached to a copy of the amended complaint in this action.

"J. G. GOULD.

"Sworn to before me, August 6, 1855."

"OTMAR CALEB, D. C."

Mary B. McMillan did not appear in the action, and a default was taken against her, and a decree of foreclosure rendered, and the property sold to the defendant, Reynolds, who acted as the attorney in obtaining the decree. Reynolds was about taking possession of the premises, in pursuance of his purchase, when plaintiffs commenced this action.

Among other allegations in plaintiffs' complaint, they allege that Mary B. McMillan did not sign or acknowledge the mortgage deed; and it is found by the jury, on a special issue submitted to them, that she "was not examined separate and apart, and without the hearing of her husband."

Defendant had judgment in the Court below, and the plaintiffs appealed to this Court, and assigned as error among others, the following:

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1. The Court erred in ruling that there was jurisdiction of the person of Mrs. Mary B. McMillan in said suit of Mills and Vantine.

2. The Court erred in rendering judgment for the defendant, when it should have been rendered for the plaintiffs

Shattuck, Spencer & Reichert, for Appellants.

1. The acts of a Court, though of general jurisdiction, are void unless it has jurisdiction of the *person*, and the record must show such jurisdiction. *Farmers' Loan and Trust Co. v. McKinney*, 6 McLean, 1; *Foster v. Glazner*, 27 Ala. 391; *Joyce v. Joyce*, 5 Cal. 449; *Sheldon v. Newton*, 3 Ohio N. S. 494.

2. The return of service of process made by a private person, must show that the provisions of the statute have been complied with, or the Court gains no jurisdiction of the person served. Our Practice Act, sec. 28, requires that a private individual serving process must be a white person, twenty-one years old, capable of being a witness in the case, and must serve the summons attached to a *certified* copy of the complaint; and if the defendant be unlearned, the nature of the suit shall be explained. Sec. 646, Practice Act.

3. The summons and evidence of service in this case are so deficient as to give no jurisdiction to the Court. See *State v. Woodruff*, 2 Cal. 241; *Joyce v. Joyce*, 5 *Ib.* 449; *Harvey v. Bestic*, 1 How. Miss. R. 106; *Smith v. Cohen*, 3 *Ib.* 39; *Fathern v. Long*, 5 *Ib.* 661; *Collins v. Hoyt*, 1 *Lundes & Marsh*, 515; *Eshridge v. Jones*, *Ib.* 595; *Ditch v. Edwards*, 1 *Scammon*, 127; *Ogle v. Coffin*, *Ib.* 239; *Townsend v. Griggs*, 2 *Ib.* 365; *Billingale v. Geer*, 3 *Ib.* 575; 1 *English (Arkansas)* R. 382, 552; 2 *Ib.* 44; *Vaughan v. Brown*, 4 *English*, 20.

The above authorities all show that the statute relative to the service of process must be fully complied with, or a judgment by default is "*coram non judice*" and void.

The fourth rule of the Twelfth District Court also requires that the certificate made by a private person should show that the defendant served was personally known to him. This, too, is wanting.

Too much caution cannot be observed in holding private persons serving process strictly to the law.

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If a Sheriff should show by his return a strict compliance, how much more a private individual.

Verbal testimony after the decree could not relate back so as to give the Court jurisdiction, but only increased the error. Plaintiffs' objection to its introduction should have been sustained. Besides, that testimony, if added to the return, would not be sufficient. He did not serve a certified copy. He did not explain it to her.

Giles H. Gray for Respondent.

1. The summons was properly served on Mary B. McMillan in the foreclosure suit.

The affidavit is such as is required by the statute. P. A., sec. 28. It shows the personal receipt by defendant, Mary B. McMillan, of the summons, and a copy of complaint; and it shows that she received the same, within the city of San Francisco, no portion of the limits of which is three miles distant from the County Clerk's office.

2. This affidavit was sufficient to authorize a judgment. If there is any defect in the service, as for example, if served by a negro, or by a minor, or if the defendant have any exemption from service, as being a legislator, or member of Congress, just before the commencement of the session; and if none of these defects appear in the return on the summons, then, although the defendant has good ground for arrest of judgment, his privilege must be pleaded, and shown to the Court by motion. *Whitwell v. Barbier*, 7 Cal.; *Wheeler v. Reynolds*, 8 Cowan, 311. Also, see *Foot v. Stevens*, 17 Wend. 485; *Yates v. Lansing*, 9 Johns., p. 437; *Peacock v. Bell*, 1 Saund. 74; *Shumway v. Stillman*, 4 Cowan, 296; *Hart v. Seixas*, 21 Wend. 40; *Bloom v. Burdick*, 1 Hill R. 139; *Wright v. Douglass*, 10 Barb. S. C. 110; *Wells v. Mason*, 4 Scam. 279; *Huntington v. Charlotte*, 15; *Vance v. Funk*, 2 Scam. 263; *Hubbard v. Harris*, 2 Scam. 279; *Varney v. Vosch*, 3 Hill S. C. 237.

A complete answer to all that is said about the defects in the affidavit of service is: *that the Court acquired jurisdiction from the time of service, and not from the date of the return.*

In *Whitwell v. Barbier*, *supra*, the Court says: "The defendant having been summoned to appear on a certain day, it cannot be said

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that the Court had no jurisdiction of the person so as to make its judgment void."

Again, in the 35th section of the Practice Act, "from the time of service of the summons and copy of complaint in a civil action, the Court shall be deemed to have acquired jurisdiction, and a control of all the subsequent proceedings."

1st. It is argued that if the return of service was not made as required by statute, a default rendered would be void. *This is not the true rule*, but the law is: *that a default rendered without jurisdiction is void*. in a Court of general jurisdiction; if the record is silent. and yet a judgment is rendered, it will be presumed that the Court had jurisdiction, until the contrary appears, and that due proof of service was made. *Grignon v. Astor*, 2 How. U. S. R., p. 291, and cases cited. *Whitwell v. Barbier*, cited by plaintiffs *here*, *does not apply* to this principle.

3. The last proposition which we shall present to the Court is a general one. It is:

That being purchaser at a Sheriff's sale, we are not bound to go beyond the record itself; and to support this, we cite *Reardon v. Lancey's heirs*, 2 Bibb, 262. The Court says: "How far the proceedings in the case under which the land in contest was sold were correct, will be unnecessary to determine; for by the execution, the Sheriff had authority to sell; and if the property sold be by law liable to execution, the right of purchase cannot be shaken, however erroneous the judgment might have been; for if the sale could afterwards be avoided, few would be willing to purchase under execution, and property sold in that way would be frequently sacrificed, greatly to the prejudice of debtor and creditor."

Also, *Woodcock v. Bennett*, 1 Cowan, 724; *Coleman v. Trabue*, 2 Bibb, 518; *Brown v. Combs*, 7 B. Monroe, 318; *Doe v. Natchez Ins. Co.*, 8 Smedes & M., p. 179; *Wood v. Jackson*, 8 Wend., p. 36.

Again, in *Grignon's Lessee v. Astor*, 2 How. U. S. R., p. 341, the Court says: "A purchaser under it (the decree) is not bound to look beyond the decree, if there is error in it of the most palpable kind, if the Court which rendered it has, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of

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the law, which gave them power to hear and determine the case before them; the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law."

Also, see 6 Pet., p. 729; *Voorhes v. Bank of U. S.*, 10 Pet. 471; *Wheaton v. Sexton*, 4 Wheaton, 506.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This bill was filed to quiet title to a lot in San Francisco. This lot was a homestead of the plaintiffs. A bill was filed by one Mills to foreclose a mortgage on this lot made by McMillan and wife, as charged, and a judgment of foreclosure had by plaintiff in this last suit. It is averred, however, that no service of process was had in that suit on the wife. In the record of that suit, the affidavit of one Gould appears, in these words:

"City and County of San Francisco, ss.: James G. Gould, of said city, being duly sworn, says: that on the fourteenth day of July, 1855, he served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action.

(Signed)

"J. G. GOULD.

"Sworn before me, August 6, 1855.

"OTMAR CALER, D. C."

The decree, so far as this defendant is concerned, was by default. The bill in the case now before us avers that the wife never signed or duly acknowledged the deed; and it is found by the jury, on a special issue, that she was not examined privately and separately as the statute requires. Under judgment in the foreclosure suit, the lot was sold; and the defendant, the purchaser at the sale, who had been the attorney for plaintiff in the last named case, was about taking possession. The bill was filed to prevent him, and remove the cloud from the plaintiff's title. Many other facts appear in the record, and sev-

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eral questions are made; but in the view we have taken of the case, it is sufficient to consider a single one, namely: was this a sufficient service to give the Court jurisdiction in the case of Mills and plaintiff to uphold that judgment?

The Practice Act, sec. 28, provides that "service of summons may be made by," among other persons, "any white male citizen over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided: a copy of the complaint, certified by the Clerk, shall be served with the summons."

The affidavit is alleged to be defective in not showing that the person serving it was a white male citizen, or over twenty-one years of age, or competent to testify, or that a *certified* copy of the complaint accompanied the summons. These defects, especially as against a purchaser who, in this case, was cognizant of these irregularities, and where the rights of a *feme covert* are involved, it is contended, invalidate the proceedings. And we think the point well taken. We have not time to review all of the authorities upon this subject, though we have examined a large number. We think the result of the whole is, that the judgments of Courts are not binding unless jurisdiction be first had of the person of the party to be affected by them. This jurisdiction is given in this State by a form of notice prescribed by statute. The statute in such cases must be substantially pursued. Where a general power of serving process is given to an officer, a general return of service is sufficient; but where the power to serve process is exceptional, and given only on prescribed conditions, there the authority is special, and the particular facts must be shown in order to give effect to the service.

The service being authorized, in other words, in a given case, that case must be shown by the record in order to give the jurisdiction, which results only from the legal notice. Thus, in Mississippi, where if personal service cannot be had, service may be made by leaving a copy at the dwelling of the defendant with a member of the family, being a free white person over sixteen, the Court said: "If the defendant be not personally served, then no such service is sufficient, unless it be exactly such service as the law has made good. If by the return it appears that the defendant was not personally served, then,

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of course, nothing short of an entire fulfillment of one of the other modes will be sufficient." (5 How. 664; 1 S. and M. 520; *Ib.* 595.) In *Ditch v. Edwards* (1 Scammon R. 127) the return to a summons was made by the Deputy Sheriff in his own name; the Court held the proceedings *coram non judice, and void*. See also, 2 Scammon, 365, to like effect. The right to serve process does not belong to every private individual; it is restricted to a particular class; and as to them, the right is given to be exercised only under particular circumstances. In order to a legal service, the service must be, of course, by some one authorized, as well as by personal capacity to act, as by the existence of the particular facts which impart the authority or control the mode of action. The mere fact that A serves a paper, is not even *prima facie* evidence of his right to serve it. He must be the person described in the statute, and must act in the manner prescribed by law. This is necessary in order to give him his authority, and this must appear by the record in order to show the authority. The validity of the act depends upon its being authorized, and this must appear in the record. From anything that appears on the return, or by the affidavit, this man Gould neither had authority to serve this process, nor did he serve it in the right way. Nor is this defect remedied by his testimony on the trial of this case below. He does not show a service of a *certified* copy of the complaint. Nor if he had, do we think it admissible, in this collateral way, to amend the record of the first case. If it can be amended at all, or this patent defect be cured, it must be by direct proceeding.

While some of our reasoning goes beyond the necessities of this case, we limit the force of this opinion, as an expressed adjudication, to the precise question before us; which is, that as against a purchaser cognizant of the facts, and in favor of married women, (whose rights are favored in the law) and on a showing of a valid defense to the action, a judgment obtained under the circumstances of this is invalid on a bill filed by her in equity directly impeaching it.

The judgment of the Court below is reversed, and the cause remanded for judgment in pursuance of this opinion.

Fremont v. Boling.

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A. Sheriff, whose term of office has expired, has no right to collect the State and County tax, as unfinished business, from the assessment list which came into his hands while in office.

The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing Sheriff, for the reason that after the settlement of the Sheriff with the County Auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then Sheriff to proceed to collect such delinquent tax as other taxes.

There is no irreconcilable conflict between the amendatory Act of 1853 and the Revenue Acts of 1853 and 1854. The provision that the Sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement.

In such a case, the party who is about to be injured by the sale of his property, has a right to an injunction against the person offering to sell, to prevent the sale.

APPEAL from the Thirteenth District Court, County of Mariposa.

This was a bill for an injunction to prevent the defendant from selling certain property of plaintiff's for the delinquent tax of 1855.

The statement of facts in this case was agreed to, and as disclosed by that agreement, is as follows: In 1855 the plaintiff was the owner of a large tract of land known as "*Las Mariposas*." In that year, the property was assessed for State and County taxes, and the amount of tax due thereon was \$8,000. The defendant, Boling, was the Sheriff of Mariposa County, where the land is located, during the years 1854 and 1855, and until the month of October, 1855, at which time Thomas Early, his successor, qualified and entered upon the discharge of the duties of such office. The assessment roll for the year 1855 came into the hands of the defendant, Boling, during that year, and before his term of office expired, and never was delivered to his successor. In January, 1858, defendant had advertised the property "*Las Mariposas*" for sale, for the delinquent tax for 1855, and was proceeding to sell the same as former Sheriff, claiming a right to do so, as unfinished business of his office, when he was restrained by this action.

The judge below made an order citing the defendant to appear at a time and place to show cause why an injunction should not issue; and in the mean time restrained the defendant from selling. At the time

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and place appointed, and after hearing of the parties, the Judge ordered the injunction to issue, upon the plaintiff giving bond; which was done.

At a final hearing, plaintiff had judgment for his costs, and the injunction was made perpetual: defendant appealed to this Court.

The question presented to this Court is, whether the defendant, as former Sheriff, could collect the tax as unfinished business of his office, after the expiration of his term of office.

B. B. Harris for the Appellant, argued:

I. The law does not authorize, and will not tolerate interference in the first instance, and before the time and right of a hearing with the matters and property of persons, either by extraordinary writs or provisional remedies, unless previous indemnity or "compensation" is given or tendered them. And in attachment, injunction, replevin and other like cases, this indemnity or compensation has been repeatedly decided by Courts to be the *bond* on which such process is contemplated to be grounded. In this case, the defendant has been restrained and damaged by order of the Court from doing certain acts, without having any such previous security; said restraining orders being nothing more or less than a temporary injunction.

II. The plaintiff is not the proper person to raise the question of rights of office in this case; the Sheriff incumbent is the person; and the remedy should be by *quo warranto* action for usurpation, or payment of taxes under protest and writ by injunction. (*Minturn et al. v. Hayes, Sheriff*, 2 Cal. R. 590.)

III. It is shown in the complaint that the advertisement of sale had commenced. Now an execution being one entire thing, the officer making the levy, is in legal contemplation, the one to finish the sale; or what in this case is still stronger, the officer advertising the sale must be the one to complete it, otherwise the law would be inconsistent, and would work repugnancy, ambiguity and confusion, and thereby divest obedience to a command *in fieri* and the rights under it, and devolve the same upon another and different person. (*People ex rel. Dunn v. Boring*, 8 Cal. R. 406; *Manlove v. White*, 8 Cal. R. 376.)

The Sheriff could not, in March following the levy, have inducted in

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the list to be handed in by him under the revenue law of 1853 and section 96 of the Act of 1854, the taxes due on the premises in question, because the same were then in the course of sale for the taxes in question, and in the Courts of Law; and this would have been a very good defense against charging them in the delinquent list of the year 1856, especially if the legality of the assessment or of the taxes was then in judicial controversy.

Admitting the allegations of the complaint to be true, section 23 of the revenue law of 1857 provides that a person acting *de facto* as an officer, is sufficient, etc.; 2 Kent, edition 8, 339.

The authority of an officer cannot be collaterally attacked (13 Wend. 491-4; 8 Paige, 428, etc., and sec. 23, Laws of 1857) make this a ground of defense to the suit upon the Sheriff's deed; therefore, there could be no "cloud upon the title." (7 Johns. 549; 9 *Ib.* 135; 13 Wend. 491; 7 Cal. Rep. 393; Doane v. Scannell, *Ib.* 432, and People v. Same, 8 Paige, 328.) The assessment is proper. See Palmer v. Boling *et als.*, 8 Cal. 384. (This case where Palmer was plaintiff.) The imposition of taxes belongs exclusively to the Legislature; their collection to the executive officers; and the judiciary is limited to the inquiry whether they have been constitutionally imposed, legally assessed and the law observed in their collection, all of which are purely legal questions and of equity cognizance. (Brooklyn v. Mergrole, 26 Wend. 132; Van Doran v. Mayor, &c., 9 Paige, 138; Wiggins v. Mayer, 9 Paige, 16; 4 Barb., S. C. Rep. 9 and 17; 8 Ohio Rep. 370; McCay v. Chilicothe.)

Attorney General for Appellant.

I have but little to add to that which has already been so well said by Mr. Harris, in support of this appeal.

All of the questions involved in this case were made and passed upon favorably to this appellant in the case of Palmer *et al.* v. Boling, 8 Cal. 384, except as to whether section 33 of the Act of April 29, 1857, "To provide revenue for the support of the government of this State," applies to the assessment and collection of the taxes due from respondent to the government in this particular instance.

The sole question in my mind is, whether or not the Act of the Leg-

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islature referred to is retrospective in its operation. I maintain that it is not, cannot be, and was not so intended by the Legislature.

"The general rule is, that no statute is to have a retrospective action beyond the time of its commencement." It is a well established principle, "that all laws are to commence *in futuro* and operate prospectively."

And a Court will never hold that the Legislature intended a retrospective action, unless such intention is clearly expressed in the Act. (*Dash v. Van Kleeck*, 7 John. Rep., from page 491 to 512, inclusive) — opinions of Justice Thompson and Chief Justice Kent.

That the Legislature did not intend this Act as retrospective, seems clear from the language employed.

By the provisions of the 39th section of the Act of April 29th, 1851, concerning Sheriffs, it was provided that the former Sheriff should complete the execution of all final process which he had begun to execute; and by the explanatory Act of May 18, 1853, the collection of taxes was construed to be unfinished business." (*Manlove v. White*, 8 Cal., p. 376.) No time has ever been specified in which unfinished business, generally, shall be completed; and unless some particular statute has fixed a limitation as applicable to this case, the old Sheriff may still finish the business of collecting the tax from respondent.

I have not been able to find any such statute. It is true, that the revenue laws then in existence required this defendant to make a final settlement with the Auditor and Treasurer on the first Monday in March succeeding the receipt by him of the assessment roll, and to return his delinquent list. But such requirement could not with any sort of justice, either to the officer or the government, be deemed to apply to such a case as this; for the officer had been restrained by a Court of Justice at the instance of parties in interest with Fremont from enforcing the law.

The Sheriff of a county can only enforce the collection of taxes by virtue of express law; and upon examination, you will find that the assessment roll (which is his authority for collection) must reach him in one of two ways.

1st. By the hand of the Auditor, who delivers him the roll of *that* year; and 2nd, by the hand of his predecessor in office, who delivers the *unfinished* roll of collections.

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Now, suppose that the decree in this case should be confirmed at this term of the Court, upon the ground that appellant is not the proper collector, (and none other is urged) could we proceed to collect the taxes (which were properly assessed, see *Palmer v. Boling*) by the hand of the present Sheriff of Mariposa? I answer not, because:

1st. He had not received the assessment as a part of the roll of this year; and 2nd. It cannot pass to him as the successor of appellant, and as *unfinished* business, for the reason that the Act of 1857 before referred to, is not upon principle, nor in terms retrospective, and therefore does not apply to this case; then as a consequence, the tax could not be enforced at all. (See *Manlove v. White*.) And in this connection I will add, that I have not been able to find any provision of the statute authorizing a continuance of the delinquent list "*ad infinitum*;" on the contrary, it seems that only the delinquencies of the next preceding year are placed upon the roll; therefore, if appellant cannot collect this tax, then no one can.

D. W. Perley for Respondent.

The point made by appellant is this: *That prior to the expiration of his term of office*, the delinquent tax list for the year 1855 was placed in his hands for collection, and that he had a right to collect said taxes as part of the *unfinished business of his office*.

Now I reply to this, that he was *no officer of the law* at the time he sought to sell the respondent's property for taxes, and that the collection of the same was *not* part of the *unfinished business of his office*.

The proper solution of this question depends on the various Acts of the Legislature of this State concerning *Sheriffs*, taken in connection with the different *Revenue Acts* from 1853 to 1857.

By the Act of 1851, concerning *Sheriffs*, page 195, sec. 39, it is provided that "notwithstanding the election of a new Sheriff, the former Sheriff shall complete the execution of all final process, which he has begun to execute."

In 1853, an *explanatory Act* was passed by the Legislature, and is found on page 275, Acts of 1853. This Act has but a simple section, and provides as follows:

"That the 39th section of the Act of 1851, concerning *Sheriffs*, shall

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be so construed as to include in its meaning the collection of all taxes put into the hands of the Sheriff for collection previous to the expiration of his term of office."

It is under this Act of 1851, and the *explanatory Act* of 1853, above cited, that the appellant contends for the right in 1858, (two years after he was *functus officio*) to sell plaintiff's property for the taxes of 1855.

The appellant proceeded precisely as if there were the *sole legislative provisions* having any bearing on the question. He utterly ignores all contemporary and subsequent legislation, qualifying or repealing the aforesaid Acts.

But the slightest examination of the Revenue Acts of 1853, 1854 and 1857, will show that the right here claimed by appellant to act as Sheriff, and sell land for taxes, is utterly baseless, and without a shadow of foundation.

The Revenue Act of 1853, page 262, sec. 39, and the Revenue Act of 1854, sec. 96, page 111, are precisely alike in these two sections.

The sections provide, that on the *first Monday of March* in each year, the Sheriff shall attend at the office of the County Auditor, and the Sheriff shall then and there *make a final settlement for the year* for the amount of all taxes with which he stands charged, as follows:

"The Auditor shall take from the *duplicate* in the hands of the Sheriff for collection, a list of all such taxes thereon, describing the property on which *delinquent taxes* are charged, and shall *note the reason assigned by the Sheriff* why such taxes *could not be collected*.

"After *deducting the amount returned delinquent*, and the fees for collecting allowed to the Sheriff, the Sheriff shall be held liable for *the balance*."

"The Auditor shall thereupon *balance the Sheriff's account* by crediting the Sheriff with the amount of *delinquent taxes*, and with all money paid to the Treasurer, together with his commissions for collecting.

"No further taxes shall be collectible on such *duplicate*; but whatever taxes may remain uncollected on the *delinquent list* on the final settlement, on the first day of March, shall be placed in the *tax list* of the *succeeding year*, and the Sheriff shall immediately proceed to collect the same."

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Now, even supposing that the *repealing Act of 1857* had not been passed, or that that Act has not the force and effect of a direct repeal of the *explanatory Act* concerning Sheriffs, passed May 18th, 1853, (Acts of 1853, p. 275) which I construe it has, in what condition would the above sections of the Revenue Acts of 1853 and 1854 leave this assumed authority of appellant to sell respondent's land for taxes.

The Revenue Act of 1853 was contemporaneous with the *explanatory Act* concerning Sheriffs, and was *in force* at the time *appellant* was elected. The Revenue Act of 1854 was passed during his term of office.

It cannot, then, be doubted that these are all Acts *in pari materia*, and are to be taken and construed together. And it is to be observed that there is *no conflict* between them; they may all stand together by giving to each a reasonable and just construction.

And it is submitted that this is the true meaning and construction of said Acts.

By the *explanatory Act* of 1853, Sheriffs were allowed to *collect taxes* as a part of the unfinished business of their office.

The Revenue Acts of 1853 and 1854 operated as a *limitation on this right*.

The retiring Sheriffs *went out of office in September*; but this does not prevent them from collecting taxes on the tax list which had been put into their hands prior to the expiration of their term of office. They had this right and privilege *until the first Monday of March* succeeding the expiration of their term. *On that day their functions expired*. They had to make *final settlement* with the Auditor and Treasurer. They had to show *why* they had not collected the delinquent taxes; and on this showing they were *credited* with all such taxes, discharged from all liability, and the amount of the delinquent tax was added to the *assessment roll of the succeeding year*.

Now, if Boling can collect the delinquent taxes of 1855, it must be on the *old duplicate list* placed in his hands prior to the expiration of his term of office. But how can this be done, when that duplicate assessment roll, as the record shows, was returned and filed in the proper office according to law, *on the first Monday of March, 1856*?

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1st. It is said that an *injunction* will not lie to restrain a sale of property for taxes, on the ground that if the said rule is void, it will not cloud plaintiff's title, and the case of *DeWitt v. Hayes* is cited by Harris in his argument on file.

This doctrine was overthrown by the Court in *Palmer v. Boling*, 8 Cal. 388.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

The defendant was Sheriff of Mariposa County in August, 1855, at which time there came to his hands the assessment list of the taxes due the State and county. The plaintiff below was assessed on the estate called *Las Mariposas*, for \$5,000. The defendant was succeeded in October, 1855, by one Early, as Sheriff of Mariposa County. The bill was filed in January, 1858, at which time the defendant claimed to be former Sheriff, and as such, entitled to collect this tax as unfinished business of his office; when he was arrested in his proceedings, to sell the land of plaintiff, by this injunction. The only question in the case is, whether the defendant, under the circumstances, had the right to collect; and in order to do this, to sell property for delinquent taxes due during his term, but not collected while in office. And the solution of this question involves the construction of the various Revenue Acts of this State. A review of these will settle this controversy.

By the Act of 1851 (Acts, p. 184, sec. 39) it is provided that, notwithstanding the election and qualification of a new Sheriff, the former Sheriff shall return all process and orders before and after judgment which he has fully executed, and shall complete the execution of all final process which he has begun to execute." In 1853, an Act was passed explanatory of this Act, as follows: SEC. 1. The thirty-ninth section of an Act, entitled, "An Act concerning Sheriffs, passed April 29th, 1851, shall be so construed as to include in its meaning the collection of all taxes put into the hands of the Sheriff for collection previous to the expiration of his term of office." (Acts of 1853, p. 275.)

By the 33d section of the Revenue Act of 1857 (Acts of 1857,

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p. 386) it is provided, "except in those counties where, by special Act, it is provided that some other person shall be Tax Collector, the Sheriff of each county shall be Tax Collector in his county, and shall collect all taxes except municipal taxes and poll taxes. But the fact that any assessment roll or tax list has been put for collection in the hands of any Sheriff whose term of office is about to expire, or shall expire before the collection is so completed, shall not be so construed as to make the collection of taxes on each assessment roll or tax list unfinished business of the office, to be completed after his term of office expires; but said roll shall be handed over to his successor in office, at the same time and in the same manner as other books and papers belonging to the county; and the fact that any assessment roll or tax list was so handed over shall not in any manner invalidate it, but the succeeding Sheriff or Tax Collector shall proceed to enforce the collection, in the same manner as though it had been first placed in his hands. And any sale made, or certificate of sale or deed given by such succeeding officer, shall be as valid, and shall have the same force and effect, as though the act had been done by the officer who originally had possession of the list." These are the provisions in reference to the office and duties of Sheriff. But they do not stand alone. They are to be taken in connection with other acts in connection with the collection of taxes. The Revenue Act of 1853 (Acts, p. 262, sec. 39) provides that on the first Monday in March, in each year, the Sheriff, the County Treasurer and County Auditor shall attend at the office of the County Auditor, and the Sheriff shall then and there make a final settlement for the year with the said Auditor and Treasurer, for the amount of all taxes with which said Sheriff stands charged, in the manner following: 1. The Auditor shall take from the duplicate in the hands of the Sheriff, for collection, a list of all such taxes therein, describing the property on which such delinquent taxes are charged as the same is described in said duplicate, and shall note therein, in a marginal column, the reason assigned by the Sheriff, etc. 2. The Auditor shall forthwith record such list of delinquencies in his office, and thereupon forward the same to the Controller of State. 3. After deducting the amount returned delinquent, and the fees for the collection, returned by the Sheriff from the sev-

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eral charges taxed on the duplicate, in a just, ratable proportion, the Sheriff shall be held liable for the balance, and shall thereupon pay such balance to the Treasurer. The Auditor shall thereupon balance the Sheriff's account by crediting the Sheriff with the amount of delinquent taxes, and with all moneys paid to the Treasurer, together with his commissions for collecting. No further taxes shall be collected on such duplicate; but whatever taxes may remain uncollected on the delinquent list in the final settlement, on the first day of March, shall be placed in the tax list of the succeeding year, and the Sheriff shall immediately proceed to collect the same, and on the first Monday in June and September proceed to pay over, etc., etc. The Revenue Act of 1854 (Acts, p. 111, sec. 96) is identical in this respect with the Act of 1853.

Taking, as we must, all these acts *in pari materia*, and it seems to us beyond question that the Sheriff of 1855 has no right to collect the taxes in 1858. The taxes of 1855, after March, 1856, are not of the unfinished business of his office, for the plain reason that after the settlement in March—which seems to have been designed to be a final settlement—the delinquent taxes of that year go on the tax list of the succeeding year, and the Sheriff—meaning the Sheriff in office—shall proceed to collect them as other taxes. It certainly was not contemplated that these delinquent taxes shall be collected by two or more Sheriffs. And to remove all doubt, it is expressly said that after this settlement “no more taxes shall be collectible on this duplicate;” they are to be put on another list, and collectible as a portion of the revenues of the year for which that list is made. The policy of the Act is as plain as its language. The Legislature meant to avoid the confusion of partial collections of taxes and of various collectors. It designed to prescribe a simple system of assessments, collections and settlements. No mode is provided for further or renewed settlements. After a great length of time, the Sheriff's bond might become insufficient. Small remnants of taxes on an old tax list might be overlooked. Confusion would grow out of the retaining of a partial collection of taxes by an old Sheriff, while there is no apparent object in the old Sheriff's keeping this petty appendage to the office, which, in a great majority of instances, would be more trouble than it

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is worth. The simple process of adding to the new list the uncollected taxes removes all this difficulty, and makes a complete and comprehensive fiscal system.

Nor is there any irreconcilable conflict between the amendatory Act of 1853 and the Revenue Acts of 1853 and 1854. The provision that the Sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement. To authorize him, in other words, to collect the taxes upon his duplicate; not to give him authority to collect taxes upon a part of another list coming to the hands of another and different officer. This is shown as well by the express language of contemporaneous Acts, as by the obvious reason of the thing. Even if the construction were more doubtful, the rule which requires us to construe all these Acts in regard to the same subject matter as if they were one law, each provision, sentence and word qualifying the rest, would force us to this construction in order to reconcile their various parts. But the construction needs no straining of words.

It by no means follows, that because defendant Boling cannot lawfully collect these taxes, they must be lost. We see no difficulty in the way of their collection, if they were otherwise lawful.

The other points of the appellant are not well taken. Boling was not *de facto* Sheriff in 1858, or any Sheriff at all. Any person else might have taken the tax list and proceeded as legally to sell any other man's property. He claims to act by virtue of law, when he has no right to act.

Judgment affirmed.

Butler v. Collins — McGill v. Rainaldi.

BUTLER v. COLLINS.

Where the allegations of the complaint are not supported by the evidence, judgment will be reversed.

APPEAL from the District Court of the Sixth Judicial District, County of Sacramento.

Wheans, McKune & Johnson for Appellant

W. S. Long & Beatty for Respondent.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., concurring.

The allegations in the complaint are not supported by the evidence; and it is clear, from an examination of the record, that the plaintiff has mistaken his form of action, and that his remedy is in contract and not in tort.

Judgment reversed.

McGILL v. RAINALDI.

Where there is no statement embodied in the record, this Court will look only to the judgment roll.

APPEAL from the District Court of the Ninth Judicial District, County of Shasta.

Isaac Boggs for Appellant.

E. Garter for Respondent.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., and TERRY, C. J., concurring.

There is no statement embodied in the record; and the case must be determined upon the judgment roll; and this discloses no error. The appeal is frivolous, and was evidently taken for delay.

Judgment affirmed, with ten per cent. damages.

People v. Way — Meyer v. Gorham.

PEOPLE v. WAY.

APPEAL from the Court of Sessions of the County of Napa.

Edgerton & Hopkins for Appellant.

Attorney General for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

The plea of former conviction is not supported by the evidence, and was properly overruled.

The objection that the evidence did not warrant the judgment is equally unsupported by the record.

Judgment affirmed.

MEYER v. GORHAM.

Where no error appears on the record, judgment will be affirmed.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Cook & Fenner for Appellant.

D. W. Perley and H. S. Love for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The plaintiff recovered judgment below, in trespass, for the levy by the defendant as Sheriff, of certain personal property of which plaintiff had possession by virtue of a chattel mortgage executed by Mitchell and Nance to him.

The case is presented under a totally different state of facts from that shown by the record when the case was before this Court heretofore.

There is no error in the record, and judgment is affirmed.

Horr v. Barker.

HORR *et al.* v. BARKER *et als.*

Hutchinson v. Bours et al. (8 Cal. R. 333) affirmed.

The rule that a factor cannot pledge the goods of his principal is, in this State, confined to technical factors, when the rights of third parties are involved. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman, without making any separation of each lot from the common mass, but voluntarily leave the flour standing on the books of the warehouseman to the credit of each purchaser for his proper number of barrels, it is a complete delivery to each purchaser and will pass the title to each. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

This case was before this Court upon a former occasion. (8 Cal. R. 503.) Upon another trial in the District Court, some additional facts were proven. The material facts, as they now appear, were substantially these: In December, 1858, Hussey, Bond & Hale sold to Barker & Paddock 6,649 barrels of flour, then on store with Tilden & Little. The sale was negotiated through J. R. West, a broker. There was evidence tending to show that it was understood between Hussey, Bond & Hale, Barker & Paddock, and West, that the sale should be kept secret, for the reason that, if known, so large a sale might affect the market, among dealers in the article. The flour sold was of two different brands, Gallego and Haxall. West was employed by Barker & Paddock to sell the flour for them. Hussey, Bond & Hale drew delivery orders, from time to time, in favor of West, upon Tilden & Little, for a large portion of the flour. One order for another large portion was drawn in favor of Barker & Paddock, who endorsed it to West. Those orders were delivered by West to Tilden & Little, and then credited West, on their books, with the flour specified in the orders. In March, 1854, the plaintiffs loaned West two different sums, making together the sum of \$11,500, and received in pledge 1,544 barrels of flour, for the delivery of which they took two warehouse receipts, issued by Tilden & Little to West. These receipts plaintiff surrendered to Tilden & Little, taking from them, in their own names,

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two warehouse receipts, dated May 17th, 1854; one for three hundred and twenty-four barrels Haxall, and the other for 1,220 barrels Gallego flour. West was in the habit of selling flour and drawing delivery orders on Tilden & Little, who were accustomed to deliver the flour called for by such orders, if required, and charging West's flour account; or if the purchaser preferred to leave the flour on storage, the quantity called for was placed to the credit of the purchaser on the books of Tilden & Little, and a warehouse receipt issued to him, if required; but no designation or setting apart of any particular barrels was made. On the twenty-ninth September, 1854, West sold to the plaintiffs five hundred barrels of Gallego flour, and drew a delivery order upon Tilden & Little for the same, "to be inspected superfine." The order was surrendered by plaintiffs to Tilden & Little on the same day, and they transferred on their books four hundred and eighty barrels to the credit of plaintiffs. The reason they did not transfer to plaintiffs the other twenty barrels, was the fact that West had previously drawn orders for all the flour on storage in his name, except the four hundred and eighty barrels. The 1,220 and the four hundred and eighty barrels of Gallego flour were part and parcel of the original pile, containing 4,135 barrels, and had never been separated from the mass. After the twenty-ninth of September, and up to the seventeenth of October, 1854, plaintiffs had inspected and separated from the mass three hundred and eighty of the four hundred and eighty barrels. On the seventeenth of October, and before the seizure by the Sheriff, the plaintiffs were in the act of completing the inspection and removal of the residue of the four hundred and eighty barrels, when the defendants forbade the plaintiffs from proceeding any further; whereupon the plaintiffs claimed the Haxall and Gallego flour as their own, and demanded the same should be given to them, which was refused by Tilden & Little at the defendants' command; after which the Sheriff took possession of the flour at the suit of Barker & Paddock against Tilden & Little.

Of the original pile of 4,135 barrels of Gallego flour, there had been previously withdrawn from the warehouse all excepting 1,682 barrels, of which number 1,320 stood on Tilden & Little's books in the name of plaintiffs, two hundred in the name of McCreery, eighty-nine in the

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name of Adams, Welsh & Co., and seventy-three in the name of C. C. Hunter, all remaining together in the same mass. It appeared that ninety per cent. of both the Gallego and Haxall flour was of the quality called superfine, and ten per cent. of the quality called bad; and that the difference in value was one dollar per barrel.

It also appeared that West, during the years 1854-5, occasionally bought and sold flour on his own account. It was also shown that it was customary in San Francisco for goods to be stored in the name of the factor.

The Court charged the jury "that plaintiffs had made out title to the property described in the complaint, to wit: 1,320 barrels of Gallego flour, and three hundred and twenty-four barrels of Haxall flour; and that they were entitled to recover," to which the defendants excepted. The plaintiffs had judgment, and the defendants appealed.

Delos Lake and Crittenden for Appellant.

1. West was intrusted with the possession of the flour as the factor or agent of Barker & Paddock. He had no power or authority to pledge it, and the pledgee consequently acquired no title or property by virtue of the pledge. *Patterson v. Tash*, 2 Strange, 1178; *McCombie v. Davies*, 6 East, 538; Same case, 7 *ib.*, p. 5; *Newson v. Thornton*, 6 East, 17; *D'Aubigny v. Duval*, 5 D. & E. 664; *Martine v. Coles and others*, 1 Maul. & S. 140; *Boyson v. Coles*, 6 Maul. & S. 14; *Barrix v. Corrie*, 2 B. & Ald. 138; *Wilkinson v. King*, 2 Camp. 335; *Monk v. Whittenbury*, 2 B. & Ald. 484; (22 E. Com. La. 205) *Williams v. Barton*, 3 Bing. 139; (11 E. C. L. 70) *Guarriere v. Peile*, 3 Barn. & Ald. 616; (5 E. C. L. R. 399) *Phillips v. Huth*, 6 Mees. & Welsby, 594; *Hatfield v. Phillips*, 9 *Ibid.* 646; Same case in House of Lords, 14 Mee. & W. 666; *Skinner v. Dodge*, 4 Hen. & Mun. 432; *Van Armedge v. Peabody*, 1 Mason, 440; *DeBouchont v. Goldsmid*, 5 Vesey, p. 211; *Kinder v. Shaw*, 2 Mass. 398; *Jarvis v. Rogers*, 15 *Ibid.* 389; *Urquhart v. McIver*, 4 John. 103, Note "a"; *Lansatt v. Lippincott*, 6 S. & Rawle, 386, 2 Kent Com. 626. (marginal paging) *Graham and others v. Dyster*, 2 Starkes R. 18.

2. As to the flour, pledged by West to the plaintiffs, (viz: 1,220 barrels of Gallego and three hundred and twenty-four barrels of Haxall)

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no title vested in the pledgees, for want of a separation or other identification of the property.

It being parcel of a larger quantity of different and unascertained quantity, quality and value, and not being selected or separated so as to enable the plaintiffs to identify any portion as their property, the sale or pledge was incomplete. *Rapebye v. McKee*, 6 Cow. 250; *Suydam v. Jenkins*, 4 Sandford, 609; *Story on Sales*, sec. 296 and note and sec. 340; *Outwater v. Dodge*, 7 Cow. 85; *Austin v. Cranen*, 4 Taunt. 644; *White v. Wilks*, 7 *Ibid.* 176; *Bunall v. Jacot*, 1 Bard. 167; *McDonald v. Hewett*, 15 John. 349; *Fitch v. Beach*, 15 Wend. 220; *Crofoot v. Bennett*, 2 Comst. 259; *Olyphant v. Baker*, 5 Denio, 379; *Downer v. Thompson*, 2 Hill, 137, and *Ibid.* 208; *Adam v. Gorham*, 6 Cal. 68; *Gardner v. Suydam*, 3 Selden, 357.

3. The property being parcel of a larger quantity in mass could not be recovered in replevin. It is not specific property, and it is impossible for the officer to execute the writ. The officer would have been justified in refusing to execute the order; there being no specific 1,644 barrels of flour, it was not his business to make partition of the whole lot. *Dewiett v. Morris*, 13 Wend. 496.

4. The property having been delivered to Barker & Paddock, under and by virtue of process in a previous action of replevin, instituted by Barker & Paddock against Tilden & Little, and they holding possession by virtue of the delivery under such process, it could not be re-replevied by the plaintiff in the action. *Lockwood v. Perry*, 9 Metcalf, 44; *Morris v. Dewitt*, 5 Wend. 71.

Shafters, Park & Heydenfeldt and George Hudson for Respondents.

I. Where segregation is necessary, it can be accomplished by disintegration.

II. The possession of a warehouse receipt or of an order upon a warehouseman accepted by him, is evidence of title to the goods specified therein in such possessor, and has not merely the qualified effect of proving a symbolical delivery to a possession of the property specified, by the holders of such paper.

In this conclusion as to segregation, four different Judges of this Court have concurred, two of whom now upon the Bench declined to listen to

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argument *in extenso* upon the side of the plaintiffs, saying in substance that they were satisfied upon this question, with the former decisions.

Upon the question of the character and effect of warehouse receipts and cognate papers among commercial men, the same state of opinion must have existed.

The question was involved in the first decision, and was directly passed upon in the second.

Upon all authority, these questions must be regarded as closed, for this cause. *Dewey v. Gray*, 2 Cal. R. 374; *Clary v. Hoagland*, 6 Cal. R. 685.

The defendants, therefore, find it necessary to bring forward some new matter; and make substantially two points, which they claim exempt their case from the effects of the former decisions; these are,

1. The pendency of the action of these defendants against Tilden & Little, and defendants' possession of the flour in dispute under it at the time of the commencement of this action.

2. The fact that West was a mere agent, and pledged the flour (1,220 barrels Gallego and three hundred and twenty-four barrels Hazall) instead of selling the same to the plaintiffs.

The plaintiffs contend that neither of these circumstances is available for the defendants.

The first objection, if correct in its principle, is available only as a matter of abatement, and should have been so plead.

The whole law of the case cited by the defendants upon this point, is canvassed in *Hunt v. Robinson & Skinker*, ante 262; and the precise point is ruled in our favor in *Rhodes v. Pattison*, 3 Cal. 469; *Stimpson v. Reynolds*, 14 Barb. R. 506; *Hoyt v. Van Alstyne*, 15 id. 568; *Shipman v. Clark et al.*, 4 Denio, 446.

2d. If this objection is a valid bar to the action, still it should be specially plead. 1 Chitt's Plead. 591; Gould Plead'g, 339, sec. 45; 12 Wend. 496.

The second new point of the defendants — that as between defendants and West, the latter had only authority to sell as the agent of defendants, and *therefore*, his pledge is invalid — we believe to be, under the circumstances of this case, entirely unsound.

While it may be admitted that no one can grant what is not his, nor

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can he do anything for another without being authorized by that other, yet we allege that the principle has its exceptions and qualifications, and is subject to and is controlled by the following, which is of universal application, viz: that all agents must be held to have all those powers, rights and relations which their principal has seemed to confer upon them, or of which he has created the appearance.

In relation to a bailment or deposit of personal property in the hands of an agent, two predicaments may exist.

1st. The agent may be a mere depositary and have a naked possession.

2d. Added to possession, he may have other *indicia* usually accompanying and characterizing the absolute ownership.

Under the first of these conditions, that of mere possession, all the cases cited by defendants, properly arrange themselves. *Pickering v. Busk*, 15 East, 38.

In this case our general proposition is fully maintained, and the inhibition to pledge by factors and brokers, is confined to those having a naked possession, and whose business character was notorious.

McCombie v. Davies, 6 East, 538. The plaintiff never, in any way, interfered with the property nor with the evidences of title, never knew of the agent's wrongful act until after its performance — a broker purchased with plaintiff's money, and without the knowledge or aid of plaintiff, converted the property by pledging it to defendant.

Martini v. Coles et al., 1 M. & S. 140. The several Judges confine the exception from liability in favor of the principal to mere naked possession in the factor. In this case, however, there was no *pledge*: a mere conversion.

Boyson et al. v. Coles, 6 M. & S. 14. All the Judges concur in saying, if the principal arms the agents with the *indicia* of property, such act enables them to deal with it to others as their own.

Kingford et al. v. Merry, 38 E. L. & Eq. 582. This case is put distinctly upon the ground of a fraud having been committed against the principals, and not that they had furnished the means for the fraud.

Warner v. Martin, 11 How. R. 209. The general doctrine as to factors and other agents, stated: "there were no *indicia* of title

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issued on the part of the owner; he merely parted with the possession." Justice Wayne's opinion, p. 220.

Covill v. Hill, 4 Denio, 327. This case is put entirely upon the ground that the owner of the property had done *nothing* by which others could have been misled.

Saltus v. Everett, 15 Wend. 474, and 20 *Ib.* 267-285. The decision of the Superior Court was to the effect that naked possession empowered an agent to bind the property to all intents. While this extreme doctrine is not sustained, a bill of lading was considered sufficient as evidence of title.

Root v. French, 13 Wend. 572, holds that a fraudulent purchaser may sell or hypothecate to another.

We insist that West was not an agent with a mere possession; he had by the direct act and consent of the defendants, for the purpose of giving him the apparent ownership of the flour, *indicia* of title — universally recognized as such — and the only way that defendants can escape all the consequences of an assumption of the right of an entire owner on the part of West, is by showing notice to plaintiffs, which notice is *negatived* by the case.

All the cases before cited, rightly understood, are authorities for the plaintiffs upon both points; in addition we cite the following: Wilkes v. Fountain & Ferris, 5 T. R. 335; Gibson v. Stevens, 8 How. 384; Gardner v. Howland, 2 Pick. 599; Brower v. Peabody, 3 Kern. R. 121; Bank of Rochester v. Jones, 4 Coma. 497.

Upon the question of West's power, thus armed, Mowry v. Walsh, 8 Cow. p. 238, is *in pari materia*, and is universally approved so. Root v. French, 13 Wend. 572, 4 Denio, 327; 20 Wend. 267, and 38 Eng. L. & Eq. 582, *supra*, and wherever it is cited or spoken of, it is treated as a decision at common law, and not under any statute.

In addition, we have to say that the doctrine for which we contend cannot be denied without subverting Ruiz v. Norton, 4 Cal. R. 355-8; Coit v. Humbert, 5 Cal. R. 260; Leet v. Wadsworth, 5 Cal. R. 460; Hutchinson v. Bowers, 6 Cal. R. 383; Jarvis v. Rogers, 13 Mass. R. 105.

All the cases cited by defendants, it is believed, were cases between

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the vendor and vendee, directly, and are put upon the ground that the *vendor never intended to part with the possession.*

White v. Wilkes, 5 Taunt. 176. The whole bulk, a part of which was in dispute, remained in the possession of the vendor in full ownership. It was a case of a liquid, which makes the difficulty much greater than in the case of a solid substance. "Per Ch. J."

Shepley v. Davis, 5 Taunt. 617, is put upon the character of the delivery order of vendor, and that of non-compliance of vendee with the terms of sale, and that vendor rightfully rescinded.

Busk v. Davis, 2 M. & S. 397. The same point as in the last preceding case. The Court, Le Blanc and Bayley, Justices, takes the precise distinctions made by this Court in its last decision in the case at bar. "The question is between vendor and vendee. The difficulty arises from not keeping that correctly in view."

Austin v. Craver, 4 Taunt. 644, is put solely upon the ground that the property in dispute was not *in esse* at the time of alleged sale, and that therefore it was a mere executory contract to sell and deliver *in futuro*. The same in principle as *Suydam v. Jenkins*, 3 Sand. 614; *Andrews v. Dietrich*, 14 Wend. 31; *Ward v. Shaw*, 7 Wend. 404, and other cases cited, are put upon the ground that vendor had not parted with the possession except as to a bailee.

Wood v. McGee, 7 Ohio, 128, (7 Ham. 466) is another case where the bulk remained in the possession of the vendor.

Reverting to the old cases of *Whitehouse v. Frost*, 12 East, 614; *Jackson v. Anderson*, 4 Taunt. 24, we find the precise facts passed upon involved here.

The bulk out of which a parcel is sold had passed from the possession and ownership of the vendor. In *Busk v. Davis*, this very distinction is taken, as in the cases cited by defendants, and sustained.

Oliphant v. Baker, 5 Denio, 379; *Crofoot v. Bennett*, 2 Coms. 258; *Riddle v. Varnum*, 20 Pick. 280, all put the solution of the question, Does the title pass? upon the intention of the parties. The vendors remaining in possession, is only evidence as to intention. This case, October Term, 1857, p. 467.

(This case was decided at the July Term, 1858. Subsequently a

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petition for a new hearing was filed, which was pending when the tenth volume went to press. Petition was denied at the April Term of that year.)

BURNETT, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., concurring.

The first point made by defendants is, that West, being only employed to *sell*, had no right to *pledge*, not even to persons ignorant of the fact that he was not the owner.

In the case of *Martine v. Coles*, (1 M. & S. 145) Lord Ellenborough said:

"But it has been decided ever since the case of *Patterson v. Tash*, that a factor cannot pledge. Perhaps it would have been as well if it had been originally decided, that when it was equivocal whether a person was authorized to act as principal or factor, a *pledge* made by such a person, free from any circumstances of fraud, was valid. But it is idle now to speculate on this subject, since a long series of cases has decided that a factor cannot pledge."

Le Blank, J., in the same case, said:

"Whether it might not originally have better answered the purposes of commerce to have considered a person in the situation of *Vos*, having the apparent symbol of property, as the true owner in respect to that person who deals with him under an ignorance of his real character, is a question upon which it is now too late to speculate; since it has been established by a series of decisions, that a factor has no authority to pledge, whether the person to whom he pledges has or has not a knowledge of his being factor."

Bayley, J., also said that "a factor has authority to sell, but not to pledge; and, therefore, a person who takes a pawn of a factor takes it at his peril. If the principal does anything to induce the person to believe the factor really the principal, that would be a different case. Cases may, perhaps, exist where a principal would be bound by a pledge made by his factor."

It is very evident that the Judges thought the rule, as originally established, was a hard one; but they feel themselves constrained to adhere to a long series of decisions. The Acts of IV Geo., 4 C. 83,

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and of VI Geo., 4 C. 94, were subsequently passed, modifying this rule. (*Phillip v. Huth*, 6 Mees. and W. 594, 596.) A statute of similar import was passed in New York in 1830. (1 R. S., 2d Ed., p. 1762; *Warner v. Martin*, 11 How., U. S., 228.)

In this State we have no statute upon this subject, and the harshness and injustice of the rule, as originally established in England under the views there taken of the commercial policy of that country, (and which reasons are inapplicable to our condition) induced this Court, in the case of *Hutchinson v. Bours*, (6 Cal. Rep. 383) to confine the rule to a technical factor, "where his only business is to sell goods consigned to him for that purpose." We see no sufficient reason for deviating from the doctrine of that case.

The next point that requires examination is, the objection that no title vested in plaintiffs for want of segregation: the flour being of different qualities, though all of the same brand, was placed in one pile by itself. In the former opinion we said: "The title to the entire lot had passed from West to the different purchasers, and the flour remained with Tilden & Little, in the same state it would have been in had each purchaser first separated his number of barrels from the mass, and then they had all put them together afterwards."

We have examined the most important authorities referred to, and see no reason to change our former opinion. West had a certain number of barrels on store in one mass; and as he sold different portions of this mass to different purchasers, he drew a delivery order for each parcel. Those several orders were surrendered by the purchasers to the warehousemen, who credited each purchaser with the number of barrels to which he was entitled. This the parties had the right to do. There was nothing improper in this voluntary act. It was matter of convenience to all. When each purchaser presented his delivery order from West, he was entitled to a separation of his number of barrels from the mass, or not, *at his election*. Each purchaser knew the exact condition of the flour, and each had the right to let his portion remain in the general mass. When West had drawn for the whole amount, and the last purchaser had surrendered his order, there was nothing further for West to do. The purchasers could not call on West to separate each portion from the mass, because each purchaser

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had voluntarily taken his portion in the mass. After surrendering their several orders, and taking a credit on the books of Tilden & Little, the purchasers had no further claim upon West. When A has six hundred barrels of flour on store, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehousemen, and the purchasers all surrender their several orders without making any separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number, we confess we cannot see what further act A has to perform, or why there is not a complete delivery to each purchaser. If the purchasers choose to leave their flour in the mass, and to trust to each other, it is their right to do so, and the seller has nothing further to do in the matter of delivery. The title has completely passed from the seller to the purchasers, respectively.

And the fact that the flour was of different qualities can make no difference under the circumstances of this case. The plaintiffs had possession of a certain number of barrels under the pledge, and a certain number under their purchase; they had voluntarily received the four hundred and eighty barrels without inspection. By this act they waived the inspection as a condition precedent to delivery. After having received the four hundred and eighty barrels, by having it placed to their credit on Tilden & Little's books, the plaintiffs could only look to West upon his covenant, that the flour should inspect superfine. Considering the dealings between West and the plaintiffs, they had the right to select the four hundred and eighty barrels from the whole mass received by them from West, so as to place all the bad flour among that which was *pledged* to them. This was what they were doing when they were forbidden by the defendants.

The reasoning of the Supreme Court of Ohio, in the case of Woods v. McGee, (7 Ohio, 467) commenting upon the decision of the Court of Appeals of Virginia in the case of Pleasants v. Pendleton (6 Rand. 473) does not seem to us to be conclusive.

"It is impossible," says the Court, "to answer the difficult inquiry, if a part only of the flour had been burnt, in that case on whom would the loss have fallen? If A, being the owner of two thousand barrels of flour, sells one thousand to B, but without anything being done to

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ascertain the identity and individuality of the part sold, and one thousand barrels are consumed by fire, what is there to determine that one thousand are the property of the vendor, and that he shall bear the loss?"

It appears to us that the Court sacrificed the common sense and justice of that case to the misapplication of a good principle, when confined to proper circumstances. Suppose A sells and delivers one thousand barrels to B, and five hundred to C, and that the two purchasers afterwards put their flour together in one mass, all being of the same brand, and without marks to distinguish one brand from another in case of partial loss upon whom would it fall? It would seem to be a very inadequate system of jurisprudence that could not give a solution to that question. The parties had a just right to do what they did do; and common justice would say, they should each bear the loss in proportion to his interest in the whole. And what possible difference can it make if one of the parties be the seller and the other the purchaser? In this latter case, as in the former, they are each the separate owner of a specified number of barrels. The seller has a thousand barrels in a warehouse in one mass and sells to a purchaser a portion, and gives him a delivery order, which he presents and takes a warehouse receipt in his own name, leaving the flour in the mass. From the transaction, it is clear that it is the mutual agreement of the seller and purchaser that the property should remain together; for the plain reason that practical common sense will not dispute about the separate identity of two or more things that are all just alike. In all such cases, we conceive it to be the duty of the Courts to look to the *intention* of the parties. They are competent to contract, and they have a practical knowledge of the best method of carrying out their intentions; and the Courts should give effect to such intentions when ascertained. If the parties consider it a delivery, it should be held to be such, as between them, or as between them and mere trespassers.

The next point which requires notice is, the objection that the property in controversy, being parcel of a large quantity, could not be recovered in replevin.

If the views we have taken be correct, that the title had passed

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from West to the several purchasers, then there was nothing in the state of the pleadings that would warrant the defendants in raising this question. If we consider, for the sake of argument only, that the other owners should have been joined in the action, either as plaintiffs or defendants, this objection should have been set up in the answer.

The only remaining objection made by the learned counsel of defendants which is necessary to notice is, that the property, having been delivered to Barker & Paddock by virtue of process issued in their previous action of replevin against Tilden & Little, it could not be replevied by the plaintiffs in this action. This objection, whether sufficient or otherwise, was not affirmatively set up in the answer, and the proof offered was properly rejected.

Judgment affirmed.

BROTHERTON v. HART *et al.*

Where the parties in the Court below stipulated that a motion for a new trial should be denied, they cannot question, in this Court, the correctness of an order denying such motion.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

D. W. Perley for Appellants.

E. A. Lawrence for Respondent.

TERRY, C. J., at the July Term, 1858, delivered the opinion of the Court—FIELD, J., concurring.

In this case the parties, by stipulation, consented that the motion for a new trial should be denied. Having consented to the order, they cannot now question its correctness. (*Meerholts v. Sessions*, 9 Cal. 277.)

Judgment affirmed.

Hyde v. Hyde — Brooks v. Park.

HYDE v. HYDE.

Judgment reversed, with directions to enter decree according to evidence.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

J. B. Hart for Appellant.

—— ——— for Respondent.

TERRY, C. J., at the July Term, 1858, delivered the opinion of the Court — FIELD, J., and BURNETT, J., concurring.

We think the evidence reported by the referee sufficiently establishes the allegation of the complaint, and entitles the plaintiff to the relief prayed for.

Judgment reversed and cause remanded, with directions to the Court below to enter a decree in accordance with the prayer of the complaint.

BROOKS v. PARK.

Where the evidence fully warranted the report of the referee, the judgment will be affirmed.

APPEAL from the District Court of the Twelfth Judicial District, County of San Francisco.

Brooks, for Appellant.

Shafters, Park & Heydenfeldt for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., and TERRY, C. J., concurring.

In this case the Referee reported against the claim of the plaintiff, and the District Court overruled the motion to set aside the report. The evidence is in the record, and fully warrants the action of the Referee and District Court.

The judgment is affirmed.

People v. Smyth.

PEOPLE v. SMYTH.

Judgment reversed, for insufficiency of evidence.

APPEAL from the Court of Sessions of the County of Del Norte.

E. D. Baker for Appellant.

Attorney General for Respondent.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Indictment for larceny. The evidence in this case was clearly insufficient to justify the conviction of the prisoner. So far from proving legal guilt, it was not even sufficient to warrant an inference of moral culpability.

Judgment reversed.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XI.

By WILLIAM FOSTER.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

11 Cal. 12-14. MARTIN v. BROWNER.

Mining.—Owner of town lot of twelve acres in a mining district cannot prevent use of part of it by miners for mining purposes, p. 14.

Cited in note to 63 Am. Dec. 94, 95 (*McClintock v. Bryden*, 5 Cal. 97), and note to 91 Am. Dec. 694, 695 (*Levaroni v. Miller*, 34 Cal. 231), on relative rights of miners and settlers on public lands. Referred to in note to 63 Am. Dec. 110.

11 Cal. 14-20. RAUN v. REYNOLDS. S. C. 15 Cal. 459; 18 Cal. 275; Kirk v. Reynolds, 12 Cal. 99; Reynolds v. Harris, 14 Cal. 676, 679 (76 Am. Dec. 463, 467).

Interest cannot be compounded on a judgment, though stipulated in note sued on, p. 19.

Cited, on the question of interest on judgments, in *Gautier v. Engleah*, 29 Cal. 168, holding that as plaintiff did not pray for interest at the same rate expressed in the note, he is not entitled to it. Doubted, *Ontron v. Lafayette Co.*, 125 Mo. 71, where it is said that in the principal case the court, in construing the statute, "by very ingenious, but, as it seems to us, rather specious reasoning, founded entirely upon the particular wording of that statute, held that interest upon a judgment could not be compounded. The wording of our statute is different, and will not support that reasoning."

Judgment by Default can give no relief beyond that demanded in the complaint, p. 19.

Cited in *Scamman v. Bonslett*, 118 Cal. 98, 62 Am. St. Rep. 230, holding foreclosure decree not justified under pleadings; *Ellis v. Rademacher*, 125 Cal. 557, applying rule when answer admitted allegations of complaint; *Claffin Co. v. Simon*, 18 Utah, 162, denying relief on distinct counts when no judgment demanded in any; *Lamping v. Hyatt*, 27 Cal. 102, holding that relief must be demanded in the complaint and specified in the summons; also *Brooks v. Forington*, 117 Cal. 220, holding that where counsel fees on foreclosure of mortgage are not prayed

for, they cannot be allowed, either under general relief or as costs. Affirmed, *Scamman v. Bonslett*, 118 Cal. 99. Cited, *Burling v. Goodman*, 1 Nev. 317, holding that judgment could not be for gold coin, where it was not prayed for.

Priority of Mortgages.—Property included in the first mortgage should be exhausted before recourse is had to the second, p. 20.

Cited, *Abbott v. Powell*, 6 Sawy. 94, where Hoffman, J., says: "Any other rule would be injurious to the mortgagor himself, for after mortgaging his property for, it might be, an insignificant part of its value; he would be unable to sell or encumber any separate parcel of it, for the purchaser or encumbrancer would have no assurance that his parcel might not be first taken to satisfy the general mortgagee."

Reversal of Judgment as affecting liability for rents and profits, p. 20.

Referred to on this point in *Conro v. Crane*, 110 U. S. 412, but the principal case does not decide the point; see S. C. 18 Cal. 275, and note thereto, post.

11 Cal. 21-22. **TURNER v. MORRISON.**

Surprise at the trial must be alleged there as a ground for continuance, otherwise it is no ground for a new trial, p. 22.

Cited, *Schellhous v. Ball*, 29 Cal. 609, holding that where surprise is claimed at the trial, the court should afford relief at once, if it would be granted on motion after the trial, but not otherwise; also, *Heath v. Scott*, 65 Cal. 552, holding that surprise at failure of the other side to introduce depositions must be alleged at the trial; and in *Black v. Appolonio*, 1 Mont. 345, holding that it is within the discretion of the trial court to allow a continuance for surprise; also, *Gaines v. White*, 1 S. Dak. 446, on the principal point.

11 Cal. 22-27. **PHELPS v. OWENS.**

General Demurrer does not cover matters of form, p. 23.

Approved, *Ward v. Clay*, 82 Cal. 505, holding that a note was sufficiently pleaded.

Punitive Damages cannot be recovered in a suit against a sheriff acting under legal process in seizing property, unless he acts with malice, oppression, or fraud; the measure of damages is the value of the property taken, with interest, pp. 24-25.

Approved, *Dorsey v. Manlove*, 14 Cal. 557, 558, where it was claimed by counsel that a seizure by a tax collector under a void assessment was a case for exemplary damages; but the court said that "the law applies in all cases the same measure of relief. This rule is founded upon a wise and beneficial policy, and it is of the utmost importance that it be strictly and rigidly adhered to by the court." This case and the principal case are approved in *Nightingale v. Scannell*, 18 Cal.

325, where the court says that the rule is based on the absence of malice or oppression: "We think an officer is no less responsible for the consequences of a malicious act than a private person"; but there being no malice shown, the rule of the principal case is enforced. In *Abbott v. 76 Land Co.*, 103 Cal. 611, the principal case is cited, and the court hold that in conversion of wheat under a bona fide claim of title the measure of damages is the actual injury done, and punitive damages cannot be awarded. The rule of the principal case is adopted, in suits against a sheriff for unlawful seizure, in *Alley v. Daniel*, 75 Ala. 409, and *Winstead v. Hulme*, 32 Kan. 574; also, in a suit against a railway for damage to a passenger by delay of train, in *Hansley v. Jamesville R. Co.*, 115 N. C. 611, 44 Am. St. Rep. 481, holding that "smart money is not recoverable in every case where an action ex delicto lies"; and in *Smith v. Holland*, 4 Tex. Ct. App. Civ. Cas. 438, in suit against a justice of the peace for illegal issuance of a writ.

11 Cal. 28-36. **HITCHENS v. NOUGUES.**

Deed purporting to convey a title in fee simple absolute gives the grantee a right to any title subsequently acquired by the grantor, p. 36.

Approved, *Green v. Green*, 103 Cal. 110, where a deed expressly purported to convey after-acquired title.

Mining.—Agreement for sale of a claim held to convey only the seller's interest, not the title to the premises, p. 36.

Cited, *Treat v. Hiles*, 68 Wis. 353, 60 Am. Rep. 863, holding that an agreement to procure the conveyance of land and work a quarry thereon, was not within the statute of frauds.

11 Cal. 41-42. **HESTON v. MARTIN.**

Mechanic's Lien.—Where contract is for a gross sum, statement of lien need not give items of labor and material, p. 42.

Cited, *Davis v. Livingston*, 29 Cal. 287, to the point that notice of lien need not specify the particular character of the materials; and in *Hicks v. Murray*, 43 Cal. 522, to the point that the statement need not apportion the amount between labor and materials; also in *Jewell v. McKay*, 82 Cal. 150, holding that the notice need not itemize the materials and labor. Cited also in *Leftwich Co. v. Florence Assn.*, 104 Ala. 594, holding that statement of total amount of materials is sufficient; and, to the point that it is enough to state amount of balance due, in *Nichols v. Culver*, 51 Conn. 179, and in *Taylor v. Netherwood*, 91 Va. 93.

11 Cal. 42-48. **PEOPLE v. SUPERVISORS.**

Mandamus will not lie to compel mode or manner of action when discretionary, p. 47.

Cited in *Sawyer v. Mayhew*, 10 S. Dak. 23, denying writ to compel audit of claim.

11 Cal. 49-68; 70 Am. Dec. 754. *PEOPLE EX REL. MCKUNE v. WELLER*.

See 11 Cal. 77-88. *People ex rel. Brodie v. Weller*.

Elections are valid only by virtue of statute. A person cannot "make title to an office through the popular vote, unless such vote was cast in pursuance of legislative regulation and authority," p. 61.

Cited, *Kenfield v. Irwin*, 52 Cal. 169, holding that "the time of holding an election, whether general or special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed; otherwise the election is held without authority and is ineffectual for any purpose." Also, *People v. Hoge*, 55 Cal. 620, by Thornton, J., in a dissenting opinion, quoting from 52 Cal. 169, as above; the majority of the court holding that an election for a board of freeholders for San Francisco, held under a notice from the board of election commissioners, was valid under the constitution. Also, *People v. Budd*, 114 Cal. 173, holding that as the law makes no provision for an election to fill the vacancy caused by death of a lieutenant-governor, no election can be held. *Sawyer v. Haydon*, 1 Nev. 80, holds that there can be no election unless specific statutory provision is made therefor, and the court say: "For an able and lucid argument on these points we would refer to the opinion of Mr. Justice Baldwin" in the principal case. In *State v. Simon*, 20 Oreg. 372, the principal case is cited to the same point; also, in dissenting opinion to *Robertson v. State*, 109 Ind. 95, where the majority of the court hold that quo warranto cannot be brought by the lieutenant-governor, as the constitution provided that the general assembly alone can try such controversies; and in *State v. Thoman*, 10 Kan. 196, holding that the duration of a judicial term may be fixed by statute if the constitution is silent, but a term prescribed by the constitution cannot be extended by statute; also, *Douglas Co. v. Keller*, 43 Neb. 646, holding that county lands cannot be sold except by virtue of a vote at a duly authorized election.

Statute requiring the governor to issue a proclamation of an election to fill vacancies in certain offices is mandatory, and an election held without such proclamation is invalid, pp. 65, 66.

Cited in *People v. Prewett*, 124 Cal. 10, but holding notice of election for school trustees sufficient; *People v. Wells*, 11 Cal. 339, holding that as there was no vacancy to be filled by election, an election for county treasurer was invalid; also, *People v. Martin*, 12 Cal. 411, holding that a proclamation must be made of an election to fill a vacancy in the office of county judge; and to the same effect in *Westbrook v. Rosborough*, 14 Cal. 187, 188. Distinguished, *State v. Thayer*, 31 Neb. 97, 98, 99, where the court say of the principal case:

"The opinion is lengthy, discursive, and involved in paradox. . . . The principal effort of the writer of the opinion seems to have been to separate it and distinguish it from that of *People v. Cowles*, 13 N. Y. 350. . . . Under the California statute it is shown that there could be no legal notice without the proclamation, . . . while under our statute the notice . . . is independent of any action of the chief executive"; held, the statutory provision requiring thirty days notice of an election is directory only. Distinguished, also, in *State v. Carroll*, 17 R. I. 596, where the election was because of failure to elect at a previous election, and it was held that notwithstanding lack of proper notice, if the election appeared to be a full expression of the popular will, the court would sustain it. Cited, *Voss v. Terrell*, 12 Tex. Civ. App. 446, in dissenting opinion, the majority of the court holding that notice of a special election for local option, given according to the local option law, is valid, though it does not conform to the notice prescribed by the general election law. Cited, to the point that proclamation or notice is necessary in case of a special election to fill a vacancy, in *George v. Oxford*, 16 Kan. 80; *Morgan v. Gloucester*, 44 N. J. L. 143; *Ex parte Kennedy*, 23 Tex. App. 81; and in notes to 81 Am. Dec. 405, 83 Id. 750, 751, 86 Id. 74. Cited, as to mandatory statutes, in *Wendel v. Durbin*, 26 Wis. 392, holding that a statute as to service of summons is mandatory; *State v. Martin*, 83 Mo. App. 58. Note to 27 Am. Dec. 110.

11 Cal. 68-70. *WHITE v. MOSES*.

General Denial does not put in issue plaintiff's capacity to sue, p. 70.

Distinguished in *Brown v. Curtis*, 128 Cal. 195, holding rule inapplicable in case of action by assignee; cited in *Whelan v. Railway Co.*, 111 Fed. 328, noted under *Primm v. Gray*, 10 Cal. 522.

11 Cal. 70. *PEOPLE v. COMEDO*.

Appeal dismissed for failure to file assignment of errors or statement of points and authorities, p. 70.

Cited, *Hutton v. Reed*, 25 Cal. 483, where the "assignment of errors" is defined as "a specification of the points or particular errors relied on." After discussing the statutory requirements as to statements on motion for new trial or appeal, the court rules that statements not conforming to the requirements will be disregarded, and only such errors as are disclosed by the judgment roll will be considered.

11 Cal. 76. *HOCKSTACKER v. LEVY*. See 9 Cal. 607.

Injunction of proceedings of another court of co-ordinate jurisdiction cannot be allowed, p. 76.

Cited, *Crowley v. Davis*, 37 Cal. 269, holding that the rule applies

in spite of the parties being different in the two suits, nor can it be changed by consent of parties; and in *Judson v. Porter*, 51 Cal. 562, holding that one district court cannot enjoin prosecution of a pending action in another district court.

11 Cal. 77-88. **PEOPLE EX REL. BRODIE v. WELLER.**

See 11 Cal. 49-68. *People ex rel. McKune v. Weller*.

District Judges are elected for six years. The constitution does not fix the time for the commencement of the term, pp. 85-88.

Affirmed, *People v. Burbank*, 12 Cal. 391, 394; also, *Pattison v. Supervisors*, 13 Cal. 182, holding that where a law is declared unconstitutional it must be because it is in conflict with the expressed terms of the constitution, not merely with its "spirit and policy"; and to same effect in *Cohen v. Wright*, 22 Cal. 322. Cited, *State v. Johns*, 3 Oreg. 538, holding that in the absence of legislation on the matter, a person elected as county judge, to fill a vacancy, holds for the full term of the office; also, *State v. Ware*, 13 Oreg. 389, holding that under the statute a person elected as circuit judge, to fill a vacancy, holds only for the unexpired term of his predecessor; and in the dissenting opinion in *Burks v. Hinton*, 77 Va. 45, a majority of the court holding that a judge elected to fill a vacancy holds only for the unexpired term.

11 Cal. 93-103. **RUSSELL v. CONWAY.**

Setoff is allowed by a court of equity, of mutual judgments, where the party claiming setoff cannot collect the judgment in his favor on account of insolvency of the other party, p. 102.

Cited, *Duff v. Hobbs*, 19 Cal. 659, holding that an offset, set up in an answer, is not an equitable defense, but a statutory right, and is governed entirely by the statute; also, *Hobbs v. Duff*, 23 Cal. 627, 629, holding that a court of equity will enforce a setoff between the real parties in interest, and where a beneficiary of a trust is insolvent, the court will compel his trustee to set off a judgment in his favor with one against him; and in *Lyon v. Petty*, 65 Cal. 324, holding that in a suit by the administrator of a mortgagee to foreclose a mortgage, a note of the mortgagee, in possession of the mortgagor, but not presented as a claim against the estate, could not be set off. Cited, also, in *Hovey v. Morrill*, 61 N. H. 13, 60 Am. Rep. 316, holding that setoff of one judgment against another will be compelled, in spite of fraudulent assignment of one of them to a third person; and in note to 18 Am. Dec. 731, on setoff of judgments.

Attorney has no lien on the judgment for his costs, p. 103.

Approved, *Hogan v. Black*, 66 Cal. 42; *Gage v. Atwater*, 136 Cal. 173, noted under *Ex parte Kyle*, 1 Cal. 332; notes to 31 Am. Dec. 757 and 51 Am. St. Rep. 258, 259.

11 Cal. 104-113. WEIMER v. LOWERY.

Mining Ditch cannot be dug through inclosure of another without his consent, p. 112.

Cited, *Rogers v. Soggs*, 22 Cal. 453, holding that miners cannot use the timber on lands of a prior settler; also, *Jennison v. Kirk*, 98 U. S. 462, holding that the owner of a ditch cannot recover damages from owner of a hydraulic mining claim for washing away the ditch; and in notes to 63 Am. Dec. 95, 96, and 91 Am. Dec. 695, on ditches as a nuisance.

Trespass.—Possession of the invaded premises is evidence of title as against a mere trespasser, p. 112.

Cited in *Kellogg v. King*, 114 Cal. 383, 55 Am. St. Rep. 77, holding that injunction lies in favor of lessees of a game preserve to restrain others from hunting therein.

11 Cal. 120-129. ROGERS v. HOBERLEIN.

Public Administrator must receive a grant of administration before title to an estate vests in him, p. 127.

Cited, *Los Angeles County v. Kellog*, 146 Cal. 593, 594, where public administrator is salaried officer and required to pay all commissions into county treasury, if he continues to administer estate after expiration of term, he must pay commissions into treasury; *Abel v. Love*, 17 Cal. 238, holding that the grant may be shown by a copy of the order, and issuance of letters is unnecessary; also, *Estate of Hamilton*, 34 Cal. 468, holding that the order does not vest the administrator with the office until he takes the oath and receives letters; and in note to 68 Am. Dec. 25 (*Beckett v. Selover*).

Public Administrator has authority to act in an estate, after expiration of his term of office, until his authority is revoked, p. 129.

Approved, *Estate of Aveline*, 53 Cal. 260; *Estate of Lermond*, 142 Cal. 586, on point that in contest for letters, such administrator acts solely for his own interest; *In re Pingree*, 100 Cal. 80, holding that a public administrator, who filed a petition for administration just before his term expired, was not entitled to the appointment, but his successor was entitled.

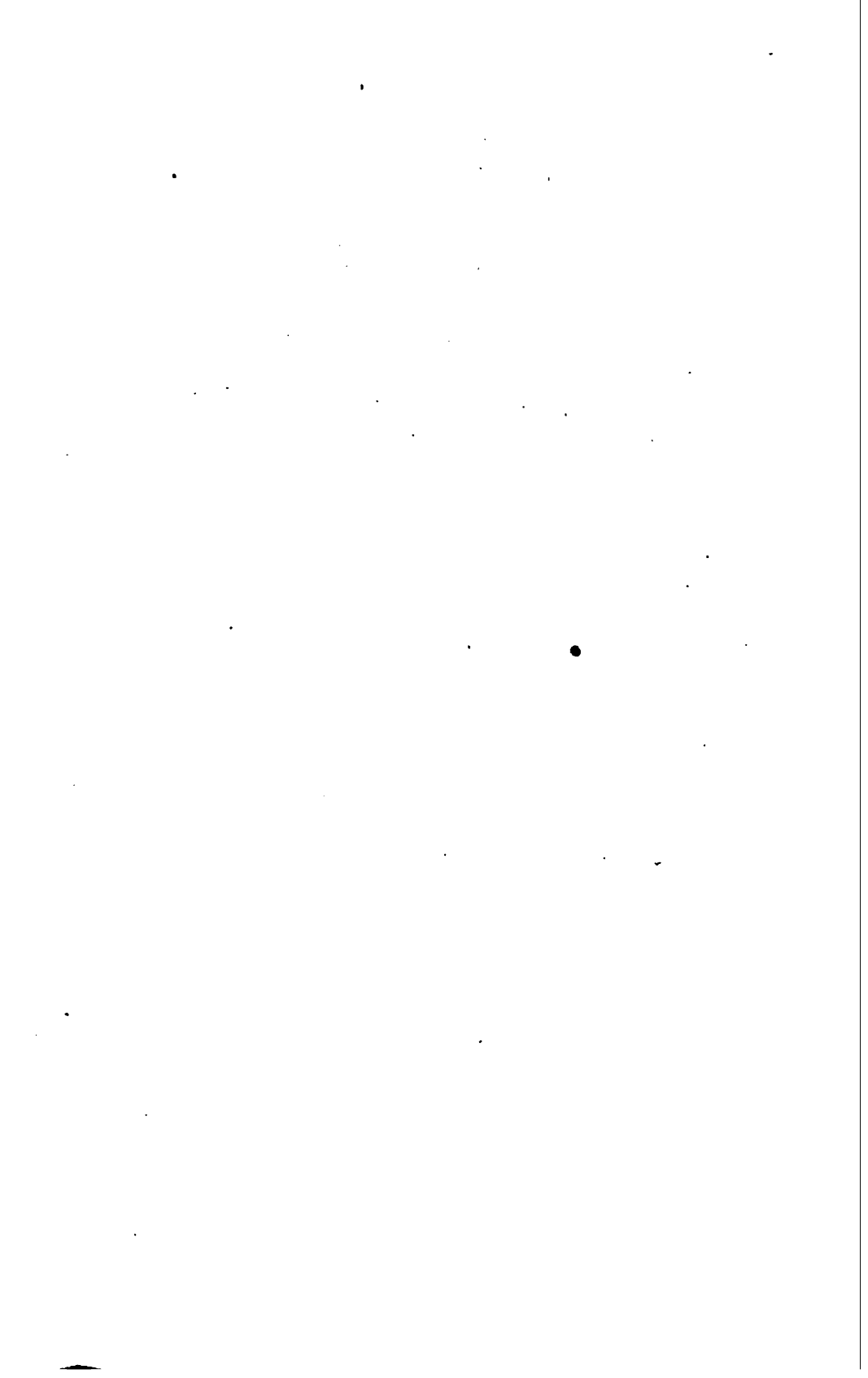
11 Cal. 129. SAYRE v. SMITH.

Appeal dismissed for want of assignment of errors, p. 129.

Cited, *Hutton v. Reed*, 25 Cal. 483; see note to 11 Cal. 70, *ante*. Cited also in *Purdy v. Steel*, 1 Idaho, 217, holding that exceptions taken at the trial must be assigned as errors.

11 Cal. 132. LAFFERTY v. BROWNLEE.

Appeal.—When statement on motion for new trial is not filed in
Notes Cal. Rep.—35



EXTRA ANNOTATION
TO
PRECEDING VOLUME

Water Rights.—Injury to ditch by deposit of mud and sediment from adjacent mining claim is a good cause of action, p. 162.

Cited in note to 68 Am. Dec. 331, on deterioration of water by mining.

11 Cal. 163-169. **DYE v. DYE.**

Pleading.—In suit by wife for division of common property after divorce, the facts on which the statutory right is based must be stated in the complaint, p. 167.

Doubted, *Gimmy v. Doane*, 22 Cal. 637, 638, holding that the rule does not apply to statutes regarding rights of property, but only to those giving a remedy; the statute as to common property is a mere regulation of the right of property, and the correctness of the decision in the principal case "may well be doubted." Cited, *Howe v. Howe*, 4 Nev. 472, as partly overruled by 22 Cal. 638; held, where pleadings in a divorce suit do not refer to property, a decree regarding the property is reversed, and the case remanded for amendment of the pleadings. Cited, on the point that in action on a contract the performance of conditions prescribed by a statute must be specially alleged, in *Himmelman v. Danos*, 35 Cal. 448, which was a suit to enforce a lien for street work; also, *Rhoda v. Alameda Co.*, 52 Cal. 352, holding that in a suit for severing a vault from a building, the facts relied on as bringing the case within the statute must be specifically stated; and to the same effect, in suit against a county to recover amount of liquor license illegally collected, in *San Luis Obispo v. Hendricks*, 71 Cal. 246. Distinguished, *White Pine Co. v. Herrick*, 19 Nev. 37, holding that in a suit on contract, not under a statute, to recover amount of a county treasurer's bond, the allegations of the complaint were sufficient.

11 Cal. 170-175. **PEOPLE v. SUPERVISORS OF EL DORADO CO.**
S. C. 8 Cal. 58.

Supervisors can only allow claims against the county that are "legally chargeable," p. 174.

Cited, *Linden v. Case*, 46 Cal. 174, holding that an injunction will not lie to prevent supervisors from illegally contracting for erection of a hall of records; the supervisors will be presumed to do their duty, but if they allow illegal claims, the taxpayers cannot be injured, for the allowance of such claims could not be sustained. Cited, also, in *Grant Co. v. Sels*, 5 Oreg. 249, holding that warrants issued to a county judge for his salary, to which he was not entitled by law, may be recovered by the county; and in note to 55 Am. St. Rep. 209, as to allowance of claims against municipal corporations.

County Warrants, in the hands of an innocent purchaser, have no greater validity than when held by the original payee. "If illegal when issued, they are illegal for all time," p. 175.

Cited, *Dana v. San Francisco*, 19 Cal. 490, holding that a suit on

county warrants, as negotiable instruments, evidencing of themselves an indebtedness of the county, cannot be maintained; and to same effect in *People v. Gray*, 23 Cal. 126; also, with regard to county bonds, in *Sutro v. Pettit*, 74 Cal. 337, 5 Am. St. Rep. 445, where the court say: "It is clear, in this state at least, that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature"; and in *Shakespear v. Smith*, 77 Cal. 640, 641, 11 Am. St. Rep. 329, holding that an order of school trustees, illegally issued, was not negotiable, and gave no rights to an innocent indorsee. Cited, on the point that county warrants are not negotiable, in *People v. Johnson*, 100 Ill. 548, 39 Am. Rep. 68; *Clark v. Polk Co.*, 19 Iowa, 255; and to like effect, as to city or town orders, in *Clark v. Des Moines*, 19 Iowa, 216, 217, 87 Am. Dec. 431; *Commissioners v. Keller*, 6 Kan. 518; *Eaton v. Berlin*, 49 N. H. 224; *Rich v. Errol*, 51 N. H. 359. In *Dorian v. Shreveport*, 28 Fed. Rep. 295, the principal case is cited on the point that the assignee of a bond stands in the shoes of the original payee; and the court holds that bonds issued for city improvements may be collected by an assignee, even though the city has no power to issue negotiable paper.

11 Cal. 175-186. **FERRIS v. COOVER**; S. C. 10 Cal. 589.

United States Supreme Court, under section 25 of the Act of Congress of 1789, has appellate jurisdiction over state courts in the cases named in the section and in no others, pp. 178-181.

Approved, *Hart v. Burnett*, 20 Cal. 171, where the court, per Field, C. J., said: "It is only final judgments or decrees of the highest court of a state which can be re-examined upon a writ of error by the supreme court of the United States. In this case the decision of the supreme court of the state finally determined certain questions of law which will control any further action of the court below, but it has never rendered any final judgment within the meaning of the twenty-fifth section of the Judiciary Act of 1789. Its judgment was that the judgment of the lower court be reversed and the cause remanded, from which a new trial followed as a matter of course." Cited, also, in *Greeley v. Townsend*, 25 Cal. 610, 612, 614, where Sanderson, C. J., declines to issue citation on a writ of error from the United States supreme court, on the ground that the case does not involve any federal questions within section 25 of the Federal Judiciary Act; and holds that so far as a statute of California attempts to regulate the practice of writs of error from the United States supreme court, it is unconstitutional, and the court will disregard it. Approved in note by Dixon, C. J., to *Ableman v. Booth*, 11 Wis. 525.

11 Cal. 187-190. **MCDONALD v. MADDUX**.

Supervisors are subject to the control of the legislature as to disposition of county funds, p. 189.

Approved, *McCauley v. Brooks*, 16 Cal. 34, 35, holding that while the legislature has entire control of state finances, it cannot, by repealing an appropriation, deprive of his rights a party who has entered into a contract the payment of which was to be made from the appropriation; and such payment may be enforced by mandamus against the controller, directing him to issue warrants for that purpose. Cited, *McDonald v. Bird*, 18 Cal. 198, holding that certain warrants against county funds are preferred claims, and that nothing in the principal case affects the question. Distinguished, *English v. Supervisors*, 19 Cal. 184, holding that supervisors must levy a yearly tax for sinking fund to redeem certain bonds, and that nothing in the principal case clashes with the doctrine that when bonds are issued, to be redeemed by certain taxation, the taxation must be enforced as part of the contract. "A legislature has no more right to violate a contract than an individual, nor can it authorize any person, natural or artificial, to do so." Cited, *Esser v. Spaulding*, 17 Nev. 303, holding that a statute authorizing transfers from the general fund to the salary fund is not unconstitutional; also, *Hockaday Co. v. Commissioners*, 1 Colo. App. 373, holding that the legislature may direct that certain county revenues be used for specific purposes; and in note to 68 Am. Dec. 299, on power of legislature over county funds.

11 Cal. 190-193. **MONTGOMERY v. TUTT.** S. C. 11 Cal. 307.

Writ of Assistance is the appropriate remedy to place the purchaser of mortgaged premises in possession, after foreclosure sale and sheriff's deed; it rests on the "obvious principle that the power of the court to afford a remedy must be coextensive with its jurisdiction over the subject matter, p. 192.

Cited in California etc. Bank v. Graves, 129 Cal. 651, sustaining issuance notwithstanding appeal where no stay bond given; *Ball v. Ridge etc. Co.*, 118 Mich. 15, applying rule to enforcement of tax sale decree; concurring opinion of Field, J., in *Tuolumne Co. v. Sedgwick*, 15 Cal. 527, where the court hold that where one has both an equitable and a statutory right to redeem property sold under foreclosure, the assertion of the statutory right is no bar to the assertion of the equitable; also, *Goodenow v. Ewer*, 10 Cal. 468, 76 Am. Dec. 545, holding that where there is no power of sale in a mortgage, the owner of the mortgaged premises cannot be deprived of his rights except by sale pursuant to a decree; and in *Horn v. Volcano Co.*, 18 Cal. 143, holding that a decree gives the summary right to be put in possession. In *Montgomery v. Middlemiss*, 21 Cal. 107, 81 Am. Dec. 148, Field, C. J., refers to the suggestion in the principal case that an order to deliver possession should first be made, unless embodied in the decree, and says: "Upon further consideration of the subject in later cases we have come to the conclusion that the preliminary order may be omitted, even where no direction for the delivery of possession is contained in

the decree. . . . All that is requisite to obtain the writ, as against the parties and those claiming with notice under them after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it." In *Siehler v. Look*, 93 Cal. 610, the court say it is expedient to include in the judgment of foreclosure a provision that a writ of assistance may issue without further notice. The principal case is quoted in *Kirsch v. Kirsch*, 113 Cal. 64, as to the power to afford a remedy being coextensive with the jurisdiction; and the court holds that where the husband has obtained a decree for the community property, after divorce for the wife's adultery, he is entitled to a writ of assistance. In *Hibernia S. & L. Soc. v. Lewis*, 117 Cal. 580, the court say: "A writ of assistance is the proper remedy to place the mortgagee, who has purchased under a foreclosure sale, in possession under his deed. It runs against the mortgagor and all persons who have purchased the fee under him pendente lite with notice." In *Terrell v. Allison*, 21 Wall. 291, the court, per Field, J., cite the principal case, and hold that the owner of the mortgaged property is an indispensable party to the suit, and refuse a writ of assistance because the decree was made without notice to her. *Root v. Woolworth*, 150 U. S. 412, quotes the principal case as to the power of a court of equity to enforce its judgment; and orders that a writ of possession issue to enforce a decree adjudging the title to real estate. The principal case is also quoted in *Shainwald v. Lewis*, 69 Fed. Rep. 493, as to jurisdiction to enforce a decree, and it is held that a court of equity has jurisdiction of a bill to revive a former decree. Cited, also, in *Rose v. Richmond Co.*, 17 Nev. 73; and notes to 51 Am. Dec. 154, 157, on writs of assistance, and 99 Id. 575, on vendor's lien.

Homestead cannot be carved out of the property so as to impair the rights of a previous mortgagee, p. 193.

Cited, *Skinner v. Beatty*, 16 Cal. 158, holding that a writ of assistance will not be set aside on account of a homestead claim by the mortgagor. Approved, *Van Sandt v. Alvis*, 109 Cal. 168, 50 Am. St. Rep. 27.

11 Cal. 194-199. JENNY LIND CO. v. BOWER.

Parol Evidence is admissible to explain the sense in which a word having two meanings, is used in a written agreement, p. 197.

Cited, *Giant Powder Co. v. California Powder Co.*, 6 Sawy. 525, 4 Fed. Rep. 728, where Field, J., holds that the court is at liberty to inquire into the circumstances under which the term "inexplosive" was used in a patent; also, *Auzerais v. Naglee*, 74 Cal. 67, holding that the word "settle" having a double meaning, the author of a letter in which it is used may explain the sense in which he used it; and in *Gentile v. Crossan*, 7 N. Mex. 597, holding that the meaning of "las lomas" in a deed might be explained.

New Trial.—Motion should be accompanied by affidavit of witness as to what he will testify, when his evidence is alleged as the ground of the motion, p. 199.

Approved, *Arnold v. Skaggs*, 35 Cal. 688; *Case v. Codding*, 38 Cal. 194; *Lander v. Miles*, 3 Oreg. 43. Cited in notes to 12 Am. Dec. 143, and 54 Id. 304, on this point.

11 Cal. 200-205; 70 Am. Dec. 774. **JOHNSON v. JOHNSON.**

Community Property held to include land purchased with common funds after marriage, though previously in possession of husband without title, p. 205.

Cited in note to 86 Am. Dec. 637, on community property.

11 Cal. 206-211. **PEOPLE v. SUPERVISORS OF SAN FRANCISCO.**

Supervisors.—A special act of the legislature, requiring supervisors to pay the amount of a judgment, is not unconstitutional, p. 211.

Cited, *San Francisco v. Beideman*, 17 Cal. 461, on the point that the legislature could authorize the city to dispose of land conveyed to her in trust for creditors; also, *Sinton v. Ashbury*, 41 Cal. 530, holding that an act requiring the city to pay commissioners for Montgomery street extension is constitutional; and in *People v. Lynch*, 51 Cal. 36, 21 Am. Rep. 693, holding that the legislature cannot by special act deprive a municipal corporation of discretion in regard to local improvements, or validate a street assessment that is void for inequality. Cited, also, in *Wilcox v. Deer Lodge Co.*, 2 Mont. 579, holding that a statute authorizing a county to pay part of the expense for building a road is constitutional.

11 Cal. 212-214. **WILLIAMS v. PRICE.**

Probate.—Decree of final settlement of accounts cannot be set aside on the mere allegation by a creditor of his ignorance of the facts, p. 213.

Cited in note to 48 Am. Dec. 746, on probate decrees.

11 Cal. 214. **RITTER v. MASON.**

Appeal.—Stipulations, not embodied in statement or bill of exceptions, are no part of the record; nor are affidavits, where there is no certificate of judge or clerk, or admission of counsel, that they were used in the lower court, p. 214.

Cited, *Everett v. Buchanan*, 2 Dak. 253, holding that an affidavit not properly incorporated in a bill of exceptions cannot be considered; also, *Granite M. Co. v. Weinstein*, 7 Mont. 351, holding that a clerk's certificate as to papers on appeal was sufficient, there being no oral testimony below.

11 Cal. 215-222. **PEOPLE v. BUSTER.**

Surety "has a right to stand on the precise terms of his contract. He can be held to no other or different contract," p. 220.

Cited, *People v. Breyfogle*, 17 Cal. 508, 509, holding that what is meant is that a rational interpretation must be given to the language of the agreement; and where there are several sureties, each for a different amount, it must be considered that each surety agrees to pay the sum opposite his name, and the principal binds himself to pay the aggregate of these sums. Cited, also, in *Pierce v. Whiting*, 63 Cal. 543, holding that sureties on an undertaking for release of attachment cannot be sued until demand for payment has been made on them and the principal; and a complaint that fails to allege such demand is fatally defective. In *Carter v. Mulrein*, 82 Cal. 169, 16 Am. St. Rep. 100, it is held that where an order provides that injunction may issue on filing a bond, the sureties on the bond are not liable for damage caused by an injunction issued several days before execution of the bond. In *Ogden v. Davis*, 116 Cal. 36, the bond was against waste on certain land; held, the sureties were not liable for waste on other land, and parol evidence was not admissible to show that the latter land was the one intended to be covered by the bond; held, also, that the bond being against waste and also for any deficiency on a judgment of foreclosure, the sureties were liable for such deficiency, even if no legal waste was proven. The principal case is cited in *Davis v. State*, 5 Tex. App. 50, holding that where a bail bond is altered after execution, the sureties are not liable.

Sureties on official bond of a state treasurer held to have "all contracted together and with reference to the common responsibility. . . . The discharge of any one of the obligors affected the contract as to all. It made it, indeed, a different contract from that made by the parties," p. 220.

Distinguished, *People v. Evans*, 29 Cal. 435, where one of several sureties on a county treasurer's bond applied to the county court to be released; the court did not act in the matter, but the treasurer filed a new bond, approved by the county judge; held, the county court had no jurisdiction under the statute, and all the sureties on the first bond were liable. Distinguished, also, in *Sacramento Co. v. Bird*, 31 Cal. 77, holding that insolvency of some sureties, and removal from the state of others, did not release any of the sureties. Affirmed, *Spencer v. Houghton*, 68 Cal. 90, 91, holding that release of one surety on a guardian's bond releases the others; and section 1543 of the Civil Code, as to release of a joint debtor, is inapplicable, because the bond was executed before the code was made. Distinguished, *Wilson v. Tebbetts*, 29 Ark. 583, 21 Am. Rep. 168, saying that the principal case was decided on the ground that the obligation was joint, not joint and several; and holding that discharge of one surety was personal to him and did not affect the liability of other sureties.

New Bond held not to be cumulative, p. 220.

Cited in note to 49 Am. Dec. 412, on cumulative bonds.

11 Cal. 222-227. **EX PARTE ELLIS.**

Habeas Corpus.—Rule of *res adjudicata* is not applicable to, p. 223.

Cited in *Miskimmins v. Shaver*, 8 Wyo. 404; noted under *In re Perkins*, 2 Cal. 424.

Habeas Corpus.—"Writ should not issue to run out of the county, unless for good cause shown, as the absence, disability, or refusal to act of the local judge, or other reason showing that the object and reason of the law requires its issuance," p. 225.

Approved, *Ex parte Deny*, 10 Nev. 214; *Ex parte Lynn*, 19 Tex. App. 122. Cited, *People v. Fairman*, 59 Mich. 570, holding that a writ of error does not lie to an order discharging a prisoner on habeas corpus, either at common law or by statute; *In re Hammill*, 9 S. D. 391, holding that the writ is of constitutional right, but its privilege is to be exercised in a reasonable manner; also in note to 67 Am. Dec. 398, on refusal of writ of habeas corpus.

Statutes must be construed "according to their true intent and meaning; that intent, when collected from the whole and every part of the statute taken together, must prevail even over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction, and absurdity," p. 224.

Approved, *Chandler v. Lee*, 1 Idaho, 351, as to a "current expense fund"; also, *Dilger v. Palmer*, 60 Iowa, 130, as to a homestead law; *St. Louis v. Speck*, 67 Mo. 408, with reference to benefits from street widening; *United States v. Snow*, 4 Utah, 321, regarding polygamy; *Board of Education v. Brown*, 12 Utah, 272, as to school tax; *Pratt v. Swan*, 16 Utah, 491, construing local statute; *Laidley v. Kline*, 23 W. Va. 577, as to proceedings on *scire facias*; and in *Holy Trinity Church v. United States*, 143 U. S. 461, holding that a statute, forbidding any person or corporation to assist the migration of any foreigner into the United States under contract to perform labor or service, did not cover the employment of a foreign pastor by a church.

11 Cal. 227-238. **FARLEY v. VAUGHN.**

Specific Performance decreed as to vendor of land, the vendee having made improvements and paid part of the purchase price, and his delay in paying the balance being reasonable, pp. 236-238.

Cited, *Grattan v. Wiggins*, 23 Cal. 37, holding that where one, who purchased at sheriff's sale land subject to a mortgage, made large expenditures in perfecting the title, and the mortgagee stood by without giving notice of his claim or offering to share the expenditure, a court of equity will not allow foreclosure and sale of the premises more

than five years later, at least until the mortgagee had indemnified the purchaser for the expenditures. Cited, also, in *Steele v. Branch*, 40 Cal. 13, holding that a vendor must perform his contract, and that any forfeiture claimed by vendor for delay by vendee in fulfilling conditions to be performed by him, was insufficient, or must be deemed waived, time not being of the essence of the contract; and to same effect in *Day v. Cohn*, 65 Cal. 510; also in note to 68 Am. Dec. 87, on forfeiture, and note to 70 Id. 740, on specific performance.

11 Cal. 238-249; 70 Am. Dec. 775. **RITTER v. SCANNELL.**

Attachment.—A return which simply states that the process was executed is sufficient, prima facie, to show due and proper execution; all presumptions are in favor of the regularity of acts of the officer, p. 248.

Approved, *Porter v. Pico*, 55 Cal. 172, holding that whether the evidence was sufficient to repel the presumption was a question for the trial court, which would not be reviewed on appeal. Denied, *Brusie v. Gates*, 80 Cal. 467, where the court say: "If this were an open question, we should be inclined to hold that a general return of service was sufficient, and that it must be presumed when the officer returned that he had served the writ by attaching the described property, that he had performed every act necessary to such service" (citing the principal case). "But this court has held to the contrary in the later cases, and we feel that we should adhere to these decisions, *Sharp v. Baird*, 43 Cal. 579; *Watt v. Wright*, 66 Cal. 207; *Gates v. McLean*, 70 Cal. 47." The three cases named do not refer to the principal case, but hold that the return must specify the details of service required by the statute. Cited, *O'Connor v. Blake*, 29 Cal. 315, holding that where the sheriff already has property under attachment, he may levy a second attachment on the same property by making a return to that effect on the back of the attachment. Cited, *Head v. Daniels*, 38 Kan. 10, 13, holding that the sheriff is not required, under the statute, to state what he did not do, or why he did what he stated; also, *Sabin v. Mitchell*, 27 Oreg. 73, holding that the return is sufficient if it can fairly be inferred that the requirements of the law were met; *Stoddard v. McMahon*, 35 Tex. 298, holding that the presumption is in favor of regularity of acts of the officer, and note to 76 Am. Dec. 148, to the same effect; also in note to 20 Am. St. Rep. 808, 809, on sufficiency of return.

Sheriff's Return on process does not affect the title of a purchaser at sheriff's sale, pp. 248, 249.

Approved, *Wilson v. Madison*, 55 Cal. 8; *Hibberd v. Smith*, 67 Cal. 564; *Exchange v. Stamm*, 9 N. Mex. 371, construing local statutes. The note to the principal case in 70 Am. Dec. 779, on this point is cited in notes to 73 Am. Dec. 528, 74 Id. 522, 76 Id. 147, 77 Id. 466.

Lien of attaching creditor takes effect immediately upon levy of the attachment and deposit of a copy with the recorder, and cannot be divested by failure of the sheriff to make a proper return, p. 249.

Cited, *Horton v. Monroe*, 98 Mich. 199, holding that failure of the sheriff to return the writ until a day after the return day did not release the lien; and *City Bank v. Cupp*, 59 Tex. 272, holding that failure to file the return for a year did not destroy the lien; also in note to 99 Am. Dec. 270, on this point.

Evidence.—If the return is not *prima facie* evidence of a proper levy, the fact may be proved by other competent evidence, p. 249.

Approved, *Brusie v. Gates*, 80 Cal. 468, where the court say: "The written return of an officer is not the only evidence of the fact that the writ was properly served; therefore, if the return simply omits to state any fact necessary to a valid service, such fact may be supplied by parol evidence, so long as the facts stated in the return are not varied or contradicted in such way as to affect vested rights." The note to the principal case, 70 Am. Dec. 779, is cited on this point in note to 29 Am. Dec. 121.

Mistake in Date of return may be corrected at any time, p. 249.

Cited in note to 5 Am. St. Rep. 657, on amending return.

11 Cal. 250-259. HUNT v. CITY OF SAN FRANCISCO.

Pleading.—Common counts in assumpsit, under the old system of pleading, are good in actions against private persons, and there is no necessity for a different rule in respect to corporations. The rules of pleading "were designed to embrace all persons, natural or artificial, capable of suing or being sued," p. 258.

Approved, *Brown v. Board of Education*, 103 Cal. 535. Cited, *Cicotte v. St. Anne's*, 60 Mich. 557, holding that corporations are on the same footing with natural persons as regards contracts.

Judgment cannot be entered on a verdict upon several counts, where one of the counts is bad, for it is not certain upon which of the counts the jury bases its finding. But the rule does not apply to judgment by default, for the several counts are distinct causes of action, and although one may be bad, this "does not affect the right of plaintiff to take judgment on those which are rightly stated," pp. 258; 259.

Approved, *Barron v. Frink*, 30 Cal. 488, holding that judgment on a general verdict upon several counts must be reversed if one of them is bad; and to same effect in *Bernstein v. Downs*, 112 Cal. 204, although the court there say: "This proposition seems to be violative of the principle that an appellant must affirmatively show error, and all intendments are in support of the judgment." Cited, *Territory v. Virginia Co.*, 2 Mont. 101, holding that a bad complaint will not sustain a good judgment; and the question as to whether there is a cause of action can be raised for the first time in the supreme court.

11 Cal. 262-279. **HUNT v. ROBINSON.**

Judgment in Replevin follows the verdict and undertaking, and is in the alternative, for possession of the property, or the value thereof if delivery cannot be had. The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit. The value is recovered only as an alternative, when delivery of the specific property cannot be had, p. 277.

Cited, *Etchepare v. Aguirre*, 91 Cal. 292, 25 Am. St. Rep. 182, where the court say: "The verdict for the defendant was special as to the value of the property, as required by the code. As to all other issues it was general. This was sufficient to justify a judgment for the return of the property, or for the value thereof in case a delivery could not be had. . . . The code does not require the verdict to be special except as to the value of the property, and the sole object of this exception is to enable the court to render an alternative judgment as required by section 667 of the Code of Civil Procedure." Cited, also, in *Swantz v. Pillow*, 50 Ark. 306, 7 Am. St. Rep. 100, holding that defendant cannot keep possession of a mule replevied from him by paying its value; also, *Wilson v. Fuller*, 9 Kan. 193, holding that judgment must be in the alternative for the thing or its value.

Replevin.—Possession obtained by the writ is only temporary and does not divest the title or discharge the lien. The party ultimately entitled to the property has a double security, while the party who replevies it does not incur the extraordinary risk of having to pay the judgment and also to lose the property. The lien of the attachment continued, and when the same property came again into the hands of the sheriff, the condition of the replevin bond, to return the property, was fulfilled, p. 279.

Approved, *Caldwell v. Gans*, 1 Mont. 578-580, where the court say: "We adopt this view and say that according to every principle of law and practice, if the sureties in the undertaking in replevin are compelled to pay the value of the property, they are entitled to the property itself"; *Union etc. Bank v. Milburn etc. Co.*, 7 N. Dak. 217, but held inapplicable where replevin plaintiff seeks merely enforcement of lien; *Mohr v. Langan*, 162 Mo. 484, 85 Am. St. Rep. 507, holding replevied property to be in custodia legis pending action; *Coen v. Watkins*, 62 Mo. App. 510, 511, holding that a mule delivered to plaintiff on a bond is not in custodia legis; *Rinker v. Lee*, 29 Neb. 790, holding that where goods were delivered to plaintiff under a replevin bond and later taken from him, he could not bring replevin for them; *Coos Bay Co. v. Wieder*, 26 Oreg. 457, holding that property replevied from an officer holding it under execution is in custodia legis, and the lien of the officer under his writ is not discharged.

General citation: *Coen v. Watkins*, 62 Mo. App. 509.

11 Cal. 281-298; 70 Am. Dec. 779. **BOURS v. ZACHARIAH.**

Notary Public cannot alter or amend defective certificate of acknowledgment of married woman's deed after delivery, p. 292.

Cited in *Bank v. Oberhaus*, 125 Cal. 323, on point that notary acts ministerially; *Durham v. Stephenson*, 41 Fla. 120, denying right in absence of reacknowledgment or its equivalent; *Wedel v. Herman*, 59 Cal. 514, holding that under section 1202 of the Civil Code the superior court can correct a defective certificate; also, *Griffith v. Ventress*, 91 Ala. 373, 24 Am. St. Rep. 924, saying that the principal case "is directly in point, and the reasoning of the court appears to us to be conclusive," and holding that a certificate of acknowledgment by a probate judge cannot be amended by him four years later. Cited, *Wambole v. Foote*, 2 Dak. 23, holding that the acknowledgment must conform to the statute; also, *Gilbraith v. Gallivan*, 78 Mo. 458, holding that a probate clerk cannot correct a certificate of acknowledgment after his term of office has expired, although it seems he may do it before; notes to 52 Am. Dec. 521, 523 (*Jordan v. Corey*), on this point; and note to 74 Id. 369, on omission of notarial seal.

11 Cal. 303-306. **SCRIBER v. MASTEN.**

Conversion.—Where one takes goods of another after notice of the ownership sufficient to put him on inquiry, the owner need make no demand before bringing suit, p. 306.

Cited, *Harpending v. Meyer*, 55 Cal. 560, holding that where goods were pledged by one who had no right to them, no demand by the owner was necessary before bringing suit, and the statute of limitations began to run against the claim from the date of receipt of the goods by the pledgee; also, notes to 1 Am. Dec. 587, on right to maintain trover, and 24 Am. St. Rep. 801, on modes of conversion.

11 Cal. 307-327. **MONTGOMERY v. TUTT.** S. C. 11 Cal. 190.

Mortgage.—In suit for foreclosure, "all persons interested in the estate at the time suit is instituted, whether purchasers, heirs, devisees, remaindermen, reversioners, or encumbrancers, should be made parties," p. 314.

Cited, *Horn v. Volcano Co.*, 13 Cal. 70, 73 Am. Dec. 571, holding that judgment creditors, having liens on the premises may be brought into the foreclosure suit on their petition or by amending the complaint; also, *Tuolumne R. Co. v. Sedgwick*, 15 Cal. 527, holding that in a suit to redeem property sold under execution, parties obtaining interests subsequent to plaintiff, before suit brought, may redeem under the statute or file a bill in equity; *Burton v. Lies*, 21 Cal. 91, holding that where the mortgagor has sold his estate in the premises, the widow of the deceased vendee must be made a party to a suit by the mortgagee to foreclose; *Alexander v. Greenwood*, 24 Cal. 512, holding that a judgment creditor, not made a party to the foreclosure suit, is not

bound by the decree; *Horn v. Jones*, 28 Cal. 203, holding that where the vendee at foreclosure sale brought a suit to quiet his title, he could go behind the decree in a mechanic's lien foreclosure and show there was no lien; *Carpentier v. Brenham*, 40 Cal. 238, holding that a junior mortgagee, not made a party to a foreclosure by the first mortgagee, is not bound thereby. Cited, also, in note to 16 Am. Dec. 184, as to who may intervene.

Parties.—Subsequent encumbrancers are not in all cases indispensable parties to a foreclosure. "The property mortgaged may be insufficient to cover the debt secured; the encumbrancers may be so numerous and their claims so large that the parties possessing the latest liens could not possibly receive any portion of the proceeds of the sale. It would be not only a great inconvenience, but a great hardship, to compel the mortgagee in such case to bring in all such persons who have acquired, without any fault of his, liens upon the property," p. 315.

Approved, *Carpentier v. Brenham*, 40 Cal. 235. Cited, note to 70 Am. Dec. 754, on subsequent encumbrancers.

Entry of Default "only cuts off the right to answer, and this is as effectually done by the decree," p. 316.

Approved, *Kittle v. Bellegarde*, 86 Cal. 564, denying a motion to set aside a default twenty months after entry thereof.

Interest upon interest already due cannot be allowed except in pursuance of a written engagement of the parties, p. 316.

Approved, *Doe v. Vallejo*, 29 Cal. 392, and *Yndart v. Den*, 116 Cal. 545, 546, 58 Am. St. Rep. 209.

Redemption.—The clause in the decree, foreclosing the equity of redemption, is a useless formula. The equitable right of subsequent encumbrancers to redeem is merged into the statutory right; "after the decree they stand, as to their right of redemption, in the same position as ordinary judgment debtors," p. 317.

Approved, *Eldridge v. Wright*, 55 Cal. 536, holding that where land of tenants in common, sold under foreclosure, was redeemed by a judgment creditor of one of them, he took the interests of all. Referred to in note to 70 Am. Dec. 676 (*McMillan v. Richards*), on this point.

Negotiable Instrument.—In a suit against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, presentation for payment at such place need not be alleged or proved, p. 317.

Approved, *Greeley v. Whitehead*, 35 Fla. 529, 48 Am. St. Rep. 259.

11 Cal. 328. **FUNKENSTEIN v. ELGUTTER.**

Appeal from justice's court to county court on questions of law and fact, dismissed, there being no issues of fact and no statement of grounds of law on which appellant intended to rely, p. 328.

Approved, *Rickey v. Superior Court*, 59 Cal. 662; Cited in *Maxson v. Superior Court*, 124 Cal. 471, discussing power of superior court on reversal of judgment entered on order overruling demurrer. Distinguished, *Ketchum v. Superior Court*, 65 Cal. 495, where "there were issues of fact that the court had jurisdiction to retry," and the superior court properly allowed defendant to amend an answer he had filed in the justice's court. Overruled, *Fabretti v. Superior Court*, 77 Cal. 307, the court saying that the principal case was "decided under section 366 of the Practice Act, which was omitted from the code; and it is now settled that if the appeal be taken on questions of law and fact, when there has been no trial of issues of fact in the justice's court, the superior court must entertain and decide the appeal as upon questions of law alone," citing 59 Cal. 471, 63 Cal. 435. Cited, *Gage v. Maryatt*, 9 Mont. 267, holding that if there is no issue in the justice's court there is nothing to be tried anew; *Paul v. Armstrong*, 1 Nev. 96, holding that the appellate court can try only the issues tried in the court below. *Italian Swiss Agr. Colony v. Bartagnolli*, 9 Wyo. 207.

11 Cal. 329-339. **PEOPLE v. WELLS.**

Election to fill a vacancy is void if there is no vacancy, p. 338.

Cited in note to 70 Am. Dec. 769, as affirmed on the authority of *People v. Weller*, 11 Cal. 49.

Statute.—A general provision must be controlled by one that is special, p. 339.

Cited on this point, as to a homestead law, in *Smith v. Shrieves*, 13 Nev. 325.

11 Cal. 339-340. **AMERICAN R. CO. v. BEAR R. CO.**

Appeal is only on the judgment roll, when there is no properly authenticated statement, p. 340.

Cited, *Everett v. Buchanan*, 2 Dak. 254, holding that anything on the judgment roll may be considered; *Henderson v. Morris*, 5 Oreg. 27, holding that anything to be reviewed by the appellate court must appear on the transcript.

11 Cal. 340. **HANSON v. BARNHISEL.**

New Trial.—Order granting it will not be reversed where no abuse of discretion appears, p. 340.

Approved, *Anthony v. Eddy*, 5 Kan. 133.

11 Cal. 341. **GRAY v. GRAY and EATON v. PALMER.**

Remittitur.—If a modification of costs is desired, application must be made within the ten days allowed for filing petition for rehearing, p. 341.

Cited, *In re Levinson*, 108 Cal. 459, to the point that if a modification of the judgment of the appellate court is desired, application must be made before the remittitur goes down; after it is issued the supreme court loses jurisdiction of the case "except in a case of mistake, or of fraud or imposition practiced upon the court."

Costs.—Section 510 of the Practice Act (sec. 1033, C. C. P.) does not apply to costs on appeal; these also include costs of making up the appeal in the lower court and the transcript. When the supreme court awards costs, only the costs on appeal are meant; and if the case is remanded for further proceedings, the costs of the former trial are to abide the event, p. 341.

Approved, *Ex parte Burrill*, 24 Cal. 352, 353. Cited, *Stoddard v. Treadwell*, 29 Cal. 282, holding that where a new trial was ordered, and the result of both trials was a judgment for plaintiff, he was entitled to costs of both trials.

General citation: *Gray v. Larrimore*, 4 Sawy. 638, Fed. Cas. No. 5721.

11 Cal. 342. **CHANDLER v. BOOTH.**

Attachment Lies to reach funds placed in hands of third party for benefit of creditors, p. 342.

Cited in *Wilson v. Harris*, 21 Mont. 397, cited under *Roberts v. Landecker*, 9 Cal. 262.

11 Cal. 343-350; 70 Am. Dec. 787. **HARDY v. HUNT.**

Wager on Election may be retracted by the maker at any time before the stakeholder pays it over to the winner, p. 348.

Cited, *Johnston v. Russell*, 37 Cal. 675, holding that the maker of an election wager may recover his stake from the other party or the stakeholder before the bet has been decided; "but persons who allow their stakes to remain until after the bet has been decided and the result has become generally known, are entitled to no such consideration. Their tears, if any, are not repentant tears, but such as crocodiles shed over the victims they are about to devour." *Wright v. Stewart*, 130 Fed. 919, plaintiff demanding money deposited with stakeholders before running of fake footrace may maintain action for its recovery. *Lewy v. Crawford*, 5 Tex. Civ. App. 298. Cited in notes to 89 Am. Dec. 603, on recovery of bets from stakeholders, and 1 Am. St. Rep. 302, on loans for gambling purposes.

Estoppel.—The maker of a wager, who instructed another to place the bet in the other's name, is not estopped from asserting his ownership, as against attaching creditors of the one who placed the bet, pp. 348, 349.

Cited in note to 73 Am. Dec. 202, on estoppel.

Garnishee, knowing the facts as to ownership of the property held
Notes Cal. Rep.—36

by him, must protect the rights of all parties by appropriate legal proceedings, p. 350.

Cited, *Walling v. Miller*, 15 Cal. 40, holding that a garnishee who delivered up, on an attachment, property held by him as bailee, after notice of the real ownership, was liable to the owner; *Bellingham Co. v. Brisbois*, 14 Wash. 179, holding that the debtor must be notified of assignment of a chose in action; also in notes, on garnishee's rights and duties, to 13 Am. Dec. 342, 26 Id. 694, 41 Id. 628, 70 Id. 791.

General citation: *Campbell's Appeal*, 178 Pa. 29.

11 Cal. 360-361. **MOORE v. SEMPLE.**

Appeal.—Agreement, not embodied in any statement or bill of exceptions, is no part of the record, p. 361.

Cited, *Everett v. Buchanan*, 2 Dak. 253, holding that clerk's minutes are no part of the record.

Clerical Error, in omitting the words "to be sold" from a decree, does not affect the decree, p. 361.

Cited, *Norton v. Meader*, 4 Sawy. 619, holding that omission of the word "copy" from a certificate of service was immaterial.

11 Cal. 361-362. **FREMONT v. COUNTY OF MARIPOSA.**

Tax.—An injunction will not lie against the collection of a tax, on the prayer of a taxpayer, alleging that taxes for previous years were illegally assessed and collected, p. 362.

Cited, *Delphi v. Bowen*, 61 Ind. 38, holding that in a suit to enjoin collection of a tax, the complaint must show that the assessment was illegal and void; *Apperson v. City*, 2 Flipp. 374, 1 Fed. Cas. 1072, discussing right of setoff against demands for taxes; note to 69 Am. Dec. 204, as to an injunction against collection of taxes.

11 Cal. 363-366. **STEPHENS v. MANSFIELD.**

Public Lands.—Abandonment must be made simply because the owner desires no longer to possess the thing; if made with an intention that some other person should become the possessor, it would be a gift, p. 365.

Partly overruled in *Richardson v. McNulty*, 24 Cal. 344, holding that what was said regarding a gift was obiter, and not law. Cited, *McLeran v. Benton*, 43 Cal. 476, holding that "there is no such thing as an abandonment to particular persons or for a consideration"; also, *Middle Creek Co. v. Henry*, 15 Mont. 576, 577, where it was held there was no abandonment.

11 Cal. 366-372. **WARING v. CROW.**

Partners in a mining claim are tenants in common, and possession of one partner or cotenant is the possession of all, p. 371.

Cited, *Lytle Creek Co. v. Perdew*, 65 Cal. 455, holding that any one of several cotenants, entitled to use of water from a creek, may bring suit for a nuisance against a person diverting the water; and in *Tully v. Tully*, 71 Cal. 346, holding that the presumption is that the tenancy in common continues until one tenant ousts another by notice that he claims adversely or by acts equivalent to notice; cited in *City v. Hopper*, 7 Utah, 238, on point that one tenant in common of water may sue alone for its diversion. *Mallet v. Uncle Sam Co.*, 1 Nev. 206, 90 Am. Dec. 496, says of the principal case: "However much its authority may be weakened by the subsequent doubts of the learned judge, who delivered the opinion of the court, as to its accuracy, the decision is certainly based upon reason and the soundest principles of law" (what is meant by the "subsequent doubts," etc., does not appear); held, the possession of one partner or cotenant inures to the benefit of all, until it becomes adverse. Cited, *Terrell v. Martin*, 64 Tex. 128, holding that possession of one cotenant inures to the benefit of another.

The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, p. 371.

In *Moon v. Rollins*, 36 Cal. 338, 95 Am. Dec. 183, the court comments on the principal case, saying of the charge to the jury therein (p. 369) that one leaving with intent to return might do so within five years: "Nothing was said as to a period of time beyond five years. But if a party may return in five years, it is not apparent why he may not return in five years and one month or two months, unless an adverse possession has barred the right of entry. It is a question of intention, and has been so held over and over again, and not a question of time, except so far as the jury are entitled to consider lapse of time . . . for the purpose of ascertaining the intention." *Trevasaki v. Peard*, 111 Cal. 605, holding that "abandonment is a matter of intent, which may be shown by the conduct of a party even against his express declarations to the contrary; and if the intent has been formed and once acted upon, the abandonment is as absolute if it exists for a minute or a second as though it continued for years." *Valcalds v. Mines*, 86 Fed. 95, 56 U. S. App. 676, on point that abandonment is question of intent; *Mitchell v. Carder*, 21 W. Va. 285, holding that a party abandons when he leaves land free to the occupancy of the next owner, without any intention to repossess it and regardless as to what may become of it; *Beaver Brook Co. v. St. Vrain Co.*, 6 Colo. App. 136, on the point that a party claiming abandonment has the burden of proof, and must establish it by unequivocal evidence; and note to 40 Am. Dec. 464, 465, on abandonment.

Forfeiture is not created by refusal of one cotenant or partner to pay, or delay in paying, the expenses of the business, or the assessments, p. 372.

Cited, *Coleman v. Clements*, 23 Cal. 248, 249, holding that a mining rule, under which a forfeiture is claimed, is to be strictly construed against the forfeiture. Construed in *Wiseman v. McNulty*, 25 Cal. 239, where the court say that in the principal case the word "forfeiture" was used in the sense of "abandonment"; and hold that where a forfeiture is claimed for nonpayment of assessments under an agreement, the party claiming it must show compliance on his part with the terms of the agreement.

11 Cal. 372-379. **McMILLAN v. REYNOLDS.**

Summons.—Affidavit of service must show affirmatively compliance with the statute, p. 378.

Cited, *Sharp v. Daugney*, 33 Cal. 514, holding that in affidavit of mailing of summons, it need not be stated that affiant is a white male citizen, as the rule applies only to service other than by publication; *Linott v. Rowland*, 119 Cal. 453, holding that an affidavit that did not show service upon a defendant was insufficient to sustain a judgment by default; also, *Coffee v. Gates*, 28 Ark. 44, holding that where service may be made by any person authorized by the officer to whom the process is directed, the person serving it must verify his return; *Black v. Clendenin*, 3 Mont. 47, holding that service by the United States marshal was not good under the statute; *Layton v. Trapp*, 20 Mont. 456, holding that where a justice of the peace appointed a person to serve summons under the statute, the affidavit of service must be verified; *Heatherly v. Hadley*, 4 Oreg. 16, 21, holding that the principal case was not in conflict with *Peck v. Strauss*, 33 Cal. 678, and distinguishing the latter case, on the point that an insufficient return of service cannot be aided by a recital in a decree; *Goodale v. Coffee*, 24 Oreg. 354, holding that an affidavit of publication of summons must aver all the statutory requirements, but these need not be recited in the order of publication, for jurisdiction is based on the affidavit.

Service of certified copy of complaint must be shown by the return on the summons, p. 379.

Approved, *Reynolds v. Page*, 35 Cal. 300, holding that a summons and certified copy of the complaint must be issued within a year from filing of the complaint.

Notice.—The vendee at foreclosure sale having knowledge of defective service of the summons, the sale is set aside, p. 379.

Cited, *Steinbach v. Lease*, 27 Cal. 299, holding that where the mortgagee purchases the premises at foreclosure sale, he is presumed to have bought with notice of all defects in publication of summons.

Equity invalidates a decree of foreclosure, at suit of the mortgagor, a married woman (whose rights are favored in the law) and who has a good defense, p. 379.

Cited, *Martin v. Parsons*, 49 Cal. 100, on the point that a court of

equity will interfere to prevent the use of a judgment as an instrument of injustice by one who procured the wrongful entry thereof when there had been no service of summons therein.

11 Cal. 380-390. **FREMONT v. BOLING.**

Tax.—Injunction issues against sale of property for taxes, where the sheriff, who was about to make the sale, was no longer in office and had no legal authority, p. 390.

Cited, *Huntington v. C. P. R. R.*, 2 Sawy. 514, holding that where an assessment was void, for failure to assess land and improvements separately, the sale of the property for taxes must be enjoined; also, *Hallenbeck v. Hahn*, 2 Neb. 438, holding that sale of real estate for taxes will not be enjoined merely because the owner has available personal property; and note to 69 Am. Dec. 201, on injunctions to restrain collection of taxes.

11 Cal. 391. **McGILL v. RAINALDI.**

Appeal must be determined on the judgment roll where there is no statement embodied in the record, p. 391.

Cited, *Everett v. Buchanan*, 2 Dak. 254, holding that general and special verdicts are part of the judgment roll, and that a judgment for plaintiff was properly rendered upon them; also, *Graham v. Linehan*, 1 Idaho, 781, holding that in Idaho the bill of exceptions is part of the judgment roll, while in California it is not.

11 Cal. 393-405; 70 Am. Dec. 791. **HORR v. BARKER.** S. C. 6 Cal. 489; 8 Cal. 603, 609.

Pledge by Factor.—The rule that a factor cannot pledge the goods of his principal is limited, in California, to a technical factor, whose only business is to sell consigned goods, affirming *Hutchinson v. Bours*, 6 Cal. 383, p. 402.

Overruled, *Wright v. Solomon*, 19 Cal. 73, 77, 79 Am. Dec. 199, 203, where the court, per Field, C. J., say: "The limitation asserted in *Hutchinson v. Bours* and *Horr v. Barker* cannot be maintained. Those decisions are anomalous in their character and in conflict with the law upon the authority of factors, as it is recognized by the United States courts and the courts of every state of the Union, where the legislature has not interfered to make a change. We do not hesitate to overrule them, for it is of the highest importance to those engaged in commerce in this state that the decisions of this court on commercial questions should be in conformity with the adjudications on like questions of the courts of the principal commercial communities of the world." Cited in note to 95 Am. Dec. 406, on factor's right to pledge; and the note to the principal case, in 70 Am. Dec. 791, on this point, is cited in note to 79 Id. 203.

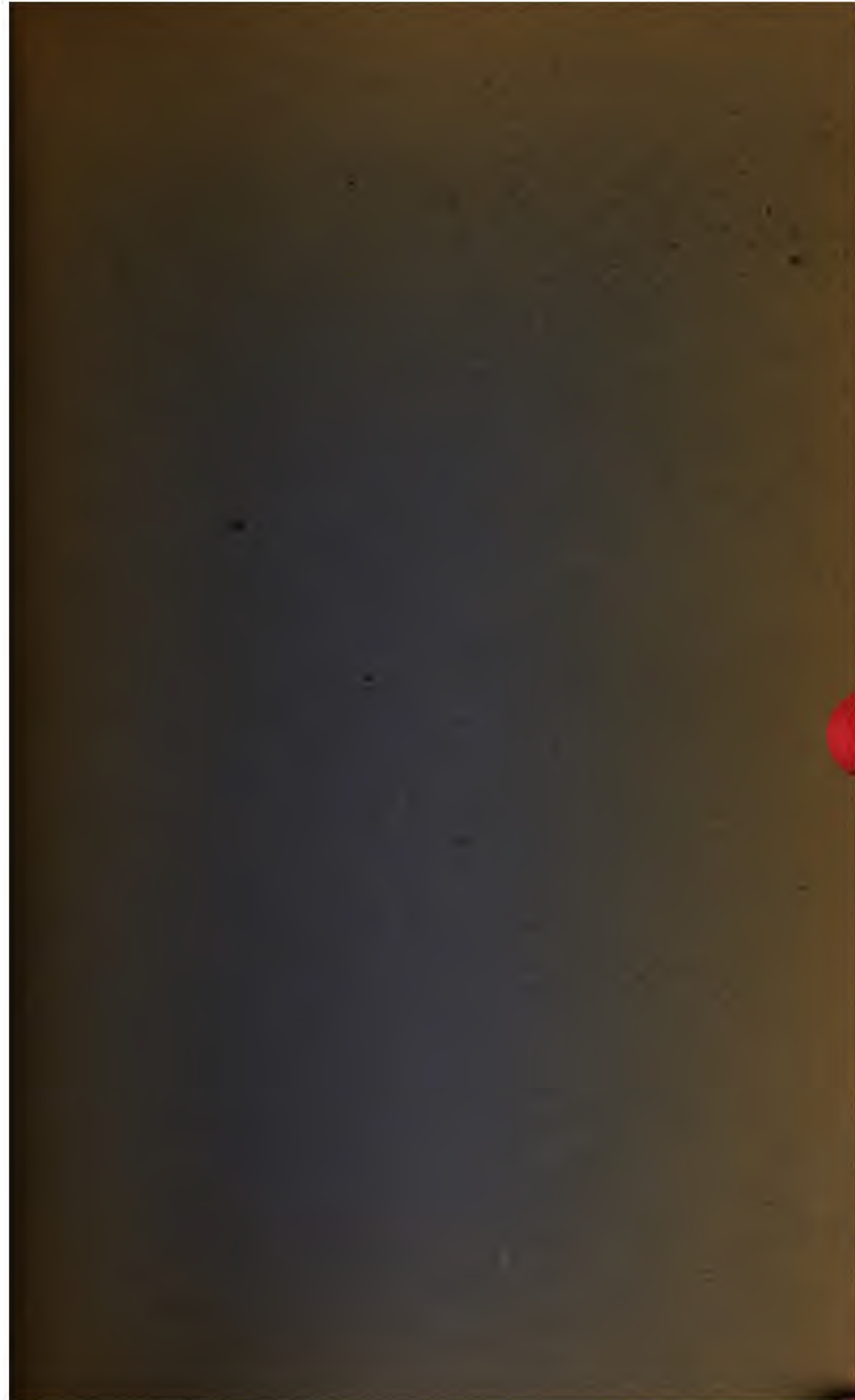
Delivery of barrels of flour, all of the same kind and stored in the same warehouse, to several purchasers, held to be complete upon the delivery to each purchaser of a warehouse order; the segregation of the different lots is for the separate purchasers to attend to, and the seller has nothing further to do in the matter of delivery; the fact that the flour was of different qualities makes no difference, pp. 402, 403.

Cited, *Kingman v. Holmquist*, 38 Kan. 739, 59 Am. Rep. 606, holding that where a seller of plants delivered two lots for two buyers at a railway station, and one of the buyers took away both lots, it was a sufficient delivery to allow the other buyer to maintain trover for his share; also, as to constructive delivery, in notes to 75 Am. Dec. 343, 77 Id. 311, 82 Id. 667, 48 Am. St. Rep. 351. The note to the principal case in 70 Am. Dec. 791, is cited in notes to 83 Id. 142, 90 Id. 202, 94 Id. 281, on segregation and constructive delivery.

11 Cal. 405. **BROTHERTON v. HART.**

Judgments by Consent, and orders made by stipulation, will not be reviewed by the supreme court, p. 405.

Approved, *Mecham v. McKay*, 37 Cal. 158; *San Francisco v. Certain Real Estate*, 42 Cal. 518; *Erlanger v. S. P. R. R.*, 109 Cal. 395.



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12 Oct

REPORTS OF CASES

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HARVEY LEE,

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JUDGES AND OFFICERS
OF THE
SUPREME COURT, DURING THE YEAR 1860.

During January Term:

HON. DAVID S. TERRY,CHIEF JUSTICE.

HON. STEPHEN J. FIELD,..
HON. JOSEPH G. BALDWIN, } **ASSOCIATE JUSTICES.**

HARVEY LEE,.....REPORTER.

THOS. H. WILLIAMS,.....ATTORNEY GENERAL.

CHARLES S. FAIRFAX,..... CLERK.

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JANUARY TERM.



CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

JANUARY TERM, 1859.

AMES v. HOY.

An action will lie on a judgment or decree obtained in one of the District Courts of this State.

Where the record book containing such judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents.

An action can be maintained at law upon a decree in equity for a specified sum of money.

APPEAL from the Fourteenth District, County of Nevada.

This was an action of debt on a decree for a sum of money obtained by the plaintiff against the defendant, in the District Court of Nevada county. The case was tried without a jury.

On the seventh day of October, 1854, the plaintiff in this suit obtained a decree in the District Court of Nevada county against the defendant Hoy, for a dissolution of copartnership then existing be-

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tween plaintiff and defendant, and also for the sum of \$1,785.97, to be paid by defendant to plaintiff. On the nineteenth day of July, 1856, the records of the District Court of Nevada county were destroyed by fire, including the decree which was then unsatisfied.

The existence and entry of the decree was denied by the answer. On the trial, the destruction of the record of the decree was admitted; whereupon the plaintiff offered to prove by parol testimony the existence and contents of the decree; to which evidence the defendant objected, on the ground that the entry and contents of the decree could not be established by parol testimony, and that no action at law can be maintained on a lost judgment. The Court overruled the objection and admitted the evidence, and defendant excepted. Plaintiff had judgment, and defendant appealed to this Court.

McConnell & Niles for Appellant.

I. The complaint shows that the judgment upon which suit was brought, was rendered in October, A. D. 1854. Inasmuch as such judgment can be enforced by execution, no action of debt can be sustained thereon.

II. The complaint is defective, because it shows upon its face that there is now no judgment in existence in the District Court of Nevada county in favor of plaintiff and against defendant.

III. The Court erred in admitting the evidence of Hill and Elliot to prove the rendition of a judgment by the District Court of Nevada county in favor of plaintiff and against defendant Hoy, and the contents of such judgment.

As to the first point, see section 209, Practice Act. The object of this section seems to have been to take away the right and the necessity of suits on judgments, by extending the time for enforcing them by execution. Indeed, it would almost seem that the Legislature intended to take away all rights of action upon a domestic judgment; and this idea is certainly countenanced by the language of the statute of limitations, which provides a period of limitation for actions upon judgments recovered in the Federal Courts, and other State Courts, but omits to mention domestic judgments.

It will be conceded that Courts discourage this sort of action. In

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England, the Legislature has discouraged it by passing a statute denying costs to plaintiffs in actions upon judgments. See Statute 43 Geo. III, 1 Chitty's Pl., sec. 3.

The fact that an action upon a domestic judgment is not mentioned by our statutory law, is a powerful argument against its existence; for if such an action can be sustained in this State, it is scarcely possible that the Legislature would have left a proceeding so liable to abuse without any of the checks and restrictions which it has been solicitous to throw around all other forms of litigation.

II. This point seems to us sufficiently clear, but lest the Court may have doubts we submit the following:

The plaintiff can find no case reported where an *attempt* even was made to sustain an action upon what is called by him a *lost judgment*; and the absence of any evidence that the point was ever mooted by the Courts, is a very conclusive argument against the doctrine contended for.

In point of fact, the phrase "lost judgment" involves a solecism in language; for if the judgment roll is lost, there is no *judgment* in existence. Really, the obligation of a judgment seems to depend so immediately and intimately upon the *judgment record*, that no metaphysical acuteness can separate them. It is certain that it is the record that creates the obligation, and if it be lost or destroyed, the obligation is gone until the judgment is restored. In this respect, a judgment differs from a bond or other *choses in action*; for if a bond be lost, the obligation or debt still remains: therefore an action may be maintained on a lost bond or other instrument *in pais*, either at law, or, as is more common, in equity, because the obligation to pay still subsists. But where is the obligation to pay a *lost judgment*? How can satisfaction be entered on a *lost record*? In the case of a lost bond the Court may, and usually does, require indemnity from the plaintiff against the future enforcement of such bond, should it be found; but it is manifest that this course would be impracticable in the case of a judgment record.

By sec. 208 of the Practice Act, the defendant in execution is entitled to have satisfaction of the judgment entered on the *judgment record*, on payment of the judgment debt. This is a positive right of which the judgment debtor cannot be deprived.

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Lord Coke defines a record as follows: "Record is derived of the Latin word *recordor*, that is, *to keep in mind*; as the poet saith '*Sic rite audita, recordor*;' and therefore a record or enrollment is a memorial or monument of so high a nature, as it importeth in itself such an absolute verity, as if it be pleaded that there is no such record, it shall not receive any trial by witnesses, jury or otherwise, but *only by itself*." Coke on Litt., p. 117 (b).

Again, the same author, after explaining in language like the above the general nature of a record of a Court of Record, proceeds to state that "Records import in themselves such incontrollable credit and verity, as they admit no plea, averment or proof to the contrary; and if such a record be alleged, and it be pleaded that there is no such record, it can only be tried by itself." *Ibid.*, p. 260 (a).

Hargrave and Butler, in their notes to the first of these two quotations remark: "The words 'if it be pleaded' are material; for in evidence before a jury the *copy* of a record will be sufficient proof of its existence and contents;" and I refer to Comyn's Digest, title "*Certiorari*," to which we also call attention. See note 164, liber 2, p. 117 (b) Coke on Litt.

The form of the pleadings in debt on judgment seems to us conclusive on this point: "One of the best arguments or proofs of the law is drawn from the right entries or course of pleading; for the law itself speaketh by good pleading, and therefore Littleton sayeth 'it is proved by the pleading,' etc., as if pleading were '*ipsius legis viva vox*.'"

The precedent given by Chitty of a declaration on a judgment has the following averment as the *prout patet per recordum* clause:

"As by the record and proceedings thereof *remaining* in the said Court of our said Lord the King himself, which said judgment still remains in full force and effect." 2 Chit. on Pl., p. 483. See the plea of *Nul Tiel Record*, 3 Chit. Pl., p. 994; Saunders' Reports, and Sergeant Williams' notes to the same; Note (3) to Pitt v. Knight, 1 Saunders, 92; 1 Chit on Pl., pp. 111, 370, 485; 3 Black. Com., p. 331; 3 Stephens' Com., pp. 583, 584.

The third point is so nearly allied to the preceding one, that they should perhaps be properly argued as one. There is, however, some difference between them, growing out of the inherent difference exist-

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ing between pleading and evidence, and we therefore consider them separately.

We have already remarked upon the well defined distinction between records and all other paper evidence of debts. In the one, the debt is created and subsists independent of the evidence. In the other, the paper monument is not only the evidence of the judgment obligation, but also the obligation itself. You cannot separate the judgment roll from the obligation to pay it.

In our books on evidence, many things besides judgment and decrees are called *records*; for instance, statutes; charters of corporations; recognizances; fines and recoveries, and very frequently, the written evidences of the acts and doings of public men and bodies. Indeed, we frequently call registered deeds and mortgages records; and, we would here suggest that those authorities which seem to hold that the loss of a record may be supplied by parol proof, apply to the last mentioned kinds of records, and not to judgments or public statutes.

Greenleaf, in his treatise on the Law of Evidence, says: "If the record is lost, and is ancient, *its existence* may sometimes be presumed; but whether ancient or recent, after proof of its loss its contents may be proved, like any other document, by secondary evidence." 1 Greenleaf's Ev., sec. 509.

The first part of the above quotation is simply the application of the doctrine of presumptions, or proscription to rights vested in pursuance of a supposed grant by matter of record; as for instance, if a corporate body have from time immemorial exercised certain corporate franchises, although there be no charter in existence, a *charter* will be presumed. The principal American case cited by Greenleaf in support of the doctrine is, *Stockbridge v. West Stockbridge*, 12 Mass. R. 400. In that case the charter had been lost thirty years, and was therefore *ancient*. But no case is cited showing that a suit may be brought on a lost record, and parol evidence given of its contents. *Ib.* 501.

Mr. Justice Story enumerates lost bonds, lost notes, and other lost instruments forming the subject of equitable interference, but never once mentions lost judgments or decrees. 1 Story's Eq. Juris., sec. 81.

A Court of Equity might restore a lost judgment, but could not enforce it until it was restored.

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The true rule in cases of lost judgments and decrees is, in the first place to restore or substitute the judgment by such proofs of a secondary nature as are within the reach of the party seeking the restoration, and then to enforce the same by execution, or bring an action of debt upon it, provided such action is maintainable.

The case of Jackson *ex dem.* Taylor v. Cullum, 2 Blackford's Rep 228, was an action of ejectment. The defendant relied on an outstanding title founded on a Sheriff's deed; such deed having been given after a sale under a judgment and execution. The judgment, execution and deed having been burned, he offered parol proof of their contents.

The Court held that such evidence was admissible.

Here it will be noticed that the operative instrument in the creation of defendant's estate was a *Sheriff's deed*. A deed is a matter in *pais*, and we have never denied that parol or any other secondary proof may be admitted to prove the contents of such instrument where it may be necessary.

But inasmuch as the Sheriff's deed must be founded on the judgment or decree of a competent Court, it follows that defendant was also admitted to prove the *fact of the rendition of such judgment*, and the issuing of execution. There is, as the Court will see, great difference between proving the existence of the judgment as a *past fact*, and proving its contents as the foundation of a present proceeding.

The authorities cited from Cowen & Hill's notes to Phillips on Evidence, are far from sustaining the opinion of the District Judge. Cow. & Hill's notes to Phil. on Ev., note 124, part 2, p. 286.

The original work of Mr. Phillips states that "if a deed enrolled be lost, a copy of the enrollment made out by the Clerk of the Peace, but not proved to be examined, is not admissible."

The note of Cowen & Hill has reference to this. They begin their note by saying that "this species of evidence can only be applicable to those cases where very ancient records are lost; for if a recent record be lost, and its contents can be ascertained, the Court will *permit a fresh one to be filed*."

In support of this they cite Jackson v. Hammond, 3 Caine's Rep. 496, where the original *nisi prius* record and issue were lost, and the

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Supreme Court, after a lapse of six years, allowed the plaintiff upon affidavits to file a new *nisi prius* record and *postea*, enter judgment and sue out execution.

They also cite and rely on *Douglass v. Yallop*, which is thus briefly reported by Sir Jas. Burrow: "A neglect of entering judgment, and the loss of the roll having been sufficiently proved to the Court, a rule was made 'that the Clerk of the Judgments shall sign a new roll, whereon is entered the judgment signed in this cause in Michaelmas term, 1729,' and that the same be numbered as roll 256, and filed among the rolls of that term; a special entry being first made expressing the day of docketing the same. And it is further ordered that this judgment shall not be made use of against the administrator of the defendant." *Douglass v. Yallop*, 2 Bur. R. 722.

It appears from the report that this order was made in 1759, just thirty years after the rendition of the original judgment; a very long period certainly under the circumstances.

In North Carolina, a memorandum from the Clerk's docket of the amount of a judgment was received in favor of a purchaser at a Sheriff's sale, upon the ground that the record had been made a very long time ago, and that it could not be found after much search. But the Court said if the record had been recent they would have hesitated about receiving it. *Doe v. Greenleaf*, 3 Hawks' N. C. R. 281. See also, *Adams v. Betz*, 1 Watts' Pa. R. 428, cited by Cowen & Hill.

Buckner & Hill for Respondent.

There are but two points herein:

First. That as execution could have been issued on the judgment, no action could be sustained thereon; or, in other words: that an action of debt will not lie on a judgment if an execution can be issued thereon.

Second. That no action at law can be sustained on a lost or destroyed judgment.

That an action can be maintained on a domestic judgment is a proposition well settled by the Courts of England and of almost every State in the Union. *Howard v. Howard*, 15 Mass. R. 197; 1 Chitty's Pleadings, 103, 104, 354, 355; 2 *Ibid.* 232-233, and notes; Post et

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al. v. Neafie, 3 Caine's R. 22; 6 Wheeler Am. Com. Law, 268 and seq.; 1 Cowen's Treatise, 47; 1 Hill R. 645; *Storer v. Storer*, 6 Mass. R. 390; 7 Cranch R. 481; 11 Condensed Rep. (S. C.) 578; 19 Johnson, 162; 15 *Ib.* 233; 1 Comyn's Digest, "Debt,"—a—2; *Greathouse v. Smith*, 3 Scammon, 541.

Conceiving the question as to right of action on a judgment to be well settled by the foregoing authorities, the next question is: When, or at what time shall the action be commenced?

We hold that an action of debt may be brought on a domestic judgment immediately on the recovery thereof. *Dennison v. Williams*, 4 Conn. 402; *Dundo v. Doll*, 2 John. 87; 6 John. 98; 16 John. 66; *Hale v. Angell*, 20 John. 342; 6 Cowen, 695; *Clark v. Goodwin*, 14 Mass. 237; *Greathouse v. Smith*, 3 Scammon, 541; *Smith v. Mumford*, 9 Cowen, 26; *Church v. Cole*, 1 Hill, 645.

In the case of *Church v. Cole*, it is expressly decided that an action will lie on a judgment, although time for issuance of execution has not yet elapsed. And in 3 Scammon, 541, the same question raised and distinctly decided that an action may be maintained on a judgment although the judgment creditors might issue an execution thereon.

By common law, an action could be maintained within a year and a day on a domestic judgment, that being the life of a judgment without issuance of execution. 1 Comyn's Digest, Debt—a—2.

By our statute the time is extended from that limitation to five years, and judgment has its life for five years without issuance of execution. Wood's Digest, 195, art. 948.

The next proposition is, that no action can be sustained on a LOST or DESTROYED judgment.

We cannot perceive the difference in maintaining an action upon a judgment on a record undestroyed, and an action on a judgment on a record destroyed. The question is more as to admissibility of parol testimony to prove the contents of the record.

Numerous authorities can be cited on this point, but the following will be found sufficient: *Jackson ex dem. Taylor v. Cullum*, 2 Blackford, 228; *Stockbridge v. West Stockbridge*, 12 Mass. 400; 1 Greenleaf on Evidence, sec. 509, note 5; *Nims v. Johnson*, 7 Cal. 110.

The testimony in this cause shows most clearly and conclusively the

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destruction of the entire record; nay, it is even admitted by the parties, and in this it differs from the case of *Nims v. Johnson*, a portion of the record therein being in existence. In that action they failed to show the loss, as a foundation for the introduction of secondary evidence as to contents; in this cause, the loss is satisfactorily proven and admitted.

From the above authorities the conclusion is irresistible, that an action of debt may be maintained on a domestic judgment at any time within its life, and that if the record of the judgment sued upon be lost or destroyed, then that its contents may be proved by parol evidence.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J. concurring.

Plaintiff recovered a judgment in the District Court of Nevada county, in October, 1854, for a sum of money. The judgment was in an equitable suit brought to dissolve a copartnership and settle the firm accounts, and for a decree for the balance due. The records of Nevada were consumed by fire before the institution of this suit, and the papers and minutes of the Court evidencing this judgment destroyed. An action at law is now brought to recover the amount of this judgment or decree. Several questions are made:

1. That suit cannot be maintained in this State on a domestic judgment. At common law, actions could be so maintained. (1 Ch. Pl. 103-4.) There is nothing in our statute which divests the right; and the policy and inconvenience, suggested by the appellant, applied as well in England as here. The chief argument is, that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of action, is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt.

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2. It is also argued that the destruction of the book containing the judgment is the destruction of the judgment itself; so that the primary evidence of the judgment being removed, no other proof of it is admissible. We think that this position is alike indefensible in reason and on authority.

3. The last objection is, that no action can be maintained at law upon a decree in equity for a specific sum of money. The action in the case before us may be considered to be in *debt*, or as an action in the nature of the action of debt, under the old system. This action was proper whenever a sum liquidated and made definite by contract or judgment was recoverable, and we are not able to perceive why a recovery in equity for a certain and ascertained amount is not as legitimate a basis for action as a judgment at law. Some of the most respectable Courts in the Union have so adjudged, and we think properly. See 15 Mass. 196, and other cases cited therein.

The judgment is affirmed.

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A deed of release, conveyance and partition, providing for the appointment of commissioners to make partition of the land therein described, according to certain terms set forth in the deed; and also, by its terms, providing that the release shall take effect upon the making the partition and report, by the commissioners, of a map of the partition, which together with the deed, is to be handed over to one F who is to file the same for record in the proper office, is sufficient to estop a party thereto from controverting the deed.

On the happening of the event the deed became effectual as a partition and release. When parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute.

Where such commissioners, in pursuance of a contract of a portion of the parties executing such deed, allotted to one G, who was not a party to the deed of partition and release, one hundred acres, and where the defendant claimed, through the parties executing such contract, and both contract and

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deed were upon record at the time of the defendant's purchase: *Held*, that the defendant, in contemplation of law, had notice of such contract of his predecessors and vendors, and that he is bound by it.

Where such commissioners in the partition and allotment failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide or allot it, or that the allotments made would in any degree have been affected by the allotments of this, or that any injury resulted to any one interested in consequence of this omission; and where important rights have vested under the partition, this Court would not be warranted in holding the action of the commissioners void, because of the failure to divide and allot the marsh land.

APPEAL from the Seventh District, County of Contra Costa.

The facts of this case appear in the opinion of the Court.

E. W. F. Sloan for Appellant.

I. The Court erred in refusing to non-suit the plaintiff. Estoppels must be certain to every intent. The recital in the indenture of partition and release is too vague and indefinite to constitute an estoppel. *Right v. Bucknell*, 22 Eng. Com. Law R. 122, was an ejectment, which came before Tenterden, C. J., on motion for non-suit. The plaintiff relied upon the words "*legally or equitably entitled, &c.*," contained in a mortgage as an estoppel; but it was held to be no estoppel, and the rule for non-suit was made absolute.

II. There is nothing in the indenture which constitutes even *prima facie* evidence of a present subsisting legal estate or right of entry in any one or more of the parties to it. These parties may have had estates in reversion or remainder only, or they may have had only equitable interests in or liens upon the ranch, perfectly consistent with the recital.

III. The partition, if actually executed, could only have operated upon boundaries, without changing the character of any one's estate or interest, whether legal or equitable, present or future; direct or contingent. It was only intended to limit the estate or interest to a portion in severalty, but not to convert it into a different estate or interest. *Jackson v. Hasbrouck*, 3 J. R. 331; *Grice v. Randall*, 23 Vt. 239; *Goundie v. N. Water Co.*, 7 Barr, 233.

IV. The indenture of partition was not executed by the commissioners. Its provisions were violated:

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1st. In not partitioning the whole ranch. (7 Mass. 399; 8 Wheat. 394; 2 Caine's, 235.) The consent of some or all of the parties by parol could not justify the neglect. *Howard v. Cooper*, 1 Hill, 44, 49; *M'Near v. Baily*, 18 Maine, 254.

2d. In making allotments to certain purchasers at the expense of the parties generally, and in making the allotment to Gutierrez in the same manner, contrary to the provisions of the indenture. *Kitchen v. Streets*, 1 Smith Ind. 27; *Curtis v. Snead*, 12 Grattan, 260; *Ham v. Ham*, 39 Maine, 217; *Johnson v. Wilson*, Willes R. 253.

Saunders & Brent for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This was an ejectment for a tract of land, being a portion of the Rancho of San Pablo, lying in the County of Contra Costa. The case was tried by the Court without a jury. The Court made a general finding that the plaintiff was seized and possessed of the premises, and was ejected by defendant, and that the plaintiff, as a matter of law, was entitled to recover; and it gave judgment of restitution, and for five hundred dollars damages. The plaintiff, on the trial, offered and read in evidence a paper purporting to be a deed of partition of the rancho of San Pablo, the parties, who were very numerous, claiming to be owners, and interested in that rancho; and the deed recites that "it was made in order to settle all disputes touching said rancho, and make amicable partition thereof."

The plaintiff claims the premises through a deed from one of the original owners, whose share, as allotted by the commissioners, he represents. The defendant claims possession as owner of an undivided interest in the rancho, claiming that the allotment and partition does not bind him or convey to the plaintiff the title in severalty of the tract sued for. The partition was made, and it was recorded by the commissioners about twelve months after the deed. The commissioners partitioned off the land, omitting to make any partition of a portion of the tract — this being swamp land — upwards of 2,000 acres in extent.

The commissioners also allowed to one Gutierrez one hundred acres

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of the land, under circumstances mentioned hereafter. The defendant's predecessor in interest was a party to this deed of partition.

Two questions are made upon which this controversy turns. The first is, what is the effect of this deed of partition, supposing it to have been regularly carried into execution — that is, is it an estoppel? The second is, has there been such a departure from its terms as to invalidate it, or the proceeding under it?

As the plaintiff, on the trial, rested upon this deed without other evidence of title, it is necessary he should maintain that, by force of the deed and the proceedings under it, he is entitled to recover the land. He does not rely upon previous possession, nor upon any deraignment of the title; but contends that this instrument contains of itself a confession of title which the parties to it cannot be permitted to contradict. The defendant offered evidence to show that the defendant was in possession previous to the execution of the deed, by way of proving a superior title in himself; and this evidence was rejected by the Court upon the ground that he was estopped by the deed. To ascertain the merits of this point, it is necessary to consider the provisions and language of the deed, which is a long and complex document. The first article provides for payment of certain expenses of litigation. The second article appoints Forbes, Cooper and Gray, "commissioners to make partition of the rancho in the manner hereinafter mentioned, and to that end, to make the necessary survey, map and report; the same to be filed for record among the land records of the County of Contra Costa, with this deed of the partition and release, the whole to take effect when so filed and recorded, and not before." The third article provides for the separation from the rancho of a tract of fifty acres, to be chosen by one Martina Castro de Alvarado, etc., "the parties of the first, second, third, fourth, fifth, sixth, seventh, eighth and ninth parts; and Goodale and Benson hereby convey and release to said Martina and her heirs, the same to take effect as soon as the said report and map and this deed shall be filed for record."

The fourth article directs that the commissioners shall then separate from the remainder of the tract one-tenth part, to be divided into three parts among Musson, Saunders and Hepburn — the others to release and convey to them this interest — in consideration of which these

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persons convey and release their interest in the balance of the rancho; these releases and conveyances to take effect as in the last article.

Articles 5 and 6 make further directions as to the allotments with the same words of release and conveyance.

Article 10 provides, in consideration of the release of Alvarado and wife, the other parties release and convey to certain persons, etc.

Article 10 is as follows: "The commissioners are to execute and close this partition within three months from the time this agreement shall be placed in their hands for that purpose. They are then to deliver the report, map, and this deed to James Alexander Forbes, who is hereby authorized and requested to file the same for record in the proper county; provided at the time of said delivery, the interest in said rancho represented by the parties of the third, fourth, fifth, sixth, seventh, eighth and ninth parts hereto, shall be vested absolutely, and in fee and clear of the lien and right of redemption of all subsequent incumbrancers not parties hereto, in the said parties of the third, fourth, fifth, sixth, seventh, eighth and ninth parts hereto respectively; but in the event that the interest in said rancho represented by the said parties of the third, fourth, fifth, sixth, seventh, eighth and ninth parts hereto, respectively, shall not be so vested in fee and clear of the lien of subsequent incumbrancers and parties hereto, then the said Forbes is to retain the said documents until the said interests in said rancho shall be so vested in said parties hereto, respectively; when, and not before, he shall file the same for record in the proper county; and meanwhile, the parties of the several parts hereto respectively covenant with the other parties hereto, except the said Goodale and Benson, not to lease, mortgage, convey, or in any manner dispose of any part of the said rancho except in subordination, and subject to this partition; for which purpose the said Forbes is hereby authorized to exhibit the said map, report and this deed, when requested by any party in interest hereto."

It has thus been seen that this instrument is what on its face it purports to be, to wit, a deed of conveyance, release and partition. It is true that the release is not to take effect except by force of a future event, to wit, the making of the partition and the recording of it. But we are unable to perceive why a deed like this may not be effect.

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ual on a future event, so at least, as to estop a party on the happening of such event to controvert it. It may be conceded that this event was a condition precedent to the vesting of the estate provided for by the deed; as was the payment of the purchase money in the case of *Brannan v. Mesick*, 10 Cal. 95. But, within the principle of that case, it would seem that on the happening of the event, the deed became effectual as a partition and release. In this respect, it is not material whether the several parties were owners or had merely liens, as the deed, taking effect on the happening of the event, and purporting to release and convey all the title of the grantor, the grantor would be estopped to deny that he had title at the time. But apart from this, we apprehend that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each, as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. He takes, by virtue of the deed, all *their* interest, and cannot be allowed to say that he holds possession of what he conveyed and released, by a title paramount to that which he conveyed. In this case, there was no pretense that the possession of the defendant previous to the deed was by any different title than that which he conveyed and released; indeed, such possession was in entire consistency with such interest, and, it is fairly presumable, was held by him as a tenant in common under the title which he showed on the trial.

The next question is as to the effect of the allotment to Gutierrez. It is urged that the commissioners exceeded their powers in making this allotment, and that this vitiates their reports and proceedings. It is answered on the other side, that the defendant claims through Bradley and King, and that they executed the deed of partition, and also the deed allowing and authorizing this act of commissioners. The record supports this statement. The defendant, to support the issue on his part, showed a decree of foreclosure in a certain suit wherein Lyman King and Mancilla B. Bradley were plaintiffs, and Antonio M. Castro was defendant; the order of sale; the Sheriff's return and certificate

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of sale to King and Bradley, purchasers; the assignment by King to one Piper and one Mathewson; the Sheriff's deed to Bradley, Piper and Mathewson, and the deed from Piper to defendant of his interest in the premises in dispute. The deed from King to Piper and Mathewson is dated on the eighth of January, 1857, and the deed from Piper to defendant on the twenty-sixth of October, 1857. The mortgage from Castro to King and Tewksbury—the latter assigning afterward to Bradley—was recorded twenty-sixth of December, 1854. The deed of partition was made fourteenth of July, 1856, and was executed by both King and Bradley, they, at that time, holding the interest or claim to a portion of which defendant afterwards succeeded. The contract between a number of these parties authorizing the allotment of one hundred acres to Gutierrez was made twenty-first of July, 1856, and was recorded twenty-seventh of August, 1857. Both Bradley and King executed this agreement. The land was set off to Gutierrez in pursuance of this agreement, which conveyed an equitable title in the land. It was, at least, such an executory agreement in respect to this land, as under the statute might be recorded; and, being recorded, imparted notice to a subsequent purchaser dealing in or with respect to the land. When Provizzo subsequently purchased, therefore, he had, in construction of law, notice of this contract by his predecessors and vendors, through whom he derives his title, and must be held bound by their contracts and engagements. He took the land subject to this charge upon it, and to the agreement thus made. And these remarks also apply to the deed of partition.

The last objection is, that the partition is not binding, because the entire tract was not divided, but some marsh land was omitted from the division and allotment. The report of the commissioners on this subject is as follows: "As to the surplus of marsh land comprised in this survey, and belonging to the said tract of the rancho de San Pablo, we have called the same to the attention of the parties interested, and they have decided that the said surplus of the said marshy lands should remain for the present undivided." No proof was offered that this land was of any value; or that the division made was affected in any manner by the failure to divide or allot it; or that the allotments made would in any degree have been affected by the allotments of this;

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or that any injury resulted to any one interested in consequence of this omission. Moreover, no objection seems to have been made to this allotment and partition on this account. Nor was any exception taken to the admission of this report and these proceedings of the commissioners as evidence, for the specific reason that the statement made by them was inadmissible proof of the facts of agreement and consent stated in the report. In no way, for so long a time after the report was filed and recorded, was there any protest or objection on this score until this defense, though, by the terms of the deed, the report and partition was to vest title. Important rights have vested under these proceedings, which a Court would not disturb without great reluctance. There is, besides all this, *some* proof that the defendant, after the report, at least impliedly, conceded that, so far as Saunders, one of these parties, was concerned, the title vested; for the witness, Morgan, says he, defendant, recommended a party to purchase from Saunders. Under all these circumstances, we think we shall not be warranted in holding that these proceedings are void because of this omission.

We think the judgment of the Court below should be affirmed.

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- In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners in the ditch was taken by the plaintiff, and subsequently, and before the trial, the witness conveyed, by deed, his interest in the ditch to plaintiff: *Held*, that such deed of conveyance did not pass the witness' right to the damages, and hence, he was an incompetent witness.
- To make the testimony of a witness admissible, he must be competent at the time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken, that disqualifies him.
- The subsequent deed to plaintiff, though it carried the property and the future use of the water, did not retroact and carry the right to damages for the past illegal use of it, any more than a deed to land carries the remedies for past trespasses.
- The failure of one partner in a ditch, to pay his proportion of the expenses of the concern, does not forfeit his right in the common property.

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This Court has often held that it would not interfere with the verdict of a jury, on the ground that such verdict is against the weight of evidence, except in extraordinary cases. It is almost impossible for an Appellate Court to satisfy itself in a decision upon such matters — so much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony.

Where parties projecting a ditch to convey water, give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it.

In appropriating unclaimed water on the public lands, only such acts are necessary, and such indications and evidences of appropriation required, as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable — surveys, notices, stakes and blazing of trees, followed by work and actual labor, without abandonment, will in every case, where the work is completed, give title to the water over subsequent claimants.

The title to the water conveyed through a ditch constructed in such manner, will, on completion of the work, date back from the beginning of the work as against subsequent appropriators.

In determining the question of diligence in the construction of such a work, the jury have a right to take into consideration the circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country traversed by such ditch, together with the difficulties of procuring labor and materials.

Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally supports or attacks the title, is admissible in evidence.

Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows.

The mere act of commencing a ditch with the intention of appropriating the water, is not sufficient of itself to give a party an exclusive right to the water of such stream.

The notice of the intention to appropriate the water, must be sufficient to put a prudent man on inquiry.

The doctrine of relation in the appropriation of water, only applies when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water.

Where parties commence the construction of a ditch, who have not at the time the pecuniary means requisite to complete the same in a reasonable time, and they project the work and claim the water with a full knowledge of their pecuniary inability to complete the same within a reasonable time, they cannot urge such want of means as an excuse for not prosecuting the work.

APPEAL from the Fourteenth District, County of Sierra.

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This was an action for damages for the diversion of water from the ditch of plaintiff.

The facts are stated in the opinion of the Court, with the exception of certain instructions which were given by the Court to the jury. The instructions given by the Court, at the request of the plaintiff, are as follows:

"1. If the jury believe that the plaintiffs did, in July, 1854, project a ditch to receive the water now in dispute, and did give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and did mark out and designate the line of said ditch by the usual marks and indications, and did pursue their work on said ditch with a reasonable degree of diligence until the same was completed so as to receive this water in dispute, then they are entitled to such water before all persons subsequently claiming or locating it.

"2. If the jury believe from the evidence, and the admissions contained in the answer, that the plaintiffs took up and claimed the water in dispute before the defendants did, and that they constructed a ditch to receive such water, with due diligence, and that since the completion of said ditch they have been deprived of such water by the defendants, and since the thirty-first of July, 1856, the plaintiffs have had their ditch in a condition to, and could have used the water in the water season prior to the commencement of this suit, and have, during such time been deprived of the use thereof by the defendants, then they must find for the plaintiffs and assess the damages.

"3. In appropriating unclaimed water on public lands, only such acts are necessary, and only such indications and evidences of appropriation are required, as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable—and surveys, notices, stakes and blazing of trees, followed by work and actual labor, without any abandonment, will in every case, where the work is completed, give title to water over subsequent claimants.

"4. If the plaintiffs surveyed the ground, planted stakes along the line, gave public notice by posting notices, or otherwise, and actually commenced and diligently pursued the work of the Yuba River Ditch,

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which was to take and receive the water in dispute, and if any of these acts were prior to the claim or location of defendants, this entitled plaintiffs to the possession and ownership of the water, and therefore the jury must find for plaintiffs.

"5. If the jury believe that the plaintiffs, with the intention to appropriate this water, used reasonable diligence in following one step by another till the ditch was completed, their title to the water, though it was not perfected until the ditch was so far completed as to convey the water, will yet on completion date from the beginning of the work.

"6. That in determining the question of the plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases.

"7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence, to complete their ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

To the giving of the foregoing instructions, the defendant excepted.

The following are the instructions given at the request of the defendant:

"1. If the jury believe from the evidence that the plaintiffs had no ditch or survey for a ditch to the stream of water in dispute, and also that they had no notice or marks upon said stream, indicating an intention to appropriate it, at the time of defendants' appropriation of the water of the said stream, they must find for the defendants.

"2. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are dependant upon the ownership of the land through which the water flows.

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"3. The mere act of commencing a ditch with the intention of appropriating the water of a stream, is not sufficient of itself to give a party any exclusive right to the water of such stream.

"4. Although plaintiffs or their grantors may have intended to appropriate the water in dispute, by means of their ditch commenced in 1854, yet, if they did not manifest their intention by such acts or in such a manner as would have notified a prudent man, about to appropriate said water, of such intention at the time defendants appropriated the same, the jury must find for the defendants.

"5. The doctrine of relation in the appropriation of water, can only apply when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water.

"6. If the jury believe from the evidence, that plaintiffs or their predecessors in interest, did not, after locating and surveying their ditch, prosecute the work on it in good faith, and as fast as the nature of the work and the state of the weather would reasonably permit, and that they had neglected the work upon it for an unreasonable length of time, immediately preceding the appropriation of the water in dispute by defendants, the verdict should be for the defendants.

"7. If the jury believe from the evidence, that the plaintiffs at the time they commenced the Yuba River Ditch, had not the pecuniary means requisite to complete the same in a reasonable time, and that they projected the said work, and claimed the water in dispute with a full knowledge of their said pecuniary inability to complete the same within a reasonable time, then plaintiffs cannot urge such want of pecuniary means as an excuse for not prosecuting said work with reasonable diligence, and completing it within a reasonable time.

"8. If the jury believe from the evidence, that the plaintiffs made an unreasonable delay after claiming the water in dispute, and that during such delay, and before the plaintiffs renewed work upon their ditch, defendants in good faith located and appropriated the water in dispute, they must find for the defendants.

"9. If the jury believe from the evidence, that the defendants were the first appropriators of the water in dispute, in good faith and without notice of any prior claim of plaintiffs, they must find for defendants.

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"10. Even if the plaintiffs had located and claimed the water in dispute, in the year 1854, and prior to the appropriation of the same by the defendants, yet, if after making such location and claim, plaintiffs failed and neglected to renew or keep in existence such notice or such other evidence of their location and claim, as would have put a reasonable and prudent man, wishing to appropriate the water, on inquiry, and that in the absence of such notices or other evidences of said location or claim, the defendants located and appropriated said water in good faith for mining purposes, they must find for the defendants.

"11. Kimball and others are plaintiffs in this action, and they must show a better title to the water in dispute than the defendants have, before they can recover, and the burthen of proof is on the plaintiffs to show that they are entitled to the water in dispute."

To the giving of which instructions so requested by the defendants, the plaintiffs excepted. The substance of the instructions refused by the Court, appear in the opinion of the Court. Defendants had verdict and judgment.

Plaintiffs moved for a new trial, which was denied, and they appealed to this Court.

McConnell & Niles and H. I. Thornton, jr., for Appellants.

We ask the reversal of the judgment in this case upon the following grounds, viz.:

I. The Court below erred in ruling out the deposition of Charles R. Howe, as evidence at the trial of said cause.

II. The Court erred in refusing to set aside the verdict of the jury in said cause, and grant a new trial upon the following grounds:

1. Insufficiency of the evidence to justify the verdict rendered by the jury.

2. Error in law, occurring at the trial, and duly excepted to by the plaintiffs.

3. The verdict is contrary to law and evidence.

III. The Court erred in refusing the instructions asked by plaintiffs, numbered 7, 8 and 9; and in giving those asked by defendants, numbered from 1 to 11 inclusive.

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I. The first point assigned for error consists in the ruling out of the deposition of Charles R. Howe.

The ground of the exclusion of the deposition was the existence of Howe's alleged interest in the damages for the eighteenth of July, 1856. It was said that the record in the present action might be evidence for or against him in any suit he might hereafter institute for such damages.

The water right or easement alleged to have been disturbed and injured, pertains to a certain ditch situate on the public land, called the "Yuba Ditch."

This ditch was projected in May, 1854.

As shown by Howe's preliminary examination, Harlow Kimball and himself were the original projectors of such ditch.

The statement made by Howe, and relied on by defendants, is substantially as follows:

In May, 1854, Kimball and himself conceived the project of constructing the ditch mentioned in the complaint, to bring in the water of the North fork of the North Yuba river, and its tributaries, to Eureka and vicinity.

Howe had no pecuniary means nor credit, and Kimball assumed the burthen of advancing all the funds immediately necessary — with the understanding, however, that Howe should hereafter advance his share of the cost and expenses — and that he should then have an interest commensurate with his advances. In the meanwhile Howe was to devote his time and labor to the construction of the ditch, etc.

Two years passed — the ditch was near its completion — and still Howe had not contributed a single cent towards its cost.

In the meanwhile, Kimball became deeply involved in debt to Johnson & Hickok for money and material advanced by them *upon his credit* towards the construction of the work.

It became absolutely necessary that Howe should comply with the condition of his arrangement with Kimball, and advance a part of the money, or that he should suffer his estate to be determined, and back out of the enterprise *in toto*. He chose the latter, and conveyed to Kimball, on the nineteenth of July, 1856, and on the same day Kimball conveyed to Johnson & Hickok, two-fifths of the whole enterprise.

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The two transactions were in fact but parts of the same transaction, as Howe's evidence shows.

Howe, in his deed to Kimball, quit-claimed to him *one-half* of the whole work, because his interest *might* have amounted to a half had he complied with his original agreement, and advanced the necessary money.

Now mark the terms of this whole arrangement so far as Howe is concerned :

Although, as a matter of form, a sum is named in the deed as a consideration, yet in point of fact he received not a cent by way of consideration, properly so called. But from his own statement it appears that the only advantage he derived from the transaction was, first, a release from all liability to Johnson & Hickok by reason of the indebtedness to them ; and secondly, he was to receive from Kimball, and Johnson & Hickok, compensation for all the labor and care he had bestowed upon the work, *from its very commencement*, at the rate of seven dollars per day.

Now the question recurs upon the nature of Howe's estate or interest before the nineteenth July, 1856, and what effect the transactions of that date had upon it.

In the first place, we admit that Howe had such an interest before the nineteenth of July, 1856, as would disqualify him as a witness in any action *instituted before that date*. But that is a very different question from the one presented by the record.

It is evident that Howe occupied towards Kimball and the enterprise one of the two following positions, viz. : first, at the commencement of the ditch, he had an interest *in presenti*, subject to be defeated by a future contingency, viz., the nonpayment of his proportion of the cost, or, secondly, he may be regarded as having at the beginning of the enterprise only an inchoate right, capable of ripening into a vested interest *in futuro*, upon the happening of a certain contingency, viz., the payment of his part of the cost.

Assuming the first hypothesis to be correct, we lay down this proposition :— upon the happening of the contingency upon which his estate depended, he became divested of such estate *retroactively*, and his title thereto, as well as all of its incidents, became as if they had never existed.

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In this respect it resembles more nearly than anything else an estate upon condition, created by deed. It is true there was no deed in this case, but the parties originally stood in the same position towards the property, and there was a contract or agreement between them, the final execution of which depended upon a condition. One other point of difference is to be found in the fact that a deed conveying an estate in lands, etc., operates upon property having a present existence, whereas in our case the original agreement or understanding between Howe and Kimball was to operate upon property to be created by their future joint efforts. But this difference evidently tends to establish the propriety of our attempt to apply the law of "estates upon condition" to cases like the present.

The rule in relation to estates upon condition is, that when the estate is divested by the failure of the grantee to perform the condition, it operates retroactively; and while the grantee, or feoffee on condition, is supposed in law never to have had an estate, the grantor shall enter as of his old title, and shall be regarded as having been all along the owner of the property. Coke on Litt., 202 (a); Bac. Abr. title *Condition*, vol. 2, p. 316; 1 Hilliard on Real Property, p. 369; 4 Kent's Com., sec. 123-127.

Again: ditch property itself is subdivided into two distinct kinds or species of property, one of which is dependent upon the other. They are — *first*, the ditch, canal or flume; and *secondly*, the water right, privilege or easement.

Either of these may be injured, and the owner may have a remedy for such injury, specially appropriate to the nature of the property, and the nature of the injury. If his ditch be cut or filled up, he may bring trespass founded on his possession. If his water right be disturbed, he may bring case founded on his title or property.

There is no averment or pretense of any injury having been committed to their ditch or other corporeal property. The gist of our action is the diversion of water which we had a right to divert from its natural fountain or stream, thereby preventing a diversion of the same water by us.

The action is founded upon the plaintiffs' title, or upon their ownership of the incorporeal hereditament or easement.

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To enable Howe, therefore, to maintain an action for such an injury after the nineteenth of July, 1856, it is necessary that he should have been one of the owners, not only of the ditch, but of the water right or easement, before that period; and also, that his estate or interest should not have been retroactively divested. This is evident.

If Howe sold his share before the completion of the ditch and appropriation, then, even if his share had been fixed and definite from the first, it would not be regarded as extending to the easement, but merely to the part of the ditch completed at the date of the sale.

These principles are so obvious and so fully sustained by reason, that we deem it unnecessary to quote authority in support of them. We content ourselves with a general reference to the following cases: *Kelly v. The Natoma Water Co.*, 6 Cal. Rep. 105; *Couger et als. v. Weaver et als.*, *Ibid.* 548; *Simpson v. Eddy*, 3 Cal. Rep., p. 249; *Irwin v. Phillips*, 5 Cal. Rep. 140.

But, it will be asked, how does all this affect the case at bar, since the complaint itself shows that plaintiffs' appropriation was prior in date to the nineteenth July, 1856, when Howe sold to Kimball?

In answer to the question we say, that taking into consideration the nature of the property, in connection with the facts disclosed by Howe's evidence, we fully establish the correctness of our position, that Howe never had a legal estate in the property, but a mere right, which might at some future time ripen into an estate.

For, granting that we are right in the assumption that neither Kimball or Howe had a vested estate in the easement until actual diversion, and granting further the truth of Howe's statement that the extent of his share was to depend on his future contributions, the following conclusions seem to follow inevitably, viz.: Upon the completion of the ditch and the diversion of the water, the *water right* became vested in the projectors jointly, or rather, perhaps, as tenants in common, in proportion to the amount advanced by each.

Inasmuch, however, as Howe had advanced nothing, no share vested in him; so that on the nineteenth July, 1856, he had no interest in the ditch or easement, and of course could not demand of defendants to make amends for the damages.

It will be perceived that our reasoning altogether pretermits the fact

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that Howe worked on the ditch from its first commencement till its completion. The reason for this is twofold—1st. Because we infer from Howe's statement, that the contribution of each of the adventurers was to be in money or its equivalent in materials. The very object of this contribution of each of the adventurers was to employ laborers. 2d. Because he was compensated for his labor in a way entirely inconsistent with the idea of his receiving a share of the ditch for it, viz., by receiving seven dollars per day for it, for the whole time he was engaged. By accepting this sum as compensation for all his rights, Howe estopped himself from saying either to his co-adventurers, or to a mere stranger, that he ever had an interest, or that he was entitled to recover damages from them for any act done either before or after such acceptance.

Upon this reasoning, we think it clear that the deposition ought to have been admitted in evidence, and that his Honor erred in excluding it.

II. The Court erred in refusing to set aside the verdict and order a new trial.

This motion was predicated on several grounds; the principal of which were "that the verdict was contrary to evidence," and "error in law occurring at the trial, and excepted to by the plaintiffs."

We contend that the verdict was contrary to the evidence.

We are aware of the great unwillingness of the Court in ordinary cases to interfere with the verdict of a jury, or with the action of a *Visi Prius* Court in sustaining such verdict. Nothing in our opinion can be more laudable than this spirit in an Appellate Court.

But cases must often arise, and we know have arisen in our State, where the ends of justice imperatively demand the exercise of this Court's undoubted prerogative to supervise the verdicts of juries, and set them aside, if in conflict with testimony. *O'Keefe v. Cunningham*, 9 Cal. Rep., p. 589; *Bagley v. Eaton*, 8 *Ibid.* 159; 9 *Ibid.* 430; Same case, July Term, 1858. The case at bar, we think, is one of these cases.

(Counsel here reviewed the evidence at great length.)

III. The Court erred in refusing instructions numbered 7, 8 and 9,

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offered by plaintiff, and in giving the instructions numbered from 1 to 11 inclusive, offered by the defendants.

It would be somewhat difficult to ascertain his Honor's objections to these instructions, had he not himself informed us.

As regards the first, (No. 7) he objects that it is not predicated upon the evidence, as it was not shown that the plaintiffs acquired any right to the disputed water in 1854.

His objection to our position that *abandonment* is a special defense, and must be specially pleaded, is that we should have objected to the introduction of any proof of abandonment if it was not warranted by the pleadings, etc. He then proceeds to remark that he fully explained the doctrine of *relation* to the jury, etc.

Now it seems to us that it is upon this very doctrine of relation that we differ from the learned Judge. He says there is no proof that we acquired any rights, etc., in 1854. But we say, that according to the very doctrine of *relation* mentioned by him — if we commenced our operations to divert the Sebastopol water in 1854, and completed them in 1856 — our acquisition of the easement relates back and dates from the year 1854; that is to say, by construction of law we are supposed, as against all subsequent intruders, to have acquired our right in that year. *Kelly v. The Natoma Water Co.*, 6 Cal. Rep., p. 105; *Barnes v. Stark*, 4 Cal. Rep., p. 414. See also, *Viner's Abr.*, title *Relation*; *Jackson v. McCall*, 3 Cowen Rep., p. 80; *Jackson v. Bull*, 1 Johns. Cas., p. 81; *Jackson v. Raymond*, *Ibid.*, p. 85, note; *Case v. De Goes*, 3 Caine's Cas., p. 262; *Jackson v. Bard*, 4 Johns. Rep., p. 234.

In *Heath v. Boss*, a patent for land dated the fourth of December, but which did not pass the great seal until the twenty-eighth, was held to relate back so as to vest the title in the patentee from the date. 12 Johns. Rep., p. 140.

The authorities are quite numerous, but the above will suffice.

The true import of the doctrine of *relation* being established, no one will deny the legal propriety of the instruction. It merely reiterates the well known rule, that the existence of a right being shown, its continuance will be presumed, and that the burthen of disproving its present existence is with those who deny it.

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The other point of difference between the Court and ourselves is upon a mere question of fact. He says we ought to have objected to the defendants' evidence of the plaintiffs' abandonment; thereby implying that evidence was offered by the defendants expressly to prove abandonment.

Now, as a matter of fact, no such evidence was offered.

All the evidence offered by the defendants was admissible in some point of view. No evidence was offered avowedly for the purpose of showing an abandonment. What we objected to was the attempt of the defendants to infer from the general circumstances and history of the case abandonment by the plaintiffs, and to impress such inference upon the jury. In our 9th instruction we distinctly affirm that the defendants must plead an abandonment by the plaintiffs, and *prove* it; which we would scarcely have said, had the defendants actually introduced such proof. Our point was, that the defendants were trying to avail themselves of an abandonment on our part without having pleaded or proved it.

Instructions are frequently asked for no other purpose than to refute the erroneous position of counsel, when it is apprehended that their error may be imposed upon the minds of the jury. And our instruction could be sustained upon this ground, if on no other.

An abandonment, properly so called, can only be voluntary. But there are cases where a *non user* for a given period will be regarded as tantamount to the expression of a determination to abandon. It is this latter sort of abandonment which bears so striking a resemblance to a forfeiture; for in ninety-nine out of every one hundred instances of abandonment by *non-user*, the will does not in fact consent. 3 Kent's Com., secs. 448, 449, 450.

All authorities concur in holding that a right can only be lost by *non-user* where the *non-user* extends over a period sufficient to vest a title by prescription. Domat's Civil Law, sec. 1030; 3 Kent's Com., sec. 448; Lawrence v. Obee, 3 Campbell, 514; Corning v. Gould, 16 Wend. 513; Yeakle v. Nace, 2 Wharton's Rep. 123.

The same principle has been applied by this Court to water privileges on the public lands, and to mining claims. Crandall v. Woods, 8 Cal. Rep. 136; Partridge v. Townsend *et als.*, July Term, 1858.

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The latter case is exactly in point.

The Civil Law in this respect agrees literally with ours. Indeed it seems to be taken for granted, that our law of easements and servitudes was derived from the Roman Law. Domat's Civil Law, sec. 1030, *et seq.*

The principle has often been applied to offices and other franchises.

From the various reported cases the following rule of procedure may be adduced:

When a man holds a right of franchise of public nature, and it is alleged that he has abandoned it by *non-user*, the fact can only be definitely ascertained and adjudged by a judicial proceeding in which the question is directly involved. *Hardin v. Page*, 8 B. Monroe, 648.

Vandief & Stewart for Respondents.

The witness Howe sold out of the ditch on the nineteenth of July, 1856.

The damages are claimed for about one year of the time while Howe owned one-half of the ditch. His right to these damages he did not sell with his interest in the ditch, and could not if he would. *Oliver v. Walsh*, 6 Cal. 456.

Under these circumstances, he was clearly incompetent by the rule in *Packer et al. v. Heaton et al.*, 9 Cal. 568.

A very metaphysical argument is based to prove that Howe was not interested in the damages at the time his deposition was taken — June 30th. 1858.

By a careful perusal of Howe's examination on his *voir dire*, it will be seen that the circumstances of his connection with the ditch enterprise were about as follows:

In May, 1854, Kimball and Howe conceived the project of constructing the ditch described as the Yuba Ditch. No understanding was then had between them as to what proportion of the ditch, when completed, should belong to each.

Howe gave his personal attention and labor, and Kimball furnished all the money that was furnished.

But nearly everything except what was done by Howe, was done on a credit extended to them mostly by Johnson & Hickok. They went

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on in this way, without any agreement or understanding between themselves, till July, 1856, one year after the completion of the ditch to the water in dispute, when they got into difficulty with the defendants about this water.

Howe and Kimball were by this time indebted to Johnson & Hickok for means advanced to carry on the work, in the sum of about ten thousand dollars.

On the nineteenth of July, 1856, Howe sold to Kimball his entire interest in the concern, describing it as *one-half*. The consideration of this sale is stated by Howe to have been that he should receive a sum equal to seven dollars for each day he had worked on the ditch; that he should be furnished work on the ditch for the future at the same rate, and that he should be discharged from all liabilities formerly incurred, and particularly from all liability to Johnson & Hickok, which was their principal, if not their only liability.

For the purpose of discharging this liability, it was arranged at the same time that Kimball should convey to Johnson & Hickok two-fifths of the ditch; for it seems that Kimball was at this time as destitute of means as Howe, and that neither could pay in any other way than by selling a portion of their ditch.

There is no evidence that the interest of either Howe or Kimball was to terminate on the failure of either to pay his portion of the expenses, nor that the quantity of either of their interests should be regulated by the sum paid into the concern by either of them.

Howe never did hold his interest under Kimball in any way. He was the first to discover the water and the route; the first and the last to work upon it. There were no conditions attached to his tenure which might not with equal propriety be said to have attached to that of Kimball.

They both acquired and held (till Howe sold out) the same character of title.

It is true that neither of them acquired such a right to the use of the water in dispute, as would enable them to maintain an action for the diversion of it, until their ditch was capable of receiving it.

The ditch was so completed, according to their testimony, in August, 1855, nearly one year before Howe sold out; during all which

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time plaintiffs claim damages, and have a right to recover for that time, if at all.

A condition upon which a forfeiture can be based, must be the subject of an *express* contract. Here, then, is no contract with a condition either express or implied.

An entry by the grantor or feoffer for condition broken, implies a grant or feoffment *on condition*. In this case, there is no grant or feoffment on condition, or otherwise.

Howe did not derive or hold his title from or under Kimball in any manner known to the law. Kimball never had any "*old estate*" in Howe's share of the property; how, then, could he "be in as of his old estate?"

For the purpose of making their theory fit the facts of this case, the learned counsel deny that there was any valid conveyance from Howe to Kimball *for want of any consideration*.

We think there was a good consideration. Howe's discharge from their joint liability to Johnson & Hickok for ten thousand dollars, was something very much resembling a consideration. Seven dollars per day for all the time he had worked, when wages were only four dollars, might be taken for some part of a consideration, especially when according to the theory of counsel, Kimball was under no legal obligation to pay anything for his past labor.

The other position assigned to the witness Howe is, that he never had any vested interest in any portion of the property, for the reasons that by the original agreement his interest was to be only in proportion to the amount contributed by him to the joint concern, and that he never contributed anything, and therefore had no interest.

In answer to this it is only necessary to say, first, there never was any such agreement, and the record will not show it.

Howe could not assign his interest in the damages. *Oliver v. Walsh*, 6 Cal. 456.

And, being interested in a part of the damages claimed, he was incompetent. *Packer v. Heaton*, 9 Cal. 571; *Gage v. Stewart*, 4 John. 293.

The second point made by appellant is, that the evidence does not justify the verdict of the jury.

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(On this point counsel for respondents also went into a lengthy discussion of the facts.)

We are referred to the case of *Conger v. Weaver*, for authority to set aside the verdict of the jury in this case. All that was decided in that case was, that this Court would not disturb the verdict when there was any evidence to sustain it. That is all we ask in this case.

This Court will not disturb a verdict where the evidence is conflicting. Had the verdict in this case been for plaintiffs, their evidence might sustain it, though we do not doubt that the preponderance of evidence is with the defendants.

The third error relied on is the refusal of the District Court to give the instructions numbered 7, 8 and 9, asked by appellants.

Number 7 was properly refused, because there was no evidence tending to show that plaintiffs acquired any right to the water by anything they did in that year; for by their own showing, they could not have appropriated the water before August, 1856; and if their right was to be dated back to 1854, it must have been by virtue of the law of relation which had been fully explained to the jury in the instructions given. It was also bad, for the reason that the issue of "abandonment" had not been made before the jury either in the pleadings (as contended by counsel) or the argument to the jury.

It is admitted that the issue of abandonment was not made by the pleadings, and that all the evidence was proper under the pleadings.

Why, then, was an instruction on that question required, unless it had been claimed by defendants, that there was such an issue? which was not the fact. The questions made to the jury, as before stated, were as to plaintiffs' intention to take up the water before defendants appropriated it; and if so, had plaintiffs followed up that intention with due diligence, or such acts as would, with them, date back their right by relation?

Number 8 was properly refused, for the reason that it was calculated to mislead the jury. It was competent for defendants to plead prior location, and prove it by showing the time of their location, and rebutting plaintiffs' location in 1854, by showing that they had not used such diligence as would entitle them to date their right back by rela-

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tion to that date. All this could be done, and was done, without raising the issue of *abandonment*.

But we will here remark, that we know of no rule which would require abandonment in a case like this to be pleaded specially. The plaintiffs have not specially set out in their complaint the circumstances on which they intended to rely to establish their right, and it may well happen that defendants would have no notice of them till they were introduced in evidence.

Number 9 is subject to the same objections as 7 and 8.

Appellants also assign as error the giving of defendants' instructions from 1 to 11; but as they have not attempted to point out the error, we are not required to notice them.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This is an action for the diversion of water, and the main question was the priority of appropriation. On the trial the plaintiffs offered one Howe as a witness. He was sworn on his *voir dire*, and upon the facts stated by him on his examination, was objected to as incompetent because interested, and excluded by the Court. The correctness of this ruling is impeached by the appellants, and is the first error assigned. The facts which determine this question of the interest of the witness are these: Witness was, in 1854, an owner in the Yuba Ditch Company, in respect to the water of which this suit is — in 1854 till 1856 — was also an owner in a ditch called the Kimball Ditch, from July, 1853, till August, 1854; sold his interest in the Yuba River Ditch Company to Harlow Kimball; the witness' interest in the Kimball Ditch was sold by the Sheriff; sold interest in the Yuba Ditch Company in July, 1856 — latter part of it; don't know exactly the date. Being asked as to the extent of his interest in the Yuba Ditch, the witness stated: "We were partners, and took up the water; I owned one-half of it then; that was what I supposed when we took it up; I sold my whole right then; I could not tell how much I did own, for I never had paid a cent on it." "There was a dispute about the water of the Yuba Ditch, or part of it, when witness sold; made a deed to Kimball, when he sold it; was paid for it; was paid

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by note about first of April, 1858, between first and fifteenth; took no mortgage or other security. Being asked how he came to settle and take the note just before the trial in this suit, in April, 1858, answered: "I was not able to go on with it, and I told them if they would pay me seven dollars per day I would take it and release them, and have no claim on the ditch; bargain made with Harlow Kimball; the note given, witness supposes, was to enable him to testify; Kimball, Johnson and Hickok gave their notes; Kimball sold to Johnson and Hickok two-fifth interests the day witness sold to them; never had a settlement from the commencement of the ditch; they were owing witness \$1,000; claimed to hold the ditch for his debt — for work on it; never been paid a dollar; Kimball and Hickok told me to bring in account, and they would settle it." On cross-examination, witness said: "In April, 1858, was not interested then or after the deed was made. No other interest than the claim for this money; no mortgage or other security for this money; the deed of the Yuba Ditch Company to Kimball was made for the purpose of Kimball's transferring a portion of witness' interest to Johnson and Hickok for heavy indebtedness due from witness and Kimball as owners of the Yuba River Ditch. Kimball at the time witness transferred to him, transferred two-fifths of this ditch to Johnson and Hickok, and they canceled all the indebtedness due from witness and Kimball; sold out all his (witness') right, because witness was in debt on it, and could not go on with it" — "was it understood that both were to be responsible for debts? thinks things got were charged to Kimball. Witness never paid anything; Kimball paid all that was paid; witness had ran behind all the time. When we first took the ditch my share was one-half, and when it ran behind I never could exactly know what it was; deeded to Kimball one-half; did it to cover the greatest interest witness ever had; the deed to Kimball and from Johnson and Hickok all parts of the same transaction; so understood to be beforehand; was to give witness seven dollars a day for all the work witness had done from the commencement, and to assume the debts."

The deposition of the witness was taken, and tended to prove facts material to the issue in support of the plaintiffs' action. This deposition being offered by the plaintiffs, was objected to by the defendants

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upon the showing made on the *voir dire*, and also for another reason, which it is not necessary to consider, as it is embraced in the answer of the witness. The plaintiffs offered in rebuttal an entry made in this case at the April Term, 1858, to this effect: "On motion of plaintiffs' attorneys it is ordered, that plaintiffs have leave to strike from their complaint their claim for damages previous to July 19th, 1856 — the date of Howe's deed to Kimball." But no amendment to the complaint in this respect seems to have been made. The plaintiffs also offered a paper in these words: "The plaintiffs in the above entitled cause release and remit to the defendants in said cause all claim and demand for damages contained in their complaint for the whole of the month of July up to the first day of August, A. D. 1856.

(Signed)

KIMBALL & Co.

By their Attorneys, H. I. THORNTON, Jr., and J. R. McCONNELL."

And filed it among the papers in the cause.

The declaration is for damages for the diversion of water for 1855 and succeeding years.

It is unnecessary to consider these matters subsequent to the taking of the deposition which was introduced to give it effect. The mere order permitting an amendment of the complaint was of no effect unless and until complied with. The release or remittitur was of no force, even if the attorneys at law signing it had any legal authority to execute it, which, to say the least, is extremely questionable: for the plain reason that to make the testimony of the witness admissible, he must have been competent at the time of the taking of his deposition. It is of no importance that he is competent afterwards, as it is the effect of the interest on the witness which disqualifies him. Whether he was interested or not depends on the issue; that issue, in this case, upon the pleadings, was the title to damages arising from a diversion of water before 1856; and this question, of course, depended upon the ownership of the water, such ownership following from the fact of prior appropriation. The question of interest then rests on this: Would the witness have gained or lost by the verdict?

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It seems that he and Kimball were joint owners before the date of the deed to Kimball, in July, 1856. For any injury to or an appropriation of the common property, while they were such joint owners, *these owners* were entitled to damages. If a recovery had been had by one, the benefit would have resulted to both. The partner or tenant in common would have held these damages in trust for both, just as if the defendants had voluntarily paid the amount of these damages to one of these owners. The sum so paid would have been the property of both. The subsequent deed to Kimball, though it carried the property and the future use of the water, did not retroact and carry the right to damages for the past illegal use of it, any more than a deed to land carries the remedies for past trespasses. An ingenious argument is made by the appellants' counsel to show that by the failure of Howe to pay his proportion of expenses, the estate he had was forfeited as a condition subsequently broken, and that all remedies and rights touching the estate, by relation, attach to the other party. We are unable to see the force of the argument. It is equally unfounded in law and in fact, for here there was no original, independent estate in Kimball; he made no deed or contract on condition subsequent. If not estopped by the deed from Howe to deny Howe's title, the facts sufficiently show, notwithstanding his not very satisfactory explanations, that Kimball and Howe were partners in this adventure, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property. We think, in the aspect in which this witness presented himself, it is the case of one partner suing for an injury done to the firm property, and calling the other as a witness to prove his case.

The argument founded upon the peculiar nature of this property is more subtle than sound. It is true that the mere right to water is a sort of incorporeal thing; but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property, and may not sue as such for any unlawful interference with it.

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The Court, therefore, did not err in excluding this deposition. Nor do we see in the statement of this witness, when properly construed, any evidence of abandonment. Howe and Kimball acquired this property as partners; for a sufficient consideration one relinquishes to the other his interest in the joint property. The nature of the property has no effect on the transaction. It is the common case of a bargain and sale by one partner to another, none the less partaking of the nature of a bargain and sale, because the selling partner was indebted to his associate on account of the firm business, and, for this purpose, makes the sale.

The next question is, whether the verdict is so clearly against the weight of evidence, that we are called upon to reverse the judgment of the District Court before whom it was given, and grant a new trial? This Court has so frequently held that it would only interfere in extraordinary cases with the decisions of the lower Courts in this respect, that it is useless to repeat the rule laid down. It is almost impossible for an Appellate Court to satisfy itself in a decision upon such matters — so much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony.

The main question was as to the priority of location of this ditch, and this depended very much upon the general fact whether the plaintiffs had done such acts in 1854 as would, in August, 1855, when they completed their ditch to the water in dispute, entitle them to invoke the doctrine of relation, and get in, in advance of the actual appropriation of the water by the defendants; and upon this question there was no little conflict in the proofs. The conflict is in respect to the dates and character of the particular acts from which the appropriation is inferred. If there were no other circumstances of conflict than those contained in the testimony of James as to the time of marking the trees, this would, perhaps, be sufficient to be left to the jury for them to determine the weight and effect of the proofs. But there are various other matters of more or less weight, such as the admissions of Howe and the like.

The points made by the appellants question the propriety of certain instructions given, and of the refusal of other instructions asked.

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A large number of instructions were given by the Court, and several refused. Those given are expressed with great clearness and precision. They embody the law as ruled by this Court, and propositions necessarily resulting from those settled heretofore. Several instructions were refused by the Court. They are marked seven, eight and nine of the list of those asked for by the plaintiff. The seventh instruction was to this effect: That if the plaintiffs did, in the *Summer of 1854*, acquire a right to the water in dispute, then the law presumes they retained the right so by them acquired, and the burthen of proving an abandonment on their part is with the defendant. This was refused, because there was no testimony showing that in 1854 the plaintiffs had acquired any such right. The instruction, as it stood, was at least ambiguous, and calculated to mislead. The right of the water did not, in strictness, accrue until the completion of the ditch — though the initiatory steps in 1854 might, by force of the subsequent event, have given title as against a subsequent appropriation from 1854, if done in that year. But this general language, though proper in some sense, was calculated to convey a wrong impression, as the jury might have inferred that these acts, of themselves, gave a right to the water. When the Court gave its reason for withholding the instruction, the appellant, if he desired the charge as to the abandonment to be given to the jury — for the Court had fully instructed the jury as to the other portions asked — should have removed this objection to it. Indeed, it is not clear that the whole substance of the legal portion of this charge had not already been given.

The eighth and ninth instructions are, in substance, that the jury should not regard any proof offered of abandonment, inasmuch as no such defense as abandonment is specifically set up in the answer. The complaint is general, not setting forth the character of title, or the facts constituting the title of plaintiff. It avers, in general terms, that "on or about the month of July, 1854, the said plaintiffs and their predecessors claimed, located, appropriated and became the owners of, and became entitled to the possession, use and enjoyment of, for mining purposes, the water and waters flowing," etc. The answer denies this general averment. Thus is put in issue the very question of title, and this involves necessarily the due prosecution of the work after the

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appropriation, or, in other words, after the indication by some palpable and unequivocal outward sign of the intent to appropriate. The title to the water does not arise, as we have intimated before, from the manifestation of a purpose to take, but from the effectual prosecution of that purpose. This prosecution, therefore, is a necessary element of a title, and the negation of this, the abandoning of the purpose, is not so much matter in avoidance of a title, as it is matter showing that no title was ever obtained. Besides, if parties go to issue, in actions of this kind, upon general averments and denials of title, we think that anything that legally supports or attacks the title is admissible in evidence, and may be applied by the jury to sustain or defeat it.

The other instructions are not liable to serious objection. Indeed, we may remark that all the instructions given by the Court seem not only prepared with remarkable care, but that they present, with extraordinary clearness and accuracy, the various questions of law, bearing on the case, to the jury.

The judgment is affirmed.

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- A judgment entered on the forfeiture of a recognizance, is the property of the State, and the Legislature may release the same in such form and on such conditions as it thinks proper to prescribe.
- It was the intention of the Legislature, by the twenty-fifth section of the Act creating a Board of Supervisors throughout this State, to transfer from the Courts of Sessions to the Boards of Supervisors, the general and special powers and duties of a civil character, which had before the passage of that Act, been vested in such Court.
- It was not the design, in this manner, to repeal any law, general or special, before existing; but as, under the decision of *Burgoyne v. The Supervisors*, (1n 3 Cal.) a question of the constitutionality of those laws which conferred duties and powers, not of criminal cognizance, was made, the Legislature meant to remove the difficulty by transferring all these functions to the Boards of Supervisors.
- The Legislature, in the passage of a law, may refer to an Act unconstitutional in itself, to indicate its will in respect to a constitutional purpose. Where power has been misplaced by the Legislature, and thus its act become un-

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constitutional and void, it may, by the passage of a constitutional law, transfer such powers to another tribunal, by reference to such act.

The fact that a District Attorney has or is entitled to a percentage on a judgment in favor of the State, will not prevent the Legislature from the passage of a law releasing the judgment.

The record of the proceedings of a Board of Supervisors under their seal, is *prima facie* evidence of such proceedings.

APPEAL from the Eleventh District, County of El Dorado.

The facts of this case, as detailed by the opinion of the Court, are as follows:

Bircham entered into a recognizance, with sureties, to appear and answer the charge of manslaughter. Afterwards an indictment was found against him for this offense. On the twenty-ninth of January, 1853, the defendant was called in the District Court, and not appearing, his undertaking was declared forfeited. Subsequently suit was brought against the defendant and his sureties on this undertaking, and on the sixteenth of May, 1853, judgment rendered by default. Bircham appeared after this, and was tried and acquitted. On the twenty-sixth of May, the Legislature passed "An Act for the Relief of Bircham and his sureties." This Act is found in the pamphlet Acts of that year, (p. 178) and is as follows: "The Court of Sessions of El Dorado County are hereby authorized to release John G. Bircham and his sureties, from liability upon any recognizance or obligation entered by him or them, for the appearance of said Bircham before said Court, on a charge of manslaughter, and upon any judgment obtained, or to be obtained, on said recognizance or obligation." The Court of Sessions took no action under this statute. The Board of Supervisors, however, in November, 1856, passed an order releasing the judgment, and ordering return of the execution. The District Court, in December, 1856, on motion, set aside the judgment, and ordered a return of the execution which had been issued on the judgment; from which order the People appealed to this Court.

Attorney General for Appellant.

"1. That the Board of Supervisors had no jurisdiction in the premises, and acted without authority of law."

We are told that the power conferred upon the Court of Sessions to

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release Bircham, *et al.*, was transferred to the Board of Supervisors, by the section 33-34.

To which we answer: *First*, that the section quoted was only designed to confer upon Boards of Supervisors such general powers as had been exercised by Courts of Sessions by virtue of general laws, and not to cover such special powers as had been conferred by special acts upon particular and isolated Boards. This act belonged to the latter class.

Secondly, the Act, when it attempted to confer unconstitutional powers upon the Court of Sessions, became and was a dead letter. It was absolutely void, and being *void*, could not be subsequently revived. See Phelan v. Supervisors, &c.

The spirit and intention of the twenty-fifth section of the fourth article of the State Constitution, would forbid the passage of an Act like this, which attempts by one general sweep to confer upon one tribunal the powers and duties named and set forth in many Acts, running through a series of years, which have been attempted to be exercised by another. Each new Act should embrace within itself all powers, duties, and rights it is intended to confer, and its "title" should clearly indicate the contents of the body.

2. The order with or without authority of law is void, because it divests vested rights of the then District Attorney, who prosecuted to final judgment, caused an execution to be issued, &c., &c.

It is maintained that an Attorney has no lien upon a judgment, and the case of *ex parte* Kyle (1 Cal. Rep., 331) is cited, but we apprehend the case does not apply.

John Hume, for Respondent.

The first question is as to whether the Board of Supervisors had any authority to make the order.

The debt due upon this undertaking was the property of the State of California, and belonged to the general fund, if paid in. See Codified Laws, page 86, section 4; also same section in Wood's Digest, art. 333, sec. 4.

The Legislature of this State have the sole and exclusive control of all moneys belonging to the general fund, and may dispose of such

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fund as in their discretion may be deemed proper; so that heretofore they have repeatedly paid out money out of such fund for charity and other purposes, which were not legal claims against the State. The Legislature had then the right to release this recognizance and judgment, just as much as if such right lodged in a private creditor.

If this view is correct, then it seems that the Act of March 6th, 1854, (see statutes of 1854, page 178) was and is of itself a complete relinquishment of all claim of the State against the parties named in that Act. The suit was in the name of the People; the People were the only creditors, and the Legislature, who alone had the control of the matter, authorized a certain Court or tribunal to satisfy the judgment and make a release. The Legislature might have authorized any individual or officer to perform the same ministerial act, and it would seem as though it would make no difference whether such release was ever actually made of record or not, as the only creditor had directed or authorized it to be done.

On the twentieth of March, A. D. 1855, an Act was passed creating a Board of Supervisors in the counties of this State. (Wood's Dig., page 692.) Section 25 of that act (Wood's Dig. page 697) reads as follows: "The Board of Supervisors shall have and exercise in its county, *all* jurisdiction and powers, other than criminal, conferred by *any* law on the Court of Sessions, or heretofore exercised by said Court, under any statute, or by *any statute provided to be exercised* by said Court, when the same does not conflict with the provisions of this Act."

It is impossible to conceive of any provisions of law which could, in terms and evident intention, more completely turn over to the Board of Supervisors *all* authority, other than criminal, which had been attempted to be given to the Court of Sessions, and I cannot see how appellant expects to except the law of March 6th from the operation of that section. By it certain powers were, or were attempted to be, conferred on the Court of Sessions; or at least it is included in that clause which confers upon said Board "*all jurisdiction and power,*" "*by any statute provided to be exercised by said Court.*" The law of March 6th, 1854, was upon the statute book at the time of the passage of the Act last cited, and as it concerned the public funds, must

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be deemed to have been in contemplation of the Legislature at the time of the passage of said last Act. Any other construction must say that the Legislature intended to cancel or withdraw the Act of the year before, and impliedly repeal said Act of March 6th, 1854. Or, if the Legislature intended in good faith to stand by the release they had granted, it would compel them to pass a special Act authorizing another party to place the release formally upon the record.

If, then, the power given to the Court of Sessions by the Act of March 6th, 1854, was given to the Board of Supervisors by the Act of March 20th, 1855, then the Board of Supervisors might make such release, whether the money belonged to the State or county.

BALDWIN, J., after stating the facts, delivered the opinion of the Court—TERRY, C. J., concurring.

The judgment in this case being the property of the State, could be released by the Legislature in such form and on such conditions as it chose to prescribe. Whether the Court of Sessions could constitutionally exercise the power of making this release, it is not necessary to inquire, though, if it chose to act in the matter, it is not easy to see why its discharge of a mere ministerial function of this sort would not be valid. But by the statute of 1855 Boards of Supervisors throughout the different counties were constituted, and, by the 25th section of the Act, it is provided that such Board "shall have and exercise in its county all jurisdiction and powers other than criminal, conferred by any law on the Court of Sessions, as heretofore exercised by said Court, under any statute or by any statute provided to be exercised by said Court, where the same does not conflict with the provisions of this Act."

It was evidently intended by this statute to transfer from the Courts of Sessions to the Boards of Supervisors the general and special powers and duties of a civil character which had before the Act been vested in the former Courts. It was not the design, in this manner, to repeal any law, general or special, before existing; but as, under the decision of *Burgoyne v. The Supervisors*, 5 Cal. 9, a question of the constitutionality of those laws which conferred duties and powers, not of criminal cognizance, was made, the Legislature meant to remove

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the difficulty by transferring all these functions to the Boards of Supervisors. The language of the Act is so express as to leave no doubt that this particular power was meant to be included.

It is said that the Act for the relief of Bircham did not sufficiently define this particular recognizance. But this was a question of identity, and we think the Court below was well warranted in its finding.

It is also urged that the Act of 1854 was void, because the Court of Sessions could not constitutionally exercise the function committed to it, and, therefore, the general Act of 1855, already quoted from, transferring the powers before given by law to the Courts of Sessions to the Boards of Supervisors, is not to be construed to embrace such powers. But this would do away with the whole effect in this respect of the Act of 1855; for all the Acts giving these civil powers to the Court of Sessions are exposed to the same objection. We do not see, however, why the Legislature may not use or refer to an Act unconstitutional in itself to indicate its will in respect to a constitutional purpose. The question is, at last, a question of legislative intent, and this intent may be accomplished by a reference to an unconstitutional Act, as a means of giving or transferring a power. This was very clearly done by the Act of 1855, which referred to these Acts, not for the purpose of giving them validity as they stood, but for the purpose of divesting these Acts of their supposed unconstitutional features, and lodging the same powers in different hands. This is not to validate void Acts, but to make Acts, void because the powers were misplaced, valid for the future, by placing those powers in constitutional hands. It seems to us that this suggestion is an answer to the argument, even upon the very liberal concession that the Act of 1854 was unconstitutional — a concession made only for the convenience of the argument.

The objection that the District Attorney had a claim of ten per cent. on the amounts collected in such cases, and therefore the Legislature could not release the debt, cannot be sustained. - There is no difference in this respect between a private litigant and the Government in such cases, and the question has been settled in cases of individual litigation. If, however, the District Attorney has any claim, when no money is collected on a judgment of this kind, this does not prevent a settlement of this controversy or a release of the claim by the Government, leav-

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ing the Attorney his claim on the conscience of the Government for remuneration, in cases where he has rendered all the services, and is only prevented by the action of the Government from collecting the debt.

Nor do we consider that there is anything in the point, that the action of the Board of Supervisors was not complete. The record of the proceedings of the Board, under the seal of the Board, was sufficient evidence, until directly impeached, of what they import, or, at the least, we do not see any fatal error in the Court below, under the circumstances, giving credence to this proof.

The judgment is affirmed.

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The interest of the occupant of a mining claim is property, and, under the Constitution, it is in the power of the Legislature to tax such property.

The whole course of legislation and judicial decisions in this State, since its organization, has recognised a qualified ownership of the mines in private individuals.

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation; and it is not perceived that the fact that the property of the Government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the Government, not an incident to the property.

There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture.

The universal standard of value is the amount of money which can be realised by a sale of the property, and this will apply as well to mining claims as other lands.

The Legislature having expressly exempted mining claims from the operation of the Revenue Act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them.

Money invested in the purchase and opening of mining claims, is not within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever."

APPEAL from the Fourteenth District, County of Nevada.

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This is an appeal by defendant from a *pro forma* judgment rendered for the plaintiffs in an action instituted to try the legality of the tax levied on the money expended in the purchase of mining claims.

The pleadings and agreed statement show the following facts, viz:— that the defendant's claims are situated upon, and form a part of the public domain of the United States: that the sum of twenty thousand dollars were paid by him some three years since for such claims; and that the further sum of five hundred dollars has been expended in constructing a tunnel for the working of the same.

On the nineteenth day of July, 1858, the County Assessor proceeded to assess the sums above mentioned, as the property of defendant; and on the twenty-first day of July, 1858, this suit was instituted to recover the amount of the tax alleged to be due thereon.

McConnell & Niles for Appellant.

I. The assessment in this case was contrary to the Statute Law of this State, and the defendant is under no legal obligation to pay the amount for which he was assessed.

This is the proposition upon which we shall chiefly rely, and to which we shall direct the bulk of our reasoning.

The Revenue Law of this State expressly exempts mining claims from taxation. Revenue Act, sec. 2; Wood's Dig. p. 416, article 3,004.

This portion of the Act is certainly direct and unambiguous enough to satisfy any one.

But a part of another section of the law has given rise to the construction now sought to be fastened upon it by respondents.

Section 5, of the same Act, in defining the several sorts of property mentioned in the Act, uses the following language: "The term personal property, whenever used in this Act, shall be deemed and taken to mean, and it is hereby declared to mean and include all household and kitchen furniture; all law, medical, and miscellaneous libraries; all goods, wares, and merchandise; all chattels, of every kind and description; all money on hand, or on deposit in banks or with individuals; all money at interest, secured by mortgage or otherwise; gold dust, solvent debts, stocks of goods on hand, horses, mules, oxen,

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cows, calves, beef cattle, hogs, sheep, goats, &c., &c.; all works and improvements; all store ships and hulks; all steamers, &c.; *all capital loaned, invested or employed in any trade, commerce, or business whatsoever,*" &c., &c. Wood's Digest, p. 616.

It is said, we believe, that mining is one of the many sorts of business contemplated by the statute; and, therefore, money invested in mining is personal property within the meaning of the Act; and that being personal property, within the meaning of the Act, it is therefore subject to taxation.

In the case at bar, the capital assessed was expended in the *purchase* of mining ground. That is to say, at the time it was assessed and the amount of the tax ascertained, it had actually ceased to belong to the person in whose name it was assessed, (the defendant) but had passed to and become the property of those from whom he purchased. The result would be, that the defendant would pay taxes upon the property of another man — while at the same time the recipient of the money — the vendor of the claims would be paying the taxes on it simply as money.

The *reductio ad absurdum* was never more applicable than here. It establishes beyond a doubt, that the money paid by the defendant for his claims, cannot be taxed as *capital*.

It may be urged, however, that the object of the Legislature was to compel all kinds of business and persons to contribute something towards the support of the State.

That therefore, while exempting mining claims, *eo nomine*, from taxation, because of the great uncertainty of their yield, and the hazardous nature of the business, they still intended, in those cases where an individual had, by paying a given sum for a mining claim, ascertained and fixed its value, to compel him to pay taxes upon the value so ascertained and fixed by his own act. We say it is possible this position may be assumed. But it is scarcely probable; for it assumes the existence of a difference which does not exist, between a mining claim and the pecuniary value of a mining claim.

It is true, that the logician or the metaphysician may discover a distinction between a thing and its value; but in the common affairs of life, the terms are more frequently used as synonymous. Capital,

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in its broadest sense, as used by philosophers and political economists, means everything of value, which is created by labor. But in the restricted and ordinary sense — the sense in which the statute uses it — it means money. Money is used as a universal representative of capital — a fixed and definite, though purely conventional standard of value. At the same time, it is not an absolute, but a relative standard; a standard that may and does vary, as circumstances vary.

The word "value" is defined to mean "that property, or those properties of a thing which render it useful or estimable; or the degree of that property, or of such properties. The real value of a thing, is its utility; its power, or capacity of procuring or producing good." Webster's Dictionary, verb. "value."

It is said by one, that if "a man seized of lands in fee, by his deed granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery *secundam formam chartæ*, then the whole land itself doth pass; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever, parcel of the land doth pass." Coke on Lit. 4, (b.)

The word "profit" is defined to mean a gain or advantage arising either from labor, or the use of a thing. It is not a quality or property of the thing, but exists apart from it; while the word "value" includes all of those inherent qualities or properties which concur to make the thing useful or desirable to men.

If, therefore, the word profit, when used in a conveyance, will pass the land, the word *value* will have at least the same operation.

We would here remark, that the authorities bearing on this question are very few.

The case of *Raguet v. Wade*, is that most nearly in point. The question in that case was, whether the Act of the Ohio Legislature, taxing capital employed in trading in foreign goods, &c., was constitutional. This is a very different question from that presented by the present case. But it will be seen by a careful perusal of that case, that the Ohio Court regarded the statute as laying a tax on the foreign goods themselves. That is, they treated the terms, "capital employed in trading in foreign goods," as meaning no more or less than "foreign goods;" and the decision went off on the general

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ground of the right of the State to tax all goods, whether domestic or foreign. *Raguet v. Wade*, 4 Hammond Ohio Rep. p. 108-115.

It seems to us conclusive, from the foregoing, that a tax upon the value of defendant's claims, as ascertained by the price he paid for them three years since, is a tax upon the mining claim itself. The only difference between such a tax, and a direct tax upon the claim, consists in the one being upon the actual value of the claim, and the other being upon an arbitrary value, ascertained and fixed in an arbitrary manner.

By the first mode, the price paid is not considered — the only inquiry being as to the *present value*; by the other mode, the *present value* is of no consequence, the only question being — what did the owner pay for it?

Hence, according to the latter method, it is quite possible for a man to pay an enormous tax upon a thing which possesses no present pecuniary value. If money expended in the purchase of mining claims can be taxed at all, it follows that the time of the purchase cannot affect the right to tax. Hence, a man may have expended twenty thousand dollars in buying claims three years ago, (as in the case at bar); he may have extracted so great a proportion of the gold therefrom as to leave them comparatively valueless; still, if respondents' reasoning is correct, he is liable to pay taxes on the money which ceased to be his three years ago, notwithstanding the decrease in the actual value of the claims.

We think such a doctrine is at war with the entire theory of taxation. A tax, properly so called, is a contribution imposed by the Government, and paid by the citizen for the support of the State. Story on the Const., sec. 472; Webster's Dic. verb. Tax.

It is imposed, either on the person of the citizen, or upon his property. In either case, it is regarded as the equivalent which the citizen pays for that protection which the State alone can give him. In the one case, it is the price he pays to secure his personal safety; in the other, to secure the safety of his property.

But if the purchaser of a mining claim pays taxes on the purchase money, he is really paying the State for its protection of another man's money, and not of his own. This conclusion is evident, pro-

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vided we regard the tax as being imposed upon the money paid, rather than upon the value of the claim; in which last case, it is, as we have shown, a tax upon the claim itself, and therefore inhibited by law.

The entire difficulty of the case seems to us to consist in the erroneous sense which the respondents put upon the language of the statute.

The operative words of the fifth section are: "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever" — and the question is, in what sense did our lawgivers use the words "loaned, invested, and employed?"

The word "loan" has but one meaning, and that is its ordinary one.

The word "invest" is more comprehensive, and includes loan. When applied to the use of money, or capital, it is thus defined — "literally, to clothe money in something; as, to *invest* money in funded or bank stock; to *invest* it in lands or goods." Webster's Dic. verb. *Invest*.

Burrill defines it — "to lay out money or capital in some permanent form, so as to produce an income; to clothe in it something. Properly applied to capital not actively employed." 2 Burrill's Law Dict. verb. *Invest*.

Undoubtedly, the word "invest" is often applied to money expended in the purchase of property. But it would seem that it is only used in reference to that class of purchases, where the thing purchased itself partakes of a pecuniary nature.

We have found but a single judicial exposition of the meaning of this word, and that favors the view which we have taken of it.

We allude to the case of *The People v. The Utica Insurance Co.*, 15 Johns. Rep., p. 391.

When a law, or a part of a law, is susceptible of two constructions — the one consistent, sensible, and constitutional — the other inconsistent, absurd, or unreasonable — the former will be preferred.

"Every interpretation that leads to an absurdity, ought to be rejected." Smith's Const. and Stat. Constr., p. 631, sec. 486.

"In mixed interpretation, the rule prevails that we must give to all doubtful words or expressions that sense which will make them produce some effect; and this effect must in general be a reasonable one,

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and it must likewise be the same that the lawgivers intended to produce. * * * * * If the words or expressions are ambiguous, and are susceptible of two senses, either of which will produce some effect, the rule then goes further, and says that the effect must be a reasonable one." *Ib.*, p. 672, sec. 527.

By construing the word "invest" to mean no more than to *use* or *employ*, we avoid all difficulties and absurd consequences.

There is one other aspect in which this case may be presented by the respondent — and to which we shall refer, viz: The defendant is engaged in the business of mining, and the purchase of mining claims is simply an incident, or a necessary branch of that business. When therefore he bought the claims mentioned in the complaint, he thereby *invested money in the business of mining*.

It seems to us this is only another phase of the several positions against which we have been contending. It affects to draw a distinction between the business or employment of mining, and the mining claims upon which the business or employment is exercised. Such a distinction is rather a metaphysical subtlety, than a legal, practical entity. As a test of value, it has no existence at all. We say of a man owning and working mining claims, that he is engaged in the business of mining. But his business, apart from his claims, and the tools and engines with which he operates, has no tangible value. A man's business cannot, with strict propriety, be termed *property*. It is a mere abstraction — an intangible, an incorporeal offspring of the brain. It cannot, as such, become the subject of litigation in the Courts; nor can it ever be directly subjected to the payment of taxes.

The capital employed in a particular business, or the revenue arising therefrom, may be, and frequently is made liable for taxes; but never, we believe, the business itself.

We presume it will not be contended that mining claims, as such, are not exempt from taxation. The language of the Act is as direct and specific as it well can be; and whatever may have been the intention of the Legislature in the fifth section, they certainly intended by the second section to exempt mining claims. The whole Act must be construed together; and according to the principle already laid down, if one construction of the fifth section is consistent, and another incon-

sistent with the plain meaning of the second section—the latter construction must be rejected.

But does the miner have an *estate* properly so called in his claim? Has he such an interest as can be termed *property* in any just sense of the word? We do not think he has—and predicate our opinion upon the following grounds.

It seems to be conceded on every hand, that the gold miner's right to seek for gold on the public domain, must be referred to some implied permission from the State and Federal Governments. This Court has, in fact, on more than one occasion asserted the existence of such a permission; but it has never gone so far as to define the nature and degree thereof.

In common parlance, we speak of it as "an implied grant;" forgetting that it has none of the elements of a grant. For if we presume a grant, we thereby presume all title out of the Government. No Court in this State has yet gone so far as to ignore the primary and paramount title of Government.

Besides, the phrase "implied grant" has been used to characterize the supposed title of the miner, in those cases only where the controversy was between private parties. In a contest between the Government itself and one of its citizens, all implications and inferences cease; and the rights of the latter must be made to depend upon the actual, and not the supposed relation he occupies towards the State. As between the State and a citizen, it is absurd to say that the Court will presume a grant to the latter of the privilege of mining upon a particular portion of the public land. The Court will presume nothing. It will take the facts as it finds them; and it will find them amply sufficient to protect the rights of the citizen. The tacit acquiescence of the State and Federal Governments—to say nothing of their positive legislation—is sufficient to prove an *actual license* to him, and nothing more.

Our own opinion at least, is, that the miner operates by virtue of an *actual* (not *implied* merely) *parol license*; and that he has only the rights which such a license can confer on him.

A parol license passes no title, estate, or interest in the thing which is the subject of the license. It gives neither a *jus ad rem*, nor a *jus*

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in re. It is not one of the received common assurances of the country. It does not figure in the books as a mode of passing title. In some few cases, Courts of Equity have interfered to prevent the perpetration of a wrong by the revocation of the license; but even those cases have not gone off upon the idea of any estate having passed to the recipient of the license.

The right acquired by a parol license, cannot in any sense of the word be called *property*. It is a mere privilege—a transient, evanescent, and revokable right. It cannot descend to his heirs, or pass to his administrators. A wife shall not be endowed of it—nor can a creditor subject it to his execution. Possessing no single element of property, it cannot, of course, be subject to taxation. Who will pretend that A's license to take fruit from B's orchard, is liable to taxation? Yet that would be as rational a pretense, as to say that the license of the State to this defendant to take gold from its mines is liable to pay taxes.

Upon this subject of parol license we refer the Court to the following authorities: Prince v. Case, 10 Conn. R., p. 375—383; 2 Hare & Wallace, Am. Leading Cas., p. 676 and note; Rerick v. Kem, 14 Serg. & Rawle, p. 267; Wood v. Lebetter, 13 Mees. & Wels., p. 838; Angell on Watercourses, secs. 285, 288, 293, 295; 3 Kent's Com., p. 452; 7 Taunton, 384—2 Eng. Com. L. Rep.

II. The tunnel of defendant is not by law subject to taxation; and therefore the assessment upon the same is contrary to law, and void.

It is quite evident that the County Assessor viewed the defendant's tunnel in the light of an "improvement," and therefore assessed it as such.

The miner's tunnel is usually a long, horizontal, subterranean excavation, passing into claims situated on hills or mountains, and starting from some point lower than the bed rock of the claims themselves. It is used for the two fold purpose of draining the water from the ground, and of taking out the pay dirt. Formerly, perpendicular shafts or wells were sunk from the surface of the claims, until the gravel or pay dirt was reached. But this mode was subject to serious drawbacks, arising chiefly from the accumulation of water in the shaft, and the danger of caving.

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A tunnel is really nothing more than a horizontal *shaft*, (if the expression may be allowed) and answers the same purpose, though in a far more perfect manner. After a tunnel reaches the claims, the miners dig small auxiliary tunnels, or drifts to the right and left, by means of which they reach the lead, and take out the gravel that contains the gold. When shafts were in use, these drifts were also used in connection with them.

We cannot perceive any solid reason for calling a tunnel an improvement, or for separating it from the claim of which it forms part.

It is as much a part of the claim itself as a shaft, or any slight excavation in the claim. The fact that it usually costs far more money than other kinds of excavations, does not strengthen the argument against us. It is not the cost of a thing, but the use to which it is put, that must determine whether it is an improvement or not. Apart from the claims, it has not a particle of value. It is really an appurtenance to the claims; and in a conveyance of the claims, and *their appurtenances*, the tunnel would pass *ex vi termini*.

In practice, the claim and the tunnel or shaft are regarded as being identical. A man is said to work on his claims when he is at work on his tunnel, though at a considerable distance from his claims. This view of their identity has been adopted by this Court, and applied in a case in which the tunnel was commenced at a considerable distance from the claims. *Packer et als. v. Warren Heaton et als.*, 9 Cal. 568.

Are we not warranted in the conclusion, that the express statutory exemption, by force of necessary inference, also exempts the tunnel as an appurtenance or incident of the claims? Assuredly; for notwithstanding the general rule that laws exempting property from taxation are to be construed strictly, there is no doubt that the exemption of the principal will enure *ex vi termini* to exempt the incident. Grants by the sovereign must receive a strict construction. Yet we well know that a grant by the Government of the principal thing will, by its own force pass the incident. The exemption of a farm will operate to exempt a right of way, or easement in running water pertaining to the farm, as well as all buildings erected thereon. So the exemption of a school-house or church will amount to an exemption of the portion of

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land which is attached to it as a necessary appurtenance, as a church-yard or burial-ground.

It matters little to this view of the question, whether a tunnel is an "improvement," or not; for the tunnel is exempted as a necessary part or appurtenance of the claim.

But we maintain that a miner's tunnel is not an *improvement* within the meaning of the law. The claim to tax works of this sort is predicated, we suppose, on the fourth and fifth sections of the Revenue Act. Wood's Dig., p. 616, art. 3006, 3007.

The fourth section declares that the Assessor shall prepare a list, etc., of the various kinds of property of each inhabitant in his county, in which he is to set down "the cash value of all improvements on public lands;" and the fifth section defines "personal property" within the meaning of the Act, to consist of a great variety of things, among which are "all works and improvements."

The word "improvement" is defined by Webster to mean "valuable additions or meliorations, as buildings, clearings, drains, fences, etc."

Burrill thus defines it: "Improvements, a term used in leases, which, according to Mr. Chitty, is sometimes of doubtful meaning. It would seem to apply principally to buildings, though generally it extends to the amelioration of every description of property, whether real or personal; but when contained in any document, its meaning is generally explained by other words"—and he refers to 1 Chitty, Gen. Practice. p. 174. Burrill's Law Dict., verb. *Improvements*.

Mr. Hilliard, speaking of "permanent improvements," instances buildings, clearings and road making, as examples. 1 Hilliard on Real Prop., p. 337.

The word *improvement* would seem to import something in the nature of a *structure*—something erected or built upon the surface of the land.

The meaning of the Legislature seems to have been to include those structures so very common in the mining region of the State, erected for habitations, for manufacturing purposes, or for purposes of trade. In many cases the owner of the improvements can scarcely be said to claim any interest in the soil upon which they are erected. Many of them contain machinery, used for a variety of purposes, but chiefly for sawing lumber and crushing quartz rock. Such machinery was mani-

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festly intended by the term "works" coupled with "improvements." See cases cited *supra*, on the Law of *Parol Licenses*.

Attorney General for Respondent.

It is well settled that the "power of taxation among independent nations is unrestricted as to things, and, with the exception of Foreign: Embassadors and agents, and their retinues, is unlimited as to persons." It may extend to all professions, trades, occupations, and *business property*. *People v. Coleman*, 4 Cal., and *People v. Naglee*, 1 Cal., page 232.

From the foregoing it follows, necessarily, that the Legislature has the power to tax "money invested in mining claims," or "capital invested in the business of mining."

"Capital, as applied to individuals," is those objects whether consisting of money or property which a merchant trader or *other person* adventures in an undertaking, or which he contributes to the common stock of a partnership."

It also, when used in a limited sense, "signifies money put out at interest."

The rule is, that "words of a statute, when not used in a technical sense, must be construed according to their ordinary signification."

Apply the rule to the Revenue Act, and the unavoidable conclusion is, that the Legislature meant by capital "that which a person adventures in an undertaking." This position is fortified by other language formed in the same section of the Act; for in the enumeration of objects and things which shall be held to be included within the term "personal property," we find preceding the word capital, "*all money at interest* secured by mortgage or otherwise."

If I am in error, the Legislature was guilty of repetition and an unnecessary use of terms; but if correct, then all is consistent and coherent.

"Invest" comes from the Latin word "*investio*," which signifies to "clothe" or adorn; and when applied to money means literally to clothe it (money) in something.

Ordinarily we mean, "to lay it (money) out in such manner as to

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bring in a revenue," though it is evident that the use of the term may be extended beyond the definition given.

Webster defines "Business" thus: "Employment; that which occupies the time, attention and labor of men for the purpose of profit or improvement; a *word of extension, use, and indefinite signification*. *Business* is a particular occupation, as agriculture, trade, mechanic art or profession; the subject of employment; that which engages the care and attention."

Mining occupies the time, attention and labor of men, and they follow it for profit. It is the one employment of the largest class of our population; in a word, it is their business. We speak of it daily as such; and if you ask a man who engages in that employment what his *business* is? he readily answers you, "Mining."

Mining was the *business* in which appellant was engaged when he gave the list of his property.

When the Legislature used this term, they meant it to be taken in its ordinary signification.

It therefore follows, from what has been said, that when a man's *money* is *invested* in a mining claim, or his "capital" is so "clothed" or "employed," he is the owner of "personal property" within the meaning of the Act which "declares" that the term "personal property," whenever used in that Act, shall be taken to include "all capital" loaned, invested or "employed in any trade, commerce, or business whatsoever."

But they say that this is an indirect mode of assessing the mining claim, and that the Act expressly exempts the claim. I admit the latter, but deny the former position.

The tax upon the business of mining, or the capital invested, is no more a direct tax upon the claim, than the tax upon the business of consigned goods is a tax *upon the goods*, or a license given to a foreigner to work in the mines, is an interference with the power of the General Government, to make rules and regulations respecting the territory of the United States; both of which points have been passed upon by this Court, in the case of the *People v. Naglee*, and the *People v. Coleman*, which I have cited. In fact, upon a review of those cases I find the distinction so clearly drawn below the exercise of the power to tax a particular business, and that of an object with

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which such business is connected, as to render it unnecessary to dwell longer upon this point.

I submit, that if the language used in the Revenue Act will bear two constructions, then it is incumbent upon this Court to adopt that which will bring about an "equal and uniform operation" of the law, and compel each class of the community to contribute its quota toward the support of that Government from which it receives protection.

The argument in reference to first branch of the case, applies equally to the question of the tunnel valued at five hundred dollars.

The tunnel was an "improvement upon lands of the United States" owned by appellant, and was therefore "personal property" within the meaning of the Act. It should have been assessed at such sum as he *valued* it, or, if he refused to *value* it, then the law requires the Assessor to do so. 1 McCord's Rep., S. C., page 217.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

Defendant is the owner of a certain mining claim, for which he paid the sum of twenty thousand dollars, and upon which, since the purchase, he has expended the sum of five hundred dollars in opening a tunnel.

These sums were assessed against him, as money invested in the business of mining. The object of this action is to test the legality of this assessment, and the questions presented are: 1st. Whether, under the Constitution, it is in the power of the Legislature to tax mining claims; and 2d. Whether money invested in the purchase and opening of such claims, is within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever."

Upon the first of these propositions we entertain no doubt. The only objection to the power of the Legislature to impose such a tax arises from the fact that the mines are the property of the Government, and are exempt from taxation under the Act admitting California into the Union. This fact, however, if admitted, does not, in our view, militate against the right to levy a tax upon the interest of the possessor of such claim. The whole course of legislation and judicial

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decisions in this State, since its organization, has recognized a qualified ownership of the mines in private individuals. Contracts affecting mining claims have been constantly enforced; remedies have been afforded to those whose possession has been disturbed, or whose claims have been trespassed upon by others, and the right of the locator to sell, hypothecate, or in any manner dispose of his property in a mining claim, has been upheld, as well by legislative enactment as by judicial decisions.

In *Tarter v. Spring Creek Company*, 5 Cal. 395, the Court held that "the policy of this State, as derived from her Legislature, is to permit sellers, in all capacities, to occupy the public lands, and by such occupation, to acquire the right of undisturbed enjoyment against all the world but the true owner."

In evidence of this, Acts have been passed to protect the possession of agricultural lands acquired by mere occupancy; to license miners; to provide for the recovery of mining claims, etc., "and that an appropriation of a portion of the public domain, or any of its incidents," establishes a *quasi* private proprietorship which entitles the holder to be protected in its quiet enjoyment.

In the *Merced Mining Company v. Fremont*, 7 Cal. 312, we held that the possessor of a mining claim "by his appropriation acquires a vested interest in the exclusive occupation and enjoyment of the land as against all the world, subject only to the right of the Government by whose license and permission his possession was acquired; and his right to protect the property for the time being, is as full and perfect as if he were the tenant of the superior proprietor for year or for life;" and in *McKeon v. Bisbee*, 9 Cal. 137, we held that the interest of the possessor of a mining claim was property under the law, and subject to be seized and sold under execution.

The Legislature recognized a proprietary interest in the possessor of mining claims by authorizing their hypothecation. See Wood's Dig., page 108, art. 416.

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation, and it

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is not perceived that the fact, that the property of the Government is exempt from taxation, affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the Government not an incident to the property.

In the hands of the Government, the lands are exempt, but the moment the title vests in a private individual, it becomes liable to the burthens which are imposed on other property of like character. If the acquisition of the fee by a private person subjects the property to taxation, it follows that the acquisition of a lesser estate would equally subject such estate.

There is no force in the objection that the value of a mining claim, which depends upon the amount of precious metals it contains, must necessarily be left to conjecture.

The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. Sales and hypothecations of mining claims are of every-day occurrence, and we apprehend their value can be ascertained with sufficient accuracy.

Upon the second proposition it is contended that though mining claims are by the statute expressly exempted from taxation, yet the money expended in their purchase and working is liable, as so much capital invested in the business of mining.

This rule would be manifestly unequal, and would in a large class of cases be productive of palpable injustice, hardship and oppression; it would exempt the first locator of a claim from taxation, while his vendee would be compelled to pay a percentage upon the purchase price, although the value of the claim at the date of the assessment might not be a tithe of the sum. The claim may yield no return whatever; may prove entirely valueless for any purpose; yet the price paid would, under the rule contended for, be a *permanent* "investment of capital," and the party compelled to pay yearly a percentage on the amount.

Or take the case of a party who, after locating a claim, sells a moiety to another for a large sum, the interest of each is equally valuable and equally protected by the Government, yet one is required to contribute to the support of the Government in return for the benefits

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afforded, while the other, who is in the enjoyment of the same benefits, contributes nothing. We think a consequence so manifestly absurd, unjust and oppressive, was never intended by the Legislature.

We do not understand a sum paid for the purchase of specific property to be so much capital invested. The mere purchase of property can in no just sense be said to be an investment of capital in the business for which the property is adapted or might be used. The purchaser parts with all interest in the money paid; he has no longer any claim upon it; and if the transaction constitute an investment of capital, the value of the property, and not the sum paid for it, is the amount of the "capital invested." As well might the purchaser of a farm be required to pay taxes on the price paid as so much "capital invested in the business" of farming as the purchaser of a mining claim upon the cost of such claim.

For the purposes of taxation there is no distinction between a thing and its value; it is the value which is assessed, and upon which the tax is imposed, and an exemption of certain property from taxation exempts its value also.

Our conclusions are: 1st. That the interest of the occupant of a mining claim is property liable to be subjected, at the will of the Legislature, to such burthens as are imposed on other property. 2d. That the Legislature having expressly exempted mining claims from the operation of the Revenue Act, we cannot presume that it intended indirectly to subject them, by levying a tax on the price paid for them, which would, as we have shown, be a partial and unequal mode of ascertaining the value, and, in a majority of cases, be productive of great injustice.

It follows that the judgment of the Court below is erroneous, and it is reversed with costs.

Killey v. Scannell.

KILLEY v. SCANNELL.

Lawful possession of personal property is *prima facie* evidence of ownership; and property thus possessed, is *prima facie* liable to be seized under a writ of attachment against the party in possession of such property.

In an action against a Sheriff to recover property thus seized, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action.

In such a case, it is not necessary that the defendant should specially plead want of notice and demand, in order to make such a defense.

APPEAL from the Fourth District, County of San Francisco.

This was an action to recover the possession or the value of certain personal property, comprising the furniture, fixtures and stock of the "Empire State Saloon."

The property was, on the nineteenth day of February, 1857, seized by the defendant as Sheriff of San Francisco county, under an attachment against one Wilson. Prior to the seizure of the property by the defendant, the plaintiff, by an instrument in writing, bargained and sold the property to Wilson, and, by the terms of the agreement, the property was to be delivered and paid for on the fourteenth day of February, 1857. On that day, Wilson paid a part of the purchase money, and the time for the payment of the balance was extended to the twenty-fourth of the same month. On the fourteenth of February, Wilson and one Kirk were in possession of the property, and appear to have been the proprietors of the saloon. This possession continued up to the time of the seizure of the property by the defendant as Sheriff.

The plaintiff's complaint contains no allegation, nor was there any proof on his part, of notice of his claim or demand of the property, prior to the bringing of this action.

Plaintiff had judgment on the report of a referee, to whom the case had been referred. The judgment was afterwards vacated and a new trial granted,— the District Judge rendering the opinion which follows the opinion of the Court in this case. Plaintiff appealed to this Court from the order granting a new trial.

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J. Clark for Appellant.

1st. Conceding that the defendant's view of the law touching the liability of the Sheriff is correct, a new trial was not the proper mode of securing his right.

The facts had all been specially found by the referee, and no objection made to such finding. It was only his conclusions of law, and the judgment entered in conformity thereto, that was really in question.

This could have been raised upon motion, or upon appeal. No one of the seven causes for a new trial specified in the Act was or could have been assigned as ground for the motion for a new trial, the latter being merely a re-examination of an issue of fact. Practice Act, secs. 192 and 187; *Gruyson v. Gould*, 4 Cal. 122.

2d. The plea of justification alleging that the property was taken under process against a third person (alleged to be the owner of it) is held as *amounting to the general issue*.

To have obtained the protection which it is claimed the Sheriff is entitled to — that is, that he should not be liable to an action until demand, where the property taken was in the apparent possession of the person against whom the process was directed, he should have pleaded these matters specially, traversing the claim of damages, without claiming a return of the property. *Chitty's Pleadings*, vol. 1, p. 556 to 564.

3d. A Sheriff taking property under a replevin order, is protected against all the world, except upon affidavit and notice by statute. See Practice Act, sec. 109.

With this exception, as against the true owners, the Sheriff under process against a third person can claim no other protection or right than that of such third person himself.

Delos Lake for Respondent.

1. The property being in the lawful possession of Kirk and Wilson, it was the duty of the defendant as Sheriff, with process against them, to levy on and seize it, and he was not a trespasser for so doing. *Camp v. Chamberlin*, 5 Denio, 199; 8 Bar. and Cress. 132; *Williams v. Lownds*, 1 Hall Superior Court R. 595; *Bond v. Ward*, 7 Mass. 123.

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2. No action, therefore, can be maintained against the defendant without a demand by the true owner. 6 Cal. R. 43; *Ib.* 512.

3. On the finding of facts by the referee, the defendant is entitled to judgment final for the return of the property or its value, as found by the referee. No new trial is necessary.

4. The order setting aside the referee's report should be affirmed, and the Court below directed to enter judgment for a return of the property; and in case return cannot be had, that defendant recover six hundred and fifty dollars, with costs.

TREY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

The judgment is affirmed for the reasons given in the written opinion of the Judge of the Fourth District filed in the record.

The following is the opinion of the District Judge referred to in the foregoing opinion of this Court:

"There is no allegation or proof on the part of the plaintiff that he either gave notice of his claim to, or demanded the property in question of, the defendant before the commencement of his action. Wilson being in the possession at the time of the levy, and having apparently the control of the property, was *prima facie* the owner. It was the official duty of the defendant as Sheriff to levy on all property found in the possession of Wilson as ostensible owner, and this property under the proof was *prima facie* liable to be attached. If it was in fact the property of the plaintiff or any other person, the real owner might have made his claim to it, and tried the question of title in a summary way, as authorized by our statute or by an action of this kind.

"Defendant having seized the property by virtue of his office and process, while in the possession of the party defendant mentioned in the writ, was entitled to notice and demand from plaintiff before he can be held liable to an action for the possession or value. Neither is it necessary, as was contended in the argument, that in order to make this defense defendant should specially plead want of notice and demand. After the defendant proved the possession was in Wilson at

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the time of the seizure, and justified under the process against him, the *onus* was on plaintiff to show affirmatively a proper demand and notice to enable him to recover.

“Report set aside and new trial ordered.

“HAGER, Judge.”

BURNETT v. THE MAYOR AND COMMON COUNCIL OF THE CITY OF SACRAMENTO.

Where the Charter of the City of Sacramento authorized the Common Council to levy a special assessment for grading and improving the streets of the city, and provided, that when the Council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement within ten days after the last publication, it shall not be made; and a protest was presented more than ten days after the last publication of such notice: *Held*, that such protest was not presented in time, and was therefore ineffectual; further *Held*, that it must appear that one-third of the owners in value of the adjacent property united in it.

An Ordinance for the improvement of the streets passed by the Council before the expiration of the time for the presentation of the protest, is not thereby invalid. The statute only inhibits the Council from proceeding with the improvement in case of such protest, and it was competent for them to pass the ordinance in advance of the time, provided they did not attempt to enforce it until afterwards. That provision of the Charter authorizing the improvement, and the mode and manner of the assessment, is not in conflict with the 13th Section of Article XI of the Constitution of this State.

That section provides for equality and uniformity of taxation upon property, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the Government of the State, or of some county or town. It has no reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested.

For the expenses of such improvements, it is competent for the Legislature to provide, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto, and specially benefited thereby.

The power of apportionment, with the power of taxation, is exclusively in the Legislature. The Constitution contains no inhibition to the tax, and prescribes no rule of apportionment.

APPEAL from the Sixth District, County of Sacramento.

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This was an action brought to recover of the City of Sacramento money paid by plaintiff, as an assessment upon his lots, for the grading and improving the streets adjacent thereto. The following facts appear in the opinion of the Court:

By the second section of the Act of March, 1853, amending the Charter of Sacramento, the Common Council of the city are authorized to levy, by ordinance, special assessments for grading or otherwise improving any portion of the streets or alleys of the city on the adjacent property situated on the line of the improvement.

By the third section of the Act of April, 1853, "to extend and better define the powers of the City Council," it is provided, that whenever the Common Council shall think it expedient to open, alter or improve any street or alley, they shall give notice thereof by publication, for ten days, in some daily paper published in the city; and, should one-third of all the owners in value, as shown by the last general assessment of the adjacent property, protest against the proposed improvement within ten days after the last day of publication, then it shall not be made; but otherwise, the Common Council shall proceed with the improvement, the expenses of which shall be borne by the adjacent property.

Under the authority of these sections, the Common Council, on the thirtieth of July, 1855, passed an ordinance requiring notice to be given that they thought it expedient to improve K street, between Eighth and Twelfth streets, by grading it, and directed publication of the notice for ten days in the *Tribune*, at that time a daily newspaper of the city. The ordinance was approved by the Mayor on the following day. The notice was published for the required period, the last publication being on the fifteenth of August; and on the twentieth of August, no protest or remonstrance having in the meantime been made, the ordinance for the improvement was passed, and on the twenty-first was duly approved. Defendant had judgment, and plaintiff appealed to this Court.

John Heard for Appellant.

I. The assessment is not a legitimate exercise of the taxing power, but an order of the Council to appropriate certain private property to

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public use without just compensation, and is a direct violation of section 8, article 1st of the State Constitution.

It is not a tax, because it is not a common burden imposed upon any State, county, town, village, district or other local public, known to the law. There is therefore no uniformity or equality in the assessment. See 5th Dana, 28; 9 Dana, 114 and 512; 6 Barbour's Sup. Ct. Rep. 209, and sec. 13, article XI, State Constitution.

Sec. 13, art. XI of the Constitution provides: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but Assessors and Collectors of town, county and State taxes shall be elected by the qualified electors of the district, county or town in which the property assessed for State, county or town purposes is situated." It is evident that the members of the Convention did not contemplate any subdivision of the districts or local publics named in this section; and I insist that the Legislature, much less the Common Council, cannot subdivide a city or county into districts, for the purpose of taxing the districts, without violating the letter and spirit of this section of the Constitution in many of its most valuable provisions; and I will suggest three of the leading principles of this section of the Constitution which would be violated by such a subdivision.

1st. The tax would not be *equal* and *uniform*.

2d. The Assessors and Collectors of the tax would not be elected by the qualified electors of the district taxed. Consequently the Assessors and Collectors would not owe that responsibility to the persons to be taxed which the Constitution contemplates.

3d. The taxing power (the City Council) is not elected by or responsible to the persons taxed, which is a clear violation of the spirit and intention of this provision of the Constitution.

To recognize such a power in the Council would be to disregard a fundamental principle in our Government — that is, that taxation and representation should go together; and to substitute for equality and uniformity in taxation, gross inequality and private plunder.

II. The provision of the 3d section of the Act amendatory of the Charter of the City, (Compiled Laws, p. 969) are restrictions upon the power of the Common Council to improve and to tax; and unless

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these restrictions are complied with, the action of the Council is unauthorized and void. Notice of their intention to improve is therefore essential to the validity of their ordinance to improve. In this case no legal or sufficient notice was given of the intention of the Common Council to improve; for by the most favorable computation of time, the Council passed the ordinance two days before they had lawful right to do so, and the ordinance was approved by the Mayor at least one day before it could lawfully be passed; nor does their proceedings upon some remonstrances after the passage of the ordinance give it vitality. No notice of an intention to receive remonstrances was given after they passed the ordinance, consequently those interested could not then be expected to remonstrate.

These are the principal points arising from the record in this case; and while I cheerfully admit that there are respectable authorities opposing the first point which I have made, I do insist that the view that I have taken of the want of Constitutional authority to levy such an assessment is most consonant with the spirit of our Constitution, with sound philosophy and the weight of authority.

I will say, in conclusion, that the position assumed by the learned counsel of the respondents at the trial, that "there is a third mode of taking private property for public use, to wit, by assessment," is so new, and so destitute of either reason or authority, that I have not thought proper to answer it.

All the cases that I have met with assume, that taxation and the right of eminent domain are the only means of divesting a citizen of his property for public use.

Winans & Moore for Respondent.

1. The statute under which respondents acted was Constitutional.

A statute which authorizes a municipal corporation to grade and improve streets, and to assess the expense among the owners and occupants of lands benefited by the improvement, in proportion to the amount of such benefit, is a Constitutional and valid law. The People v. The Mayor, etc., 4 Comstock, 419, 429, *et seq.* (overruling People v. Mayor, etc., 6 Barbour, 209, cited by appellant); People v. Coleman, 4 Cal. 46; Extension of Hancock street, 18 Penn. State, (6

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Harris) 26; *City of Lexington v. McQuillon*, 9th Dana, 523; *People v. Naglee*, 1 Cal. 252, 253; which last case we think is decisive of the point.

II. The proceedings of respondents, as shown by the record, were in entire conformity with the requirements of the statute.

These proceedings were instituted and perfected under an Act defining the powers of the Council of the City of Sacramento, passed April 26, 1853. Compiled Laws of Cal. 968, 969.

The proceedings of respondents were had and taken under sec. 3 of that Act, which provides, that "when the Common Council shall think it expedient to improve a street or alley, they shall give notice thereof by publication for ten days in some daily paper published in said city."

Should one-third of all owners in value, as shown by the last general assessment of the adjacent property, protest against the proposed improvement within ten days after the last day of said publication, it shall not then be made. If no such protest be made, the Common Council shall proceed with such improvement, the expenses of which shall be borne by the property adjacent.

Thus it will be perceived, that the Council are required to give ten days' notice of their intention to improve a street or alley, in a daily paper published in said city; and after the expiration of such ten days, a further period of ten days is allowed for protest or remonstrance on the part of owners.

The record shows that the ordinance giving notice of intention to improve the street in question, was passed by the City Council July 30th, 1855, and published in the *Tribune*, a daily newspaper of said city, from August 1st to August 15th of said year inclusive.

Thus, the ten days' notice required by the statute extended from August 1st to August 10th inclusive, and the further ten days' time allowed to owners to protest or remonstrate extended from August 10th to August 20th inclusive. The transcript further shows that the ordinance to improve said street (no protest or remonstrance having been made or filed) was passed by the City Council on the night of August 20th, at half-past ten o'clock, P. M., and approved by the Mayor August 21st.

It is not pretended by appellant that any protest whatever against

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such improvement was made by owners during the ten days allowed by the statute, and the transcript shows that no such protest was filed until August 27th, six days after the expiration of the statutory time. The protest, therefore, was a nullity, and entirely ineffectual. Moreover, an inspection of the record will show that one-third of the owners in value did not unite in protesting against the improvement. This, however, was unimportant, as the protest was not made in time, and therefore null. But appellant contends, that inasmuch as the owners of adjacent property were allowed by the statute until the expiration of the twentieth of August to protest, the City Council had no right to act until the twenty-first, and, therefore, the ordinance that they passed on the night of the twentieth, directing the improvement in question, was a nullity, and that, therefore, respondents cannot enforce payment from the owners of the improvement subsequently made.

To this we answer: *First*. That the said ordinance was not approved by the Mayor, and therefore did not take effect until the twenty-first, when it first became a law; and, *Secondly*. The statute does not prohibit the Council from "making an ordinance" within the ten days allowed for the protest, directing the improvement, *but* from "making the improvement" itself within that time. It was perfectly competent, therefore, for the Council at any time after the expiration of the ten days' notice given by them, to pass an ordinance directing the improvement, provided they did not attempt to enforce such ordinance, nor proceed with the improvement, until the ten days allowed for protest had expired, and of course not then, if any statutory protest had been presented within that time. In other words, the statute does not render the ordinance ordering the improvement, but "the making" of the proposed improvement, the substantial thing. The record shows that the contract for doing the work was not made till September 7th, nor approved by the Council till September 10th, and the work was not commenced till a long period after that. From which facts we gather the following conclusions:

First. One-third of the owners did not protest against the proposed improvement.

Second. No protest was made within the statutory time of ten days.

Third. Respondents duly advertised the proposed improvement for ten days.

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Fourth. After the expiration of such ten days, they waited more than ten days longer before they proceeded with the proposed improvement.

Fifth. The ordinance which they passed on the twentieth of August, and which was approved upon the twenty-first, was neither "a making of" nor a "proceeding with" the proposed improvement.

We submit, therefore, that the proceedings of respondents were in all respects regular, and that the judgment should be affirmed.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The protest presented on the twenty-seventh of August was ineffectual, for the reason that it was not made until after the expiration of the statutory time, and the further reason that it does not appear that one-third of the owners in value of the adjacent property united in it. The passage of the ordinance on the twentieth, and its approval on the twenty-first, are of no consequence. Its validity is not affected, even if it were passed and approved before the expiration of the time limited for protest. The statute only inhibits the Council from proceeding with the improvement in case of such protest, and it was competent for them to pass the ordinance in advance of the time, provided they did not attempt to enforce it until afterwards. The contract for the work was not made until September 7th, or approved until September 10th, and the work was not commenced until some time afterwards.

The case before the Court is thus stripped of all objections to the regularity of the proceedings of the Common Council, and the appeal must be determined upon the constitutionality of the provisions of the law under which the defendants acted. The contemplated improvement was made, the street was graded, and the expenses were assessed upon the adjacent property. The amount levied upon the property of the plaintiff, was two hundred and ten dollars. This he paid under protest to prevent a sale, and now brings his action to recover back the money.

The appellant contends that the law in authorizing special assessments for the expenses of improvement upon the adjacent property,

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conflicts with the eighth section of Article I of the Constitution, which provides that private property shall not be taken for public use, without just compensation, and the thirteenth section of Article XI, which provides that taxation shall be equal and uniform throughout the State.

Whether the taking of private property in the opening of a street, and the apportioning of the expenses among the owners of adjacent property would be within the prohibition of the eighth section of the first article of the Constitution, it is unnecessary to determine. Our impressions are, that it would not be if such expenses were assessed upon the property in proportion to the amount of benefit produced; but this question does not properly arise in the case at bar. Here there has been no exercise of the right of eminent domain. No private property of the plaintiff has been taken for public use. His land remains untouched. The street was previously opened, and it is that which has been improved by grading. The assessment is the tax levied to meet the expenses of the improvement. Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is, that the compensation must be either made, or a fund provided for it in advance.

The assessment, therefore, must rest for its validity upon its being a legitimate exercise of the taxing power. The thirteenth section of Article XI of the Constitution does not cover the case. That section provides for equality and uniformity of taxation upon property, but applies, in our judgment, only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the Government of the State, or of some county or town. We do not think it has any reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested. For the expenses of such improvements, it is competent for the Legislature to provide, either by general taxation upon

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the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto and specially benefited thereby. The law in question places the burthen upon the adjacent property, which is a far more equitable apportionment than if imposed upon the entire property of the city. There would, indeed, be manifest injustice in levying a general tax for a local improvement which produces a great benefit to the owners of property in its vicinity, but lessens, perhaps, at the same time, the value of property at a distant part of the city. In such taxation there would be no equality. "It is wrong," says Ruggles, J., in delivering the opinion of the Court of Appeals of New York, in *The People v. the Mayor of Brooklyn*, (4 Coms. 419) "that a few should be taxed for the benefit of the whole, and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires, that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burthen. There being no Constitutional prohibition, the Legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county or district lines. General taxation for such local objects is manifestly unjust. It burthens those who are not benefited, and benefits those who are not burthened. This injustice has led to the substitution of street assessments, in place of general taxation; and it seems impossible to deny that in the theory of their apportionment, they are far more equitable than general taxation, for the purpose they are designed for.

The law in question avoids the injustice of general taxation for local purposes, and lays the burthen upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property, which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, with the power of taxation, is exclusively in the Legislature. The Constitution contains no inhibition to the tax,

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and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the Legislature, and their responsibility to their constituents. See the *People v. the Mayor of Brooklyn*, 4 Comstock, 419, and the cases cited in the opinion of the Court and the briefs of counsel, which latter are in the appendix to the volume, 607.

Judgment affirmed.

CROSBY v. WATKINS *et al.*

Rais v. Norton, 4 Cal. 355, affirmed.

Where a party contracts for a quantity of wheat, to be delivered on demand and paid for on delivery, in an action for non-delivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit.

In such a case the measure of damages is, the difference between the contract price and the value of the article sold.

APPEAL from the Ninth District, County of Tehama.

This was an action for damages for the non-delivery of a quantity of wheat purchased by plaintiff of defendants.

The facts as stated by the Court are as follows: H. M. Stone, the agent of the plaintiff, contracted with the defendants for the purchase of a quantity of wheat, at the price of two cents and a half per pound, to be delivered upon demand and paid for on delivery. The contract was made by Stone, in his own name, without disclosing his principal. Within the time limited by the contract, plaintiff, through Stone, notified the defendants that he was ready to receive and pay for the wheat under the contract, and demanded a delivery, which the defendants refused. The contract price of the wheat was two and a half cents per pound, and the Court finds that at the time of demand and refusal to deliver, it was worth four cents per pound. Plaintiffs had judgment for the difference between the contract price and the actual value of the wheat, and from this judgment the defendant appeals.

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Crocker & Robinson for Appellants.

I. The action should have been in the name of Stone as plaintiff, or, at least, he should have been made a party. In no other way could the liability of defendants to Stone upon the written contract be based. *Newcomb v. Clark*, 1 Denio, 226; *Argenti v. Brannan*, 5 Cal. 351; *Price v. Dunlap*, *Ib.* 483; *Phillips v. Husband*, *Ib.* 509; 12 Pick. 554; 15 Mass. 286; 13 *Ib.* 396-404; 13 John. Rep. 88.

When a promise is made to a third person, for the benefit of the plaintiff, the complaint must state it to have been made according to the fact; and it is a fatal variance to aver that the promise was made to the plaintiff. *Hall v. Huntoon*, 17 Vermont, 244; 11 Vermont, 79.

In this case, the contract was made by defendants with Stone in his own name, and he is the *only party against whom they could have enforced it*; there is, therefore, no *mutuality* or privity between plaintiff and defendants.

A contract must be *mutual* to be binding. *Chitty on Contracts*, 15; 5 Cal. Rep. 351, 509.

The judgment in this case is *no bar* to an action upon the contract in the name of Stone. He is not a party to the record, and is not therefore estopped by the judgment.

A judgment cannot be pleaded in bar, unless between the same parties. *Cleaton v. Chambliss*, 6 Randall, 86; 1 Dw. & Batt. 486; 1 Cooke, 305; 6 Conn. 508; 1 A. K. Marsh, 179; 1 McCord, 338.

In equity, the person having the legal title in the subject must be a party, though he has no beneficial interest, that the legal right may be bound by the decree of the Court. *Mitford Ch. Pleadings*, 206; (179).

Treating this as an action of law, then the *legal* title to the contract is in Stone, (it having been made to him, and he having never assigned it) and the action should have been in his name. Treating it as a suit in equity, then still Stone should have been made a party under the foregoing well established rule.

At law, the party who has the legal interest in the contract must be the plaintiff. 4 Dana, 474; 7 Munroe, 416.

The legal interest in a contract is in the person to whom the promise

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is made, and he is the person who must bring the action. 17 Vermont, 244; 11 Vt. 79.

II. There is no averment in the complaint, or sufficient proof on the trial, of a *tender* of the price of the wheat and a refusal to receive it.

Under this contract the acts of the parties are *concurrent*; that is, defendants could not sue on it without a demand of the price and an offer to deliver, and the plaintiff cannot recover without a *tender* of the price and a demand of the wheat.

When the acts to be done by each party are to occur at the same period, neither party can sue on the contract without showing an *offer* or *tender* of performance on his part. 1 Cal. Rep. 42, 51, 337; 2 *Ib.* 163; 4 *Ib.* 282; Littell Sel. Cases, 253; Chitty on Contracts, 746; (638).

Robinson, Beatty & Heacock for Respondent.

The only question of importance to be considered by the Court in determining this cause is, whether the plaintiff, since Stone did not reveal his agency, or the name of his principal, at the time of making the contract, is entitled to sue and recover.

There are many conflicting authorities on this point; but the general current of modern decisions would seem to fully sustain the proposition that the principal may sue or be sued upon a contract entered into by his agent, whether such agent reveals such agency or discovers the name of his principal or not. Story on Agency, p. 156; Ruiz v. Norton *et al.*, 4 Cal. 358; Sims v. Bond, 5 Byam & Ad.; Taintor v. Prendergrast, 3d Hill N. Y. Rep., page 72; Hicks v. Whitmore, 12 Wend. Rep., page 548; 2d Kent Com., sec. 41, marginal page 632; Story on Agency, sec. 160, and the authorities there cited; Smith's Merc'y Law, b. 1, ch. 5, sec. 5, page 139-140, and the authorities there cited.

TERRY, C. J., after stating the facts, delivered the opinion of the Court — BALDWIN, J., concurring.

Two questions are presented by the record: *First*, whether the plaintiff can sue in his own name on the contract; and *second*, whether

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he can recover in this action without showing a tender of the price agreed on.

The first point is answered by the decision of this Court in *Ruiz v. Norton*, 4 Cal., 355.

Upon the second point, Mr. Parsona, in his work on Contracts, vol. 1, p. 449, states the rule to be as follows: "In every sale, unless otherwise expressed, there is an implied condition that the price shall be paid before the buyer has a right to possession; and that is a condition precedent. But it seems, that in an action for non-delivery, the buyer need only aver that he was *ready* and willing to receive and pay for them, and a refusal to deliver, without averring an actual tender."

In such cases, the measure of damages is the difference between the contract price and the actual value of the articles sold. 3 Parsona, 481, note A.

Judgment affirmed.

EASTERLING v. POWER *et al.*

The judgment in this case reversed, on the ground that the evidence did not justify the verdict.

APPEAL from the Tenth District, County of Yuba.

This action was brought in the Court below by the respondent to recover of the appellants the sum of five hundred dollars, an alleged balance of account for flour sold and delivered, and for packing done for appellants.

The answer denies any indebtedness for *flour*, and admits the claim of respondent for five hundred dollars for packing goods, but pleads a promissory note in defense.

The note is set out in the answer, and is in these words:

"\$1,050.00.

"On demand, for value received, I promise to pay C. Arnold, or

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bearer, one thousand and fifty dollars, in packing, from time to time, at the going rates, within ninety days from date.

"MARYSVILLE, April 7, 1856.

J. W. EASTERLING."

The answer further says, that by special agreement entered into by said Easterling, the amount of said packing was to be applied on said note; and the truth of this plea is fully sustained by the testimony of three or four witnesses.

The cause was tried by a jury, who returned a verdict for the plaintiff. Defendant appealed to this Court.

E. D. Wheeler for Appellants.

Bryan & Filkins for Respondent.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

The evidence in this case does not sustain the verdict, and the Court erred in refusing a new trial. It is immaterial whether, at the time the packing was done by plaintiff for defendants, the note was owned by defendants or Goodwin. The evidence shows, that at the time the goods were delivered to plaintiff for transportation, it was agreed that the freight should be credited on the note; and, admitting the note to have been the property of Goodwin, we can see no objection to his becoming paymaster, if he chose to do so, and looking to the defendant to be reimbursed.

Judgment reversed, and cause remanded.

FRATT *et al.* v. CLARK.

Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property.

APPEAL from the Sixth District, County of Sacramento.

Fratt v. Clark.

This was an action of assumpsit to recover the value of certain cattle, the property of plaintiffs, unlawfully taken by the defendant.

The complaint is in two counts, trover and assumpsit. The defendant demurred to the complaint on the ground that two causes of action were improperly united; to wit, trover and assumpsit. The record does not show how this demurrer was disposed of, but it is supposed to have been overruled, as the cause was tried by a jury who returned a verdict for the plaintiffs. Defendant moved for a new trial, which was denied, and he appealed to this Court.

J. C. Zabriskie for Appellant.

Clark & Gass for Respondent.

The complaint was not demurrable. *Hillman v. Hillman*, 14 Howard Prac. Rep. 456; *Dorman v. Killam*, *Ib.* 184-202; *Badger v. Benedict*, 4 Abb. 176.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

This is an action in assumpsit for the value of certain cattle. The evidence shows that the defendant, who was a butcher, unlawfully and without authority took plaintiff's cattle, which he slaughtered and sold to various persons.

The appellant objects that the evidence does not sustain the allegations in the complaint. The objection is not tenable. It is well settled, that where a person takes and sells the property of another, without authority, the party aggrieved may waive the tort and sue in assumpsit for the price received at such sale, or for the value of the property so taken. The rule is thus expressed in *Burley v. Taylor*, 5 Hill, 582, by Mr. Justice Cowan: "If trover would have lain, it follows that an action for money had and received will lie for the price or for the value as goods sold and delivered at the election of the plaintiff;" and a great many authorities, American and English, are cited in support of the doctrine.

Judgment affirmed.

May v. Borel.

MAY v. BOREL *et al.*

Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage.

APPEAL from the Sixth District, County of Sacramento.

A statement of facts appear in the opinion of the Court.

Thos. Sunderland for Appellant.

Clark & Gass for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

This was a bill filed in equity to enjoin the sale of certain real estate, and to set aside and cancel the mortgage made by the defendant, Jonghaus, to John H. Gass, and by him transferred with the note before due to defendant, Borel. On the third of January, 1856, the legal title to the property in question was in John H. Gass, who on that day conveyed it to Jonghaus. On the same day Jonghaus mortgaged the property to Gass as security for the payment of the note of two thousand dollars. The note and mortgage was delivered by Gass to a third party to be negotiated, and was, before maturity, assigned for a valuable consideration to defendant, Borel. On the ninth of January, at the instance of one R. H. Stanley, who was acting as the agent of the plaintiff, the deed from Gass to Jonghaus was destroyed, and another taken, conveying the same property with other property. Jonghaus then conveyed to Walker, who was a grantor of the plaintiff. At the time of the destruction of the first deed from Gass to Jonghaus, and the execution of the second, Stanley had notice of the existence of defendant's mortgage and of the first deed from Gass to Jonghaus.

Under these circumstances, we see no reason to doubt the correctness of the order dissolving the injunction. Plaintiff's agent having actual knowledge of the defendant's mortgage, plaintiff must be deemed to have taken the property subject to it.

Judgment affirmed.

Wheatley v. Strobe and Wilcoxson.

WHEATLEY v. STROBE, AND WILCOXSON *et al.*, INTERVENORS.

The following written order possesses all the requisites of an inland bill of exchange: "MR. STROBE:— Please pay the bearer of these lines two hundred and thirty six dollars, and charge the same to my account."

The insertion of the word "*please*" does not alter the character of the instrument.

Such an order being a bill of exchange, the written acceptance of the party to whom it is addressed, is necessary to charge him as acceptor under our statute. His verbal acceptance is not sufficient.

Where the order is given for a valuable consideration, and for the whole amount of the demand against the drawee, though worthless as a bill, it operates as an assignment of the debt or fund against which it is drawn.

The want of a written acceptance does not affect the right of the payee to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment.

After the delivery and presentation of the order, the debt due by the drawee could not be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order would be an effectual protection, as it would also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee.

APPEAL from the Sixth District, County of Sacramento.

This was an action of assumpsit to recover a sum of money. The facts as they appear in the opinion of the Court, are as follows:

As appears from the record in this case, Strobe was indebted to Wheatley, and Wheatley to Howel, and Howel to Wilcoxson & Co. To pay his debt, Wheatley gave Howell an order on Strobe for \$236, payable to bearer. This order is not set forth in the record, but is admitted by counsel to be in the following form:

"SAC. CITY, July 18, 1857.

MR. STROBE:— Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account.

E. D. WHEATLEY."

On the twenty-fifth of July the order was presented to Strobe, and by him was verbally accepted. No acceptance in writing was made.

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Soon afterwards Wilcoxson & Co., whose demand against Howel was in judgment, and upon which they had previously issued execution, garnished the debt, if any, due by Strobe to Howel, by virtue of this order. Subsequently Wheatley commenced the present suit against Strobe to recover the original debt. Strobe admitted the original indebtedness, but set up the order, his verbal acceptance, and the garnishment of Wilcoxson & Co., and prayed that Howel and Wilcoxson & Co. might be made parties, and he be allowed to pay the amount into Court. Wilcoxson & Co. filed a petition of intervention, setting up substantially the same facts, with the additional fact that the order was given for a debt due by Wheatley to Howel, and asserting a right to the amount of the debt by virtue of their garnishment, and praying judgment in their favor for the same. The plaintiff demurred to the answer of Strobe; the demurrer was sustained, and, with the judgment entered thereon, the petition of intervention was denied. Defendant appealed to this Court.

P. L. Edwards for Appellant.

I. At common law a parol acceptance of a bill of exchange was sufficient. Story on Bills of Exchange, 291, sec. 242; Byles on Bills of Exchange, page 237.

If, however, the paper under examination is a bill of exchange, then it comes within the provisions of our statute, and a parol acceptance is insufficient to bind the acceptor, and of consequence, for the want of mutuality, it cannot bind the other parties. Wood's Digest, p. 72, sec. 6.

That this paper is not a bill of exchange, is apparent from the considerations:

1st. It is essential to a bill or note, that it be payable in money only, at all events not out of a particular fund. It must direct the payment of the money without condition and at all events. Byles on Bills of Exchange, 59 and 154, note; Story on Bills of Exchange, p. 60, sec. 46.

A case in all respects similar, if not identical with this, is that of *Little v. Shackford*, 21 Eng. Com. L. R. 498, to which attention is particularly invited.

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2d. The terms of the paper express the request to pay as a favor, and are not those of mere civility. If so, there is no absolute direction for the payment of the money, and it is therefore not a bill of exchange. Story on Bills of Exchange, 47, sec. 33. Byles on Bills of Exchange, 59-60 and notes.

II. If the instrument is not a bill of exchange, what is it? or is it anything? If anything, it is an order or request for the payment of money, and although defective and worthless as a bill of exchange, still it may be evidence of a valid agreement. Byles on Bills of Exchange, 155.

A owes B a sum of money, and B owes C the like sum, and the three agree that B shall be discharged, and that A shall pay the sum directly to C; the contract is without the statute of fraud, and in every way valid. Chitty on Contracts, 451, 453.

The release of the legal right which the respondents had against Strobe, was a sufficient consideration for the promises of the latter to pay to Howel, and binds all. 1st Parsons on Contracts, 369.

It was not necessary that all the parties should be present together, and assenting to the agreement. It was sufficient that all assented before any withdrawal of the proposition. In this view the order was a proposition on the part of the respondent to pay his debt to Howel by the promise of Strobe. The respondent assented by *giving the order*; Howel assented by receiving it, and Strobe assented by *accepting and agreeing to pay* Howel instead of respondents. Thus there was a sufficient consideration without the statute of fraud, and the debt became one owing directly from Strobe to Howel, which was the subject of garnishment by the Messrs. Wilcoxson & Co.

III. In any view it will be difficult to resist the conclusion that the drawing and delivery of the order operated as an assignment of the demand from the respondents in favor of Howel against Strobe. The rule is, that when the *drawee* of an order is the debtor of the *drawer*, then the order is to be regarded as an assignment of the debt. Quin v. Hanford, 1 Hill N. Y., 82; Byles on Bills of Exchange, 59-60, and notes.

Besides, the case shows that it was the intention to draw for the whole of the *particular fund*, to wit, the whole of the indebtedness

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from Strobe to the respondents, for wood sold and delivered; and "where an order is drawn for the whole of a *particular fund*, it amounts to an equitable assignment of the fund." *Mandeville v. Welch*, 5 Wheat. R., 286.

See the whole question satisfactorily settled in 3 *Leading Equity Cases*, 206, 233.

IV. We submit that the *whole* controversy, in all its aspects, could and *ought* to have been determined in this action. In support of the view presented on this point, we think it unnecessary to cite any authorities other than that of *Van Buskirk, Admr. v. Roy*, (8 How. Prac. R. 425); *Voorhies' New Code*, (Ed. of 1855, p. 119; note *d*) and keeping in view the difference between our statute and that of New York, 1 *Whitaker's Practice*, 82, 83, 84.

H. H. Hartley for Respondents.

The paper drawn on Strobe by Wheatley was an inland bill of exchange; it had all the requisites to make it such; it was in writing, contained an order to pay absolutely a certain sum of money, and was directed to a certain party. *Story on Bills*, 33.

The insertion of the word *please* in the order does not vary its effect; the using of terms of politeness in a commercial paper is not to be construed into asking a favor and not demanding a right.

A drawing of a bill will be deemed a demand of a right, not asking a favor, where the language is susceptible of two interpretations; when it is deemed as a favor only, the language used must repel in an unequivocal manner, the presumption it was claimed as a right. *Story on Bills*, sec. 33.

The case of *Settle v. Shealford*, 22 Eng. Com. L. R. 498, is commented on in the foot note to *Story on Bills*, sec. 33, and very properly doubted as sound law; numerous authorities are there referred to, which held a different doctrine. *Ruffo Webb*, 1 Espin. R., 129; *Chitty on Bills*, 150, 151, 175.

In France the word *please* is always used; "*Il vous plait payer*," etc. *Diet du Natorial art. Letter de Change*, Tom. 4, p. 592, 593.

The paper was therefore a good bill of exchange. It was held in England in *Sproat v. Mathers*, 1 Term Rep. 482, that a parol

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acceptance of a bill was good, but the law in England has been changed by 1 and 2 Geo. IV., chap. 78. After that Act no acceptance was valid, save in writing; but this is regulated by statute in our own State. Wood's Dig., p. 72, art. 182, sec. C, enacted that no person shall be charged as an acceptor of a bill of exchange unless his acceptance is in writing, and signed by himself or agent.

Strobe not having accepted the bill, therefore was not in any manner bound upon it to any person whatsoever.

The bill or order being payable to bearer, and if accepted at all, only accepted in favor of the bearer or holder who should present it for payment, was not the subject of garnishment by the intervenors. The payor of a negotiable instrument cannot be garnisheed. Cal. Rep. p.

By the acceptance, if it can be claimed such, the appellant Strobe bound himself to pay the bearer of the note, and not Howel the debtor of the intervenors — the lawful holder of the bill who could only take advantage of the acceptance. Story on Bills, sec. 113.

It is sufficient answer to the second point made by appellant, that the paper, if it was not a bill, certainly, till the payment, did not operate as a discharge of Strobe's debt to Wheatley, he, at most, by his promise only agreed to pay the holder of the order on presentation. There was no promise absolutely to pay Howel, nor even were that so, would it operate so as to prevent Howel from returning the order to the drawer Wheatley, and demanding from him its amount.

The drawing of the order or bill could not operate as an assignment of the debt, so as to vest it in Howel, because there was no assent of Howel so to receive it; and even did it so operate, there was nothing in the transaction to limit and confine it between Howel and Strobe. Howel could have disposed of it to an innocent purchaser, who could have fallen back and claimed the amount from the original drawer, as was done in this case.

The intervenors had no right to come into Court and litigate between parties plaintiff and defendant.

A garnishment is no defense except between actual parties.

Wilcoxson has fixed the liability of Strobe, if he is at all liable, and he must decide that for himself.

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The demurrers were properly sustained, and the judgments of the Court below were correct.

FIELD, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

Upon the facts in this case the appellants make two points: *First*. That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and, *Second*. If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisities of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "*please*" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked. Story on Bills, sec. 33 and notes; 3 Kent, 74.

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient. Act concerning Bills of Exchange, sec. 6. Upon the order, therefore, he is not liable.

But the second point is well taken. The order, though not available as a bill of exchange against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howel. It was given for an antecedent debt, and for the full amount of the demand against Strobe; the consideration was valuable, and there was no splitting of the amount due into distinct and different causes of action; and in such cases it is well settled that an order, whether accepted or not, operates as an assignment of the debt, or fund against which it is drawn.

The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he

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must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the partly beneficially interested. Courts of law, equally with Courts of equity, gave effect to assignments, like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee. *Mandeville v. Welch*, 5 Wheat. 277; *Corser v. Craig*, 1 Wash. C. C. 427; *Blin v. Prince*, 20 Vt. 25; *Wheeler v. Wheeler*, 9 Cowen, 34; *Nesmith v. Drum*, 8 Seargt. & Watts, 9; *Robins v. Bacon*, 3 Greenl. 346; *Adamson v. Robinson*, 1 Pick. 461.

After the delivery and presentation of the order, the debt due by Strobe could not be reached on attachment issued by the creditors of Wheatley. As against any attempt by them to enforce its payment upon any such proceeding, the order would be an effectual protection; and we do not perceive why it should not equally avail as against the suit of the assignor himself, unless it is made to appear that such suit is prosecuted for the benefit of the assignee. *Drake on Attach.*, chap. 37; *Black v. Paul*, 10 Mo. 103; *Lovely v. Caldwell*, 4 Ala. 684; *Corser v. Craig*, 1 Wash. C. C. 424.

In this State, all actions are required, with some few specified exceptions, to be brought in the name of the real party in interest, (*Prac. Act*, sec. 4). In the present case, upon the facts alleged in the answer, and which are admitted by the demurrer to be true, it is clear that the plaintiff is not the real party in interest, and there is no allegation in the complaint that the suit is prosecuted for the benefit of Howel. A judgment recovered by Wheatley after the presentation of the order, without notice to the assignee, would be no protection to the defendant against a suit by the assignee for the same demand.

The position of the defendant is not unlike that of a party summoned as garnishee, after receiving notice of an assignment by his creditor of the demand; if he fails in answering to set up the assignment, and judgment in consequence passes against him as a debtor of the assignor, it will not afford protection against a suit by the assignee. *Nugent v. Opdyke*, 9 Robinson, 453; *Crayton v. Clark*, 11 Ala. 787; *Foster v. White*, 9 Porter, 221.

Kirk v. Reynolds — Reynolds v. Harris.

Upon the facts set up in the answer, we are of opinion that the prayer of the defendant should have been granted; that he should have had leave to deposit the amount in suit in Court, and that process should have issued to bring in Howel, and that Wilcoxson & Co. should have been allowed to intervene.

The rights between the plaintiff and Howel to the demand due by Strobe, should be first determined, and afterwards the claim asserted by the intervenors disposed of. This claim, of course, can only be a matter for consideration in case the money is adjudged to have been at the time of the alleged attachment the property of Howel. *Van Buskirk, Adm. v. Roy*, 8 How. Prac. 425.

Judgment reversed, and cause remanded for further proceedings.

KIRK v. REYNOLDS *et al.*, AND REYNOLDS v. HARRIS.

A party cannot be permitted to prosecute two separate and distinct remedies, in the Supreme Court, for a review of the same question at the same time.

APPEAL from the Eleventh District, County of El Dorado.

John Hume for Appellants.

Sanderson & Newell for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This is a proceeding in the nature of a bill of review, the object of which is to procure an examination and reversal of the decree of the Court below in case of *Raun v. Reynolds and Kirk*, 11 Cal. 14, on the ground of error apparent in the record.

The plaintiff appealed from the decree in the original case, and the same questions raised by this record were presented in this Court on the appeal. As a party cannot be permitted to prosecute two separate and distinct remedies in this Court for a review of the same question at the same time, the appeal is dismissed.

Judith Jordan and Ann H. Jordan v. Giblin.

JUDITH JORDAN AND ANN H. JORDAN v. GIBLIN,
KELLY, *et al.*

A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant.

An affidavit which avers a cause of action against the defendant — that defendant cannot after due diligence be found in the State — that summons has been issued but Sheriff cannot find him — that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county — is insufficient to authorize the Court to appoint an attorney to represent such absent defendant.

Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction.

APPEAL from the Fourth District, County of San Francisco.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of the City of San Francisco, at the suit of the defendants, Giblin and Kelly.

The plaintiffs, one the wife, and the other the infant daughter of Michael Jordan, claimed the title to the property by virtue of two deeds of conveyance from Benj. F. Watkins, and others, to them and Michael Jordan, and also by deed from Michael to them.

The question which this Court has considered in its opinion is, as to the jurisdiction of the Superior Court over the person of the defendant, Michael Jordan, in the actions upon which the judgments were obtained, and under which the defendants sought to sell the property in question. The facts upon which those judgments were obtained, are as follows:

At the time of the institution of the suits, and for several days thereafter, the defendant was a resident of the City of San Francisco. Some days after the bringing of said actions, he left this State and has continued absent ever since, his family continuing to reside in San Francisco. No service of summons was had on him prior to his departure, nor was there any publication of the summons, except only in the case of Giblin, and that only for the period of thirty days. No

Judith Jordan and Ann H. Jordan v. Giblin.

order was made directing a copy of the complaint and summons to be deposited in the post office, directed to said defendant at his place of residence, nor was any so sent; nor was an attorney appointed to defend the action; nor was there any appearance in said action on the part of the defendant. In the case of *Abrams v. Jordan et al.*, the following affidavit was made for the purpose of having an attorney to represent Jordan.

"Thomas Giblin, being duly sworn, says he is one of the plaintiffs above named. That said plaintiffs have a cause of action against the said defendants, for the sum of six hundred and thirty-nine dollars, being balance due from said defendants to said plaintiffs, for work and labor performed, and materials furnished, by said plaintiffs for said defendants, in the building of some houses in the City of San Francisco. * * * That said defendant, Jordan, cannot, after due diligence, be found within the State of California. That a summons has been issued against the said Jordan in said action, but the Sheriff of the County of San Francisco cannot find him. That the residence of said Jordan is in the City of San Francisco, and he has still a family, consisting of a wife and children, there residing.

"Sworn to, etc.

THOS. GIBLIN."

Upon this affidavit an attorney was appointed for Jordan.

Plaintiffs had judgment in the Court below, and defendants appealed to this Court.

F. M. & H. H. Haight for Appellants.

H. S. Love for Respondents.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of San Francisco at the suit of the appellants against Michael Jordan. The property is claimed by respondents.

Two principal questions are made by the record. *First.* That the

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title of appellants is superior in law and equity to that of Jordan, the defendant in these executions. *Second.* That the appellants had no right to subject the property to sale, for the reason that the judgments are void for want of jurisdiction in the Court rendering them.

It is conceded, that if these judgments are out of the way, the title of the respondents is good, and that they have a right to intervene in this form to protect it. We are inclined to think that the Court below was right in holding in favor of respondents on the first proposition; but it is unnecessary, in our view, to pass definitely upon this point, inasmuch as we think the decree below should be affirmed on the second ground above stated.

The ground of the want of jurisdiction of the Superior Court is, that there was no personal or other sufficient service of notice of the actions in the cases of *Gibben v. Jordan*, 6 Cal. 416, and *Abrams v. Jordan*, in which cases these executions issued:

The facts connected with this point are these: At the time of the institution of this suit, and for several days afterwards, the defendant Jordan was a resident of San Francisco; at the time of the affidavit for an order of service by publication, in the case of *Giblin v. Jordan*, he was beyond the limits of the State, and has not since returned. The statute requires that in cases where the party to be served is out of the State, publication must be made at least three months. *Prac. Act*, sec. 31.

In the case of *Abrams*, the affidavit does not show a state of facts authorizing the appointment of attorney. The record does not show that any summons had been issued and placed in the hands of the proper officer, or that any effort had been made to find the defendant in order that he might be personally served. We have already held, in proceedings of this character, where service is attempted in modes different from the course in common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.

Judgment affirmed.

Hutchinson v. Burr.

HUTCHINSON v. BURR, et al., FUND COMMISSIONERS, ETC.

In a bill to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners created by the Act of April 20, 1858, for the claims approved by the Board of Examiners, it is necessary that some of the persons to whom the bonds are to be issued, should be made parties to the action.

APPEAL from the Fourth District, County of San Francisco.

This was an action by bill to enjoin the defendants, as a Board of Fund Commissioners, from issuing bonds of the City and County of San Francisco, to the holders of claims against the city which had been approved by the Board of Examiners created by the Act of April 20, 1858. None of the persons to whom the bonds were to be issued were made parties to the action. The only parties named in the bill were the persons constituting the Board of Fund Commissioners.

The defendants demurred to the bill on general grounds, and amongst others, on the ground that "there is a defect of parties defendants," and also on the ground that "the complaint does not state facts sufficient to constitute a cause of action." The Court below sustained the demurrer on the latter ground; from which ruling of the Court, the plaintiff appealed to this Court.

Gregory Yale and F. A. Fabens for Appellant.

Hoge and Wilson for Respondents.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The plaintiff seeks to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners, created by the Act of April 20, 1858, for the claims approved by the Board of Examiners under that Act. The persons to whom, according to the report of the Examiners, the bonds are to be issued, are not made parties to the suit, and without their presence there can be no binding determination of the questions upon which the decision of this Court is desired, unless, perhaps, from the special circumstances of the case, the great

Fallon v. Dougherty.

number of persons to whom the bonds are to be issued, and the character of the questions involved, it may answer to bring in only a sufficient number to fully represent and protect the interests of all; but upon this we express no opinion. It is enough to sustain the judgment, on the demurrer, that *none* of the persons entitled to the bonds under the Act, are made parties. Judgment affirmed.

FALLON v. DOUGHERTY.

In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered.

APPEAL from the Sixth District, County of Sacramento.

This was an action of ejectment to recover possession of a lot of land in the City of Sacramento.

The plaintiff derails title through one John A. Sutter and G. W. Hammersly. On the trial she, to lay the foundation for the introduction of secondary evidence, introduced one Stevens, who testified as follows:

“The plaintiff in this action was a resident of San Francisco county. Witness was acting as her agent and attorney in fact, and was conducting this suit for her; he had made search for the original deed from Sutter to Hammersly and Murray, to ascertain where the deed was, and had made other diligent inquiry about the same, but was unable to obtain the original, or ascertain where it was, or whether it was in existence.”

There was no other evidence offered to establish the loss of the deed. The Court below ruled that this evidence was sufficient to account for the loss of the deed; and thereupon a certified copy was given in evidence: to which ruling of the Court the defendant excepted. Plaintiff

Patterson v. Supervisors of Yuba County.

had judgment. Defendant moved for a new trial, which was denied, and he appealed to this Court.

C. A. Johnson for Appellant.

Robinson, Beatty & Heacock, for Respondent.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

This case must be reversed for want of sufficient preliminary proof of the inability of the plaintiff to produce the original deed from Sutter to Hammersly, through whom she derails title to the premises in controversy, to authorize the admission of the record copy. The evidence introduced only shows a search by the agent of the plaintiff and inquiry of Hammersly. It does not appear that the plaintiff herself has not the possession or control of the original. Her affidavit, in the absence of other evidence, should have been offered on the point. *Laws* of 1857, chap. 254, sec. 2; *Macy v. Goodwin*, 6 Cal. 581; *Hensley v. Tarpey*, 7 Cal. 288; *Bagley v. Eaton*, 10 Cal. 147.

Judgment reversed, and cause remanded for a new trial.

PATTERSON v. THE BOARD OF SUPERVISORS OF YUBA COUNTY.

In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action.

An injunction cannot be granted affecting the rights and interest of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.

The case of *Hutchinson v. Burr et al.*, ante 103, affirmed.

APPEAL from the Tenth District, County of Yuba.

This was an action by bill to restrain the Board of Supervisors from issuing bonds, in pursuance of an Act of the Legislature, to the San Francisco and Marysville Railroad Company.

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acceptance of a bill was good, but the law in England has been changed by 1 and 2 Geo. IV., chap. 78. After that Act no acceptance was valid, save in writing; but this is regulated by statute in our own State. Wood's Dig., p. 72, art. 182, sec. C, enacted that no person shall be charged as an acceptor of a bill of exchange unless his acceptance is in writing, and signed by himself or agent.

Strobe not having accepted the bill, therefore was not in any manner bound upon it to any person whatsoever.

The bill or order being payable to bearer, and if accepted at all, only accepted in favor of the bearer or holder who should present it for payment, was not the subject of garnishment by the intervenors. The payor of a negotiable instrument cannot be garnisheed. Cal. Rep. p.

By the acceptance, if it can be claimed such, the appellant Strobe bound himself to pay the bearer of the note, and not Howel the debtor of the intervenors — the lawful holder of the bill who could only take advantage of the acceptance. Story on Bills, sec. 113.

It is sufficient answer to the second point made by appellant, that the paper, if it was not a bill, certainly, till the payment, did not operate as a discharge of Strobe's debt to Wheatley, he, at most, by his promise only agreed to pay the holder of the order on presentation. There was no promise absolutely to pay Howel, nor even were that so, would it operate so as to prevent Howel from returning the order to the drawer Wheatley, and demanding from him its amount.

The drawing of the order or bill could not operate as an assignment of the debt, so as to vest it in Howel, because there was no assent of Howel so to receive it; and even did it so operate, there was nothing in the transaction to limit and confine it between Howel and Strobe. Howel could have disposed of it to an innocent purchaser, who could have fallen back and claimed the amount from the original drawer, as was done in this case.

The intervenors had no right to come into Court and litigate between parties plaintiff and defendant.

A garnishment is no defense except between actual parties.

Wilcoxson has fixed the liability of Strobe, if he is at all liable, and he must decide that for himself.

Wheatley v. Strobe and Wilcoxson.

The demurrers were properly sustained, and the judgments of the Court below were correct.

FIELD, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

Upon the facts in this case the appellants make two points: *First*. That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and, *Second*. If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisities of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "*please*" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked. Story on Bills, sec. 33 and notes; 3 Kent, 74.

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient. Act concerning Bills of Exchange, sec. 6. Upon the order, therefore, he is not liable.

But the second point is well taken. The order, though not available as a bill of exchange against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howel. It was given for an antecedent debt, and for the full amount of the demand against Strobe; the consideration was valuable, and there was no splitting of the amount due into distinct and different causes of action; and in such cases it is well settled that an order, whether accepted or not, operates as an assignment of the debt, or fund against which it is drawn.

The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he

Wheatley v. Strobe and Wilcoxson.

must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the partly beneficially interested. Courts of law, equally with Courts of equity, gave effect to assignments, like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee. *Mandeville v. Welch*, 5 Wheat. 277; *Corser v. Craig*, 1 Wash. C. C. 427; *Blin v. Prince*, 20 Vt. 25; *Wheeler v. Wheeler*, 9 Cowen, 34; *Nesmith v. Drum*, 8 Seargt. & Watts, 9; *Robins v. Bacon*, 3 Greenl. 346; *Adamson v. Robinson*, 1 Pick. 461.

After the delivery and presentation of the order, the debt due by Strobe could not be reached on attachment issued by the creditors of Wheatley. As against any attempt by them to enforce its payment upon any such proceeding, the order would be an effectual protection; and we do not perceive why it should not equally avail as against the suit of the assignor himself, unless it is made to appear that such suit is prosecuted for the benefit of the assignee. *Drake on Attach.*, chap. 37; *Black v. Paul*, 10 Mo. 103; *Lovely v. Caldwell*, 4 Ala. 684; *Corser v. Craig*, 1 Wash. C. C. 424.

In this State, all actions are required, with some few specified exceptions, to be brought in the name of the real party in interest, (*Prac. Act*, sec. 4). In the present case, upon the facts alleged in the answer, and which are admitted by the demurrer to be true, it is clear that the plaintiff is not the real party in interest, and there is no allegation in the complaint that the suit is prosecuted for the benefit of Howel. A judgment recovered by Wheatley after the presentation of the order, without notice to the assignee, would be no protection to the defendant against a suit by the assignee for the same demand.

The position of the defendant is not unlike that of a party summoned as garnishee, after receiving notice of an assignment by his creditor of the demand; if he fails in answering to set up the assignment, and judgment in consequence passes against him as a debtor of the assignor, it will not afford protection against a suit by the assignee. *Nugent v. Opdyke*, 9 Robinson, 453; *Crayton v. Clark*, 11 Ala. 787; *Foster v. White*, 9 Porter, 221.

Kirk v. Reynolds — Reynolds v. Harris.

Upon the facts set up in the answer, we are of opinion that the prayer of the defendant should have been granted; that he should have had leave to deposit the amount in suit in Court, and that process should have issued to bring in Howel, and that Wilcoxson & Co. should have been allowed to intervene.

The rights between the plaintiff and Howel to the demand due by Strobe, should be first determined, and afterwards the claim asserted by the intervenors disposed of. This claim, of course, can only be a matter for consideration in case the money is adjudged to have been at the time of the alleged attachment the property of Howel. *Van Buskirk, Adm. v. Roy*, 8 How. Prac. 425.

Judgment reversed, and cause remanded for further proceedings.

KIRK v. REYNOLDS *et al.*, AND REYNOLDS v. HARRIS.

A party cannot be permitted to prosecute two separate and distinct remedies, in the Supreme Court, for a review of the same question at the same time.

APPEAL from the Eleventh District, County of El Dorado.

John Hume for Appellants.

Sanderson & Newell for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This is a proceeding in the nature of a bill of review, the object of which is to procure an examination and reversal of the decree of the Court below in case of *Raun v. Reynolds* and *Kirk*, 11 Cal. 14, on the ground of error apparent in the record.

The plaintiff appealed from the decree in the original case, and the same questions raised by this record were presented in this Court on the appeal. As a party cannot be permitted to prosecute two separate and distinct remedies in this Court for a review of the same question at the same time, the appeal is dismissed.

Wheatley v. Strobe and Wilcoxson.

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The rights between the plaintiff and Howel to the demand due by Strobe, should be first determined, and afterwards the claim asserted by the intervenors disposed of. This claim, of course, can only be a matter for consideration in case the money is adjudged to have been at the time of the alleged attachment the property of Howel. Van Buskirk, Adm. v. Roy, 8 How. Prac. 425.

Judgment reversed, and cause remanded for further proceedings.

KIRK v. REYNOLDS *et al.*, AND REYNOLDS v. HARRIS.

A party cannot be permitted to prosecute two separate and distinct remedies, in the Supreme Court, for a review of the same question at the same time.

APPEAL from the Eleventh District, County of El Dorado.

John Hume for Appellants.

Sanderson & Newell for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This is a proceeding in the nature of a bill of review, the object of which is to procure an examination and reversal of the decree of the Court below in case of Raun v. Reynolds and Kirk, 11 Cal. 14, on the ground of error apparent in the record.

The plaintiff appealed from the decree in the original case, and the same questions raised by this record were presented in this Court on the appeal. As a party cannot be permitted to prosecute two separate and distinct remedies in this Court for a review of the same question at the same time, the appeal is dismissed.

Judith Jordan and Ann H. Jordan v. Giblin.

JUDITH JORDAN AND ANN H. JORDAN v. GIBLIN,
KELLY, *et al.*

A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant.

An affidavit which avers a cause of action against the defendant — that defendant cannot after due diligence be found in the State — that summons has been issued but Sheriff cannot find him — that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county — is insufficient to authorize the Court to appoint an attorney to represent such absent defendant.

Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction.

APPEAL from the Fourth District, County of San Francisco.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of the City of San Francisco, at the suit of the defendants, Giblin and Kelly.

The plaintiffs, one the wife, and the other the infant daughter of Michael Jordan, claimed the title to the property by virtue of two deeds of conveyance from Benj. F. Watkins, and others, to them and Michael Jordan, and also by deed from Michael to them.

The question which this Court has considered in its opinion is, as to the jurisdiction of the Superior Court over the person of the defendant, Michael Jordan, in the actions upon which the judgments were obtained, and under which the defendants sought to sell the property in question. The facts upon which those judgments were obtained, are as follows:

At the time of the institution of the suits, and for several days thereafter, the defendant was a resident of the City of San Francisco. Some days after the bringing of said actions, he left this State and has continued absent ever since, his family continuing to reside in San Francisco. No service of summons was had on him prior to his departure, nor was there any publication of the summons, except only in the case of Giblin, and that only for the period of thirty days. No

Judith Jordan and Anna H. Jordan v. Giblin.

order was made directing a copy of the complaint and summons to be deposited in the post office, directed to said defendant at his place of residence, nor was any so sent; nor was an attorney appointed to defend the action; nor was there any appearance in said action on the part of the defendant. In the case of *Abrams v. Jordan et al.*, the following affidavit was made for the purpose of having an attorney to represent Jordan.

"Thomas Giblin, being duly sworn, says he is one of the plaintiffs above named. That said plaintiffs have a cause of action against the said defendants, for the sum of six hundred and thirty-nine dollars, being balance due from said defendants to said plaintiffs, for work and labor performed, and materials furnished, by said plaintiffs for said defendants, in the building of some houses in the City of San Francisco. * * * That said defendant, Jordan, cannot, after due diligence, be found within the State of California. That a summons has been issued against the said Jordan in said action, but the Sheriff of the County of San Francisco cannot find him. That the residence of said Jordan is in the City of San Francisco, and he has still a family, consisting of a wife and children, there residing.

"Sworn to, etc.

THOS. GIBLIN."

Upon this affidavit an attorney was appointed for Jordan.

Plaintiffs had judgment in the Court below, and defendants appealed to this Court.

F. M. & H. H. Haight for Appellants.

H. S. Love for Respondents.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of San Francisco at the suit of the appellants against Michael Jordan. The property is claimed by respondents.

Two principal questions are made by the record. *First.* That the

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title of appellants is superior in law and equity to that of Jordan, the defendant in these executions. *Second.* That the appellants had no right to subject the property to sale, for the reason that the judgments are void for want of jurisdiction in the Court rendering them.

It is conceded, that if these judgments are out of the way, the title of the respondents is good, and that they have a right to intervene in this form to protect it. We are inclined to think that the Court below was right in holding in favor of respondents on the first proposition; but it is unnecessary, in our view, to pass definitely upon this point, inasmuch as we think the decree below should be affirmed on the second ground above stated.

The ground of the want of jurisdiction of the Superior Court is, that there was no personal or other sufficient service of notice of the actions in the cases of *Gibben v. Jordan*, 6 Cal. 416, and *Abrams v. Jordan*, in which cases these executions issued:

The facts connected with this point are these: At the time of the institution of this suit, and for several days afterwards, the defendant Jordan was a resident of San Francisco; at the time of the affidavit for an order of service by publication, in the case of *Giblin v. Jordan*, he was beyond the limits of the State, and has not since returned. The statute requires that in cases where the party to be served is out of the State, publication must be made at least three months. *Prac. Act*, sec. 31.

In the case of *Abrams*, the affidavit does not show a state of facts authorizing the appointment of attorney. The record does not show that any summons had been issued and placed in the hands of the proper officer, or that any effort had been made to find the defendant in order that he might be personally served. We have already held, in proceedings of this character, where service is attempted in modes different from the course in common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.

Judgment affirmed.

Hutchinson v. Burr.

HUTCHINSON v. BURR, et al., FUND COMMISSIONERS, ETC.

In a bill to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners created by the Act of April 20, 1858, for the claims approved by the Board of Examiners, it is necessary that some of the persons to whom the bonds are to be issued, should be made parties to the action.

APPEAL from the Fourth District, County of San Francisco.

This was an action by bill to enjoin the defendants, as a Board of Fund Commissioners, from issuing bonds of the City and County of San Francisco, to the holders of claims against the city which had been approved by the Board of Examiners created by the Act of April 20, 1858. None of the persons to whom the bonds were to be issued were made parties to the action. The only parties named in the bill were the persons constituting the Board of Fund Commissioners.

The defendants demurred to the bill on general grounds, and amongst others, on the ground that "there is a defect of parties defendants," and also on the ground that "the complaint does not state facts sufficient to constitute a cause of action." The Court below sustained the demurrer on the latter ground; from which ruling of the Court, the plaintiff appealed to this Court.

Gregory Yale and F. A. Fabens for Appellant.

Hoge and Wilson for Respondents.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The plaintiff seeks to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners, created by the Act of April 20, 1858, for the claims approved by the Board of Examiners under that Act. The persons to whom, according to the report of the Examiners, the bonds are to be issued, are not made parties to the suit, and without their presence there can be no binding determination of the questions upon which the decision of this Court is desired, unless, perhaps, from the special circumstances of the case, the great

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number of persons to whom the bonds are to be issued, and the character of the questions involved, it may answer to bring in only a sufficient number to fully represent and protect the interests of all; but upon this we express no opinion. It is enough to sustain the judgment, on the demurrer, that *none* of the persons entitled to the bonds under the Act, are made parties. Judgment affirmed.

FALLON v. DOUGHERTY.

In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered.

APPEAL from the Sixth District, County of Sacramento.

This was an action of ejectment to recover possession of a lot of land in the City of Sacramento.

The plaintiff derails title through one John A. Sutter and G. W. Hammersly. On the trial she, to lay the foundation for the introduction of secondary evidence, introduced one Stevens, who testified as follows:

"The plaintiff in this action was a resident of San Francisco county. Witness was acting as her agent and attorney in fact, and was conducting this suit for her; he had made search for the original deed from Sutter to Hammersly and Murray, to ascertain where the deed was, and had made other diligent inquiry about the same, but was unable to obtain the original, or ascertain where it was, or whether it was in existence."

There was no other evidence offered to establish the loss of the deed. The Court below ruled that this evidence was sufficient to account for the loss of the deed; and thereupon a certified copy was given in evidence: to which ruling of the Court the defendant excepted. Plaintiff

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had judgment. Defendant moved for a new trial, which was denied, and he appealed to this Court.

C. A. Johnson for Appellant.

Robinson, Beatty & Heacock, for Respondent.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

This case must be reversed for want of sufficient preliminary proof of the inability of the plaintiff to produce the original deed from Sutter to Hammersly, through whom she derails title to the premises in controversy, to authorize the admission of the record copy. The evidence introduced only shows a search by the agent of the plaintiff and inquiry of Hammersly. It does not appear that the plaintiff herself has not the possession or control of the original. Her affidavit, in the absence of other evidence, should have been offered on the point. *Laws* of 1857, chap. 254, sec. 2; *Macy v. Goodwin*, 6 Cal. 581; *Hensley v. Tarpey*, 7 Cal. 288; *Bagley v. Eaton*, 10 Cal. 147.

Judgment reversed, and cause remanded for a new trial.

PATTERSON v. THE BOARD OF SUPERVISORS OF YUBA COUNTY.

In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action.

An injunction cannot be granted affecting the rights and interest of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.

The case of *Hutchinson v. Burr et al.*, ante 108, affirmed.

APPEAL from the Tenth District, County of Yuba.

This was an action by bill to restrain the Board of Supervisors from issuing bonds, in pursuance of an Act of the Legislature, to the San Francisco and Marysville Railroad Company.

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acceptance of a bill was good, but the law in England has been changed by 1 and 2 Geo. IV., chap. 78. After that Act no acceptance was valid, save in writing; but this is regulated by statute in our own State. Wood's Dig., p. 72, art. 182, sec. C, enacted that no person shall be charged as an acceptor of a bill of exchange unless his acceptance is in writing, and signed by himself or agent.

Strobe not having accepted the bill, therefore was not in any manner bound upon it to any person whatsoever.

The bill or order being payable to bearer, and if accepted at all, only accepted in favor of the bearer or holder who should present it for payment, was not the subject of garnishment by the intervenors. The payor of a negotiable instrument cannot be garnisheed. Cal. Rep. p.

By the acceptance, if it can be claimed such, the appellant Strobe bound himself to pay the bearer of the note, and not Howel the debtor of the intervenors — the lawful holder of the bill who could only take advantage of the acceptance. Story on Bills, sec. 113.

It is sufficient answer to the second point made by appellant, that the paper, if it was not a bill, certainly, till the payment, did not operate as a discharge of Strobe's debt to Wheatley, he, at most, by his promise only agreed to pay the holder of the order on presentation. There was no promise absolutely to pay Howel, nor even were that so, would it operate so as to prevent Howel from returning the order to the drawer Wheatley, and demanding from him its amount.

The drawing of the order or bill could not operate as an assignment of the debt, so as to vest it in Howel, because there was no assent of Howel so to receive it; and even did it so operate, there was nothing in the transaction to limit and confine it between Howel and Strobe. Howel could have disposed of it to an innocent purchaser, who could have fallen back and claimed the amount from the original drawer, as was done in this case.

The intervenors had no right to come into Court and litigate between parties plaintiff and defendant.

A garnishment is no defense except between actual parties.

Wilcoxson has fixed the liability of Strobe, if he is at all liable, and he must decide that for himself.

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The demurrers were properly sustained, and the judgments of the Court below were correct.

FIELD, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

Upon the facts in this case the appellants make two points: *First*. That the verbal acceptance of Strobe was sufficient to render him liable to Howel upon the order of Wheatley; and, *Second*. If this be untenable, that the order operated as an equitable assignment of the demand against Strobe, which thus became subject to attachment as the property of Howel.

The first of these points cannot be sustained. The order possesses all the requisities of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "*please*" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked. Story on Bills, sec. 33 and notes; 3 Kent, 74.

The order being a bill of exchange, the written acceptance of Strobe was necessary to charge him as acceptor under the statute. His verbal acceptance was insufficient. Act concerning Bills of Exchange, sec. 6. Upon the order, therefore, he is not liable.

But the second point is well taken. The order, though not available as a bill of exchange against Strobe for want of acceptance, operated as an equitable assignment of the demand of Wheatley to Howel. It was given for an antecedent debt, and for the full amount of the demand against Strobe; the consideration was valuable, and there was no splitting of the amount due into distinct and different causes of action; and in such cases it is well settled that an order, whether accepted or not, operates as an assignment of the debt, or fund against which it is drawn.

The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he

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must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the partly beneficially interested. Courts of law, equally with Courts of equity, gave effect to assignments, like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee. *Mandeville v. Welch*, 5 Wheat. 277; *Corser v. Craig*, 1 Wash. C. C. 427; *Blin v. Prince*, 20 Vt. 25; *Wheeler v. Wheeler*, 9 Cowen, 34; *Nesmith v. Drum*, 8 Seargt. & Watts, 9; *Robins v. Bacon*, 3 Greenl. 346; *Adamson v. Robinson*, 1 Pick. 461.

After the delivery and presentation of the order, the debt due by Strobe could not be reached on attachment issued by the creditors of Wheatley. As against any attempt by them to enforce its payment upon any such proceeding, the order would be an effectual protection; and we do not perceive why it should not equally avail as against the suit of the assignor himself, unless it is made to appear that such suit is prosecuted for the benefit of the assignee. *Drake on Attach.*, chap. 37; *Black v. Paul*, 10 Mo. 103; *Lovely v. Caldwell*, 4 Ala. 684; *Corser v. Craig*, 1 Wash. C. C. 424.

In this State, all actions are required, with some few specified exceptions, to be brought in the name of the real party in interest, (*Prac. Act*, sec. 4). In the present case, upon the facts alleged in the answer, and which are admitted by the demurrer to be true, it is clear that the plaintiff is not the real party in interest, and there is no allegation in the complaint that the suit is prosecuted for the benefit of Howel. A judgment recovered by Wheatley after the presentation of the order, without notice to the assignee, would be no protection to the defendant against a suit by the assignee for the same demand.

The position of the defendant is not unlike that of a party summoned as garnishee, after receiving notice of an assignment by his creditor of the demand; if he fails in answering to set up the assignment, and judgment in consequence passes against him as a debtor of the assignor, it will not afford protection against a suit by the assignee. *Nugent v. Opdyke*, 9 Robinson, 453; *Crayton v. Clark*, 11 Ala. 787; *Foster v. White*, 9 Porter, 221.

Kirk v. Reynolds — Reynolds v. Harris.

Upon the facts set up in the answer, we are of opinion that the prayer of the defendant should have been granted; that he should have had leave to deposit the amount in suit in Court, and that process should have issued to bring in Howel, and that Wilcoxson & Co. should have been allowed to intervene.

The rights between the plaintiff and Howel to the demand due by Strobe, should be first determined, and afterwards the claim asserted by the intervenors disposed of. This claim, of course, can only be a matter for consideration in case the money is adjudged to have been at the time of the alleged attachment the property of Howel. Van Buskirk, Adm. v. Roy, 8 How. Prac. 425.

Judgment reversed, and cause remanded for further proceedings.

KIRK v. REYNOLDS *et al.*, AND REYNOLDS v. HARRIS.

A party cannot be permitted to prosecute two separate and distinct remedies in the Supreme Court, for a review of the same question at the same time.

APPEAL from the Eleventh District, County of El Dorado.

John Hume for Appellants.

Sanderson & Newell for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

This is a proceeding in the nature of a bill of review, the object of which is to procure an examination and reversal of the decree of the Court below in case of Raun v. Reynolds and Kirk, 11 Cal. 14, on the ground of error apparent in the record.

The plaintiff appealed from the decree in the original case, and the same questions raised by this record were presented in this Court on the appeal. As a party cannot be permitted to prosecute two separate and distinct remedies in this Court for a review of the same question at the same time, the appeal is dismissed.

Judith Jordan and Ann H. Jordan *v.* Giblin.

JUDITH JORDAN AND ANN H. JORDAN *v.* GIBLIN,
KELLY, *et al.*

A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant.

An affidavit which avers a cause of action against the defendant — that defendant cannot after due diligence be found in the State — that summons has been issued but Sheriff cannot find him — that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county — is insufficient to authorize the Court to appoint an attorney to represent such absent defendant.

Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction.

APPEAL from the Fourth District, County of San Francisco.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of the City of San Francisco, at the suit of the defendants, Giblin and Kelly.

The plaintiffs, one the wife, and the other the infant daughter of Michael Jordan, claimed the title to the property by virtue of two deeds of conveyance from Benj. F. Watkins, and others, to them and Michael Jordan, and also by deed from Michael to them.

The question which this Court has considered in its opinion is, as to the jurisdiction of the Superior Court over the person of the defendant, Michael Jordan, in the actions upon which the judgments were obtained, and under which the defendants sought to sell the property in question. The facts upon which those judgments were obtained, are as follows:

At the time of the institution of the suits, and for several days thereafter, the defendant was a resident of the City of San Francisco. Some days after the bringing of said actions, he left this State and has continued absent ever since, his family continuing to reside in San Francisco. No service of summons was had on him prior to his departure, nor was there any publication of the summons, except only in the case of Giblin, and that only for the period of thirty days. No

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order was made directing a copy of the complaint and summons to be deposited in the post office, directed to said defendant at his place of residence, nor was any so sent; nor was an attorney appointed to defend the action; nor was there any appearance in said action on the part of the defendant. In the case of *Abrams v. Jordan et al.*, the following affidavit was made for the purpose of having an attorney to represent Jordan.

"Thomas Giblin, being duly sworn, says he is one of the plaintiffs above named. That said plaintiffs have a cause of action against the said defendants, for the sum of six hundred and thirty-nine dollars, being balance due from said defendants to said plaintiffs, for work and labor performed, and materials furnished, by said plaintiffs for said defendants, in the building of some houses in the City of San Francisco. * * * That said defendant, Jordan, cannot, after due diligence, be found within the State of California. That a summons has been issued against the said Jordan in said action, but the Sheriff of the County of San Francisco cannot find him. That the residence of said Jordan is in the City of San Francisco, and he has still a family, consisting of a wife and children, there residing.

"Sworn to, etc.

THOS. GIBLIN."

Upon this affidavit an attorney was appointed for Jordan.

Plaintiffs had judgment in the Court below, and defendants appealed to this Court.

F. M. & H. H. Haight for Appellants.

H. S. Love for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

This was an action to enjoin the sale of certain real estate in San Francisco. This sale was attempted to be made under two executions issuing from judgments rendered in the late Superior Court of San Francisco at the suit of the appellants against Michael Jordan. The property is claimed by respondents.

Two principal questions are made by the record. *First.* That the

Judith Jordan and Ann H. Jordan v. Giblin.

title of appellants is superior in law and equity to that of Jordan, the defendant in these executions. *Second.* That the appellants had no right to subject the property to sale, for the reason that the judgments are void for want of jurisdiction in the Court rendering them.

It is conceded, that if these judgments are out of the way, the title of the respondents is good, and that they have a right to intervene in this form to protect it. We are inclined to think that the Court below was right in holding in favor of respondents on the first proposition; but it is unnecessary, in our view, to pass definitely upon this point, inasmuch as we think the decree below should be affirmed on the second ground above stated.

The ground of the want of jurisdiction of the Superior Court is, that there was no personal or other sufficient service of notice of the actions in the cases of *Gibben v. Jordan*, 6 Cal. 416, and *Abrams v. Jordan*, in which cases these executions issued:

The facts connected with this point are these: At the time of the institution of this suit, and for several days afterwards, the defendant Jordan was a resident of San Francisco; at the time of the affidavit for an order of service by publication, in the case of *Giblin v. Jordan*, he was beyond the limits of the State, and has not since returned. The statute requires that in cases where the party to be served is out of the State, publication must be made at least three months. *Prac. Act*, sec. 31.

In the case of *Abrams*, the affidavit does not show a state of facts authorizing the appointment of attorney. The record does not show that any summons had been issued and placed in the hands of the proper officer, or that any effort had been made to find the defendant in order that he might be personally served. We have already held, in proceedings of this character, where service is attempted in modes different from the course in common law, that the statute must be strictly pursued to give jurisdiction. A contrary course would encourage fraud and lead to oppression.

Judgment affirmed.

Hutchinson v. Burr.

HUTCHINSON v. BURR, et al., FUND COMMISSIONERS, ETC.

In a bill to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners created by the Act of April 20, 1858, for the claims approved by the Board of Examiners, it is necessary that some of the persons to whom the bonds are to be issued, should be made parties to the action.

APPEAL from the Fourth District, County of San Francisco.

This was an action by bill to enjoin the defendants, as a Board of Fund Commissioners, from issuing bonds of the City and County of San Francisco, to the holders of claims against the city which had been approved by the Board of Examiners created by the Act of April 20, 1858. None of the persons to whom the bonds were to be issued were made parties to the action. The only parties named in the bill were the persons constituting the Board of Fund Commissioners.

The defendants demurred to the bill on general grounds, and amongst others, on the ground that "there is a defect of parties defendants," and also on the ground that "the complaint does not state facts sufficient to constitute a cause of action." The Court below sustained the demurrer on the latter ground; from which ruling of the Court, the plaintiff appealed to this Court.

Gregory Yale and F. A. Fabens for Appellant.

Hoge and Wilson for Respondents.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The plaintiff seeks to enjoin the issuance of bonds of the City and County of San Francisco by the Fund Commissioners, created by the Act of April 20, 1858, for the claims approved by the Board of Examiners under that Act. The persons to whom, according to the report of the Examiners, the bonds are to be issued, are not made parties to the suit, and without their presence there can be no binding determination of the questions upon which the decision of this Court is desired, unless, perhaps, from the special circumstances of the case, the great

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number of persons to whom the bonds are to be issued, and the character of the questions involved, it may answer to bring in only a sufficient number to fully represent and protect the interests of all; but upon this we express no opinion. It is enough to sustain the judgment, on the demurrer, that *none* of the persons entitled to the bonds under the Act, are made parties. Judgment affirmed.

FALLON v. DOUGHERTY.

In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered.

APPEAL from the Sixth District, County of Sacramento.

This was an action of ejectment to recover possession of a lot of land in the City of Sacramento.

The plaintiff derails title through one John A. Sutter and G. W. Hammersly. On the trial she, to lay the foundation for the introduction of secondary evidence, introduced one Stevens, who testified as follows:

“The plaintiff in this action was a resident of San Francisco county. Witness was acting as her agent and attorney in fact, and was conducting this suit for her; he had made search for the original deed from Sutter to Hammersly and Murray, to ascertain where the deed was, and had made other diligent inquiry about the same, but was unable to obtain the original, or ascertain where it was, or whether it was in existence.”

There was no other evidence offered to establish the loss of the deed. The Court below ruled that this evidence was sufficient to account for the loss of the deed; and thereupon a certified copy was given in evidence: to which ruling of the Court the defendant excepted. Plaintiff

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had judgment. Defendant moved for a new trial, which was denied, and he appealed to this Court.

C. A. Johnson for Appellant.

Robinson, Beatty & Heacock, for Respondent.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

This case must be reversed for want of sufficient preliminary proof of the inability of the plaintiff to produce the original deed from Sutter to Hammersly, through whom she derails title to the premises in controversy, to authorize the admission of the record copy. The evidence introduced only shows a search by the agent of the plaintiff and inquiry of Hammersly. It does not appear that the plaintiff herself has not the possession or control of the original. Her affidavit, in the absence of other evidence, should have been offered on the point. *Laws* of 1857, chap. 254, sec. 2; *Macy v. Goodwin*, 6 Cal. 581; *Hensley v. Tarpey*, 7 Cal. 288; *Bagley v. Eaton*, 10 Cal. 147.

Judgment reversed, and cause remanded for a new trial.

PATTERSON v. THE BOARD OF SUPERVISORS OF YUBA COUNTY.

In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action.

An injunction cannot be granted affecting the rights and interest of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.

The case of *Hutchinson v. Burr et al.*, ante 103, affirmed.

APPEAL from the Tenth District, County of Yuba.

This was an action by bill to restrain the Board of Supervisors from issuing bonds, in pursuance of an Act of the Legislature, to the San Francisco and Marysville Railroad Company.

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This action was against the Board of Supervisors of Yuba county — the Railroad Company not having been made parties. Upon a final hearing of the case, the Court ordered the injunction to issue; from which order the defendants appealed to this Court.

B. S. Brooks and T. Dame for Appellants.

The Court below erred in granting the injunction.

T. B. Reardon for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This is an appeal from an order granting an injunction to restrain the defendants from issuing their bonds, in pursuance of an Act of the Legislature, to the San Francisco and Marysville Railroad Company.

Even if we were to concede that the plaintiff had a right to interpose in this manner to stay an Act of this nature, done in pursuance of legislative authority, and that the facts stated in the bill justify the action of the Court below, it is clear that, under the decision of this Court in *Hutchinson v. Burr*, *ante*, 103, the proceeding was improper in the absence of the parties beneficially interested. The Supervisors are not the real parties interested, certainly not in favor of the Railroad Company, in resisting this application; and an injunction should not have been granted affecting their rights and interests until they had an opportunity to be heard, and until they were secured by such bonds on the award of the injunction as would compensate them for the injury and loss they might sustain in the premises.

The public importance of the question involved makes it desirable that a decision should be had on the merits of this application. But it would be improper to pass upon the rights of parties in their absence; and our judgment would be of no validity in such cases as to the absent parties. If the Railroad Company were not an indispensable party, we should not notice this defect; but we might as well undertake to settle the rights of C, in the contest between A and B, as to decide this question in a contest between the plaintiff and the Supervisors.

For this reason we reverse the order granting the injunction, and remand the case.

Heyman v. Landers.

HEYMAN & CO. v. LANDERS *et al.*

When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint, in advance of the filing, to the Judge, and obtain the order of the allowance of the writ; and such practice is regular, and not in conflict with our statute.

In such case, the order does not take effect until the filing the complaint and the undertaking required.

Where suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the Court decides that such judgment was not fraudulent, but valid: *Held*, that the effect of such judgment is, that plaintiff was not entitled to the restraining order.

The only damages which the law allows for the detention of money under its process is the legal interest.

APPEAL from the Sixth District, County of Sacramento.

This was an action to recover damages for the wrongful issuance of an injunction or restraining order. The facts, as detailed by the opinion of the Court, are as follows:

On the third of November, 1856, the plaintiffs brought suit against one Arronson, of Sacramento, to recover the sum of ten thousand and one hundred dollars, and issued an attachment and levied upon his property. On the same day, but subsequent to the levy of the attachment of the plaintiffs, several other creditors of Arronson commenced suits against him, and caused attachments to be issued and levied upon the same property. Judgments in the several suits passed by default, and the plaintiffs immediately issued execution upon the one recovered by them, under which the Sheriff proceeded and sold the property attached. Whilst the property was in the Sheriff's custody, the other creditors instituted suit to set aside the judgment of the plaintiffs as fraudulent and collusive, and obtained an order from the District Judge, directing the payment of the proceeds of the sale into Court to abide the determination of the suit, upon filing a bond, to be approved by the Clerk, in the sum of one thousand dollars. The order was indorsed upon the complaint in that suit, and filed with it. The undertaking, which is the subject of the present action, was then executed, and the restraining order issued. The condition of the undertaking is

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to pay such damages, not exceeding the sum of one thousand dollars, as the defendants in that suit might sustain, by reason of the order, if the Court should finally decide that the plaintiffs therein, the creditors, were not entitled thereto. In obedience to the order, the proceeds of the sale, amounting to seven thousand and eleven dollars, were paid into Court, and remained there from December 15, 1856, to April 29, 1857, when the suit was decided against the creditors, and it was adjudged that the judgment recovered by the plaintiffs herein was valid, and not fraudulent or collusive, and that they were entitled to the money. The present action is to recover the damages sustained by reason of the restraining order. It appeared in evidence on the trial, that during the period the money was detained in Court it was worth two per cent. interest a month, and that the plaintiffs employed counsel to obtain the discharge of the restraining order, and paid for their services three hundred dollars, which was a reasonable fee. The Court allowed as damages the counsel fee paid, and interest upon the money at the rate of two per cent. a month, and gave judgment for the full amount of the undertaking. From this judgment the defendants appeal, and make the following points: *First.* That the restraining order was void, because made before the complaint in the suit of the creditors was filed; *Second.* That the Court has never decided that the plaintiffs in that suit were not entitled to the restraining order; and, *Third.* If the defendants are liable upon the undertaking, the rule of damages must be the legal interest of ten per cent. a year upon the money in Court.

Thomas Sunderland for Appellants.

1. The first error complained of is, that the Court permitted the introduction in evidence of the restraining order of the Court.

It appeared that the order was made by the Judge at chambers, before any suit was instituted; the complaint and order were filed at one and the same time, and as one paper. Now the statute (Practice Act, sec. 22) provides that a suit shall be commenced by filing the complaint and issuing a summons.

The restraining order, therefore, must have been made before any suit was pending, and when the judge who made the order had no

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jurisdiction. By the 113th section of our Practice Act, an injunction may be granted at the time of issuing the summons; but there is no authority for issuance of an injunction by the Court or Judge before the suit is commenced or the complaint filed. If there is no authority for such order, then, it follows that the order was void, and it ought not to have been introduced in evidence.

Appellants objected to the introduction of the undertaking sued on, for the same reasons urged against the order of the Judge, and also because both the order and undertaking showed that the latter was given to indemnify respondents against loss until the return day of the order to show cause. Heyman & Co. were ordered to appear on the twenty-eighth of November, 1856, and show cause why the prayer of the complaint should not be granted. In the meantime, the Sheriff was restrained from paying the proceeds of the goods to them.

The extent of the liability of appellants was the damage sustained by Heyman & Co. from the eighteenth of November until the twenty-eighth.

2. The condition of the undertaking is, that the plaintiffs in said suit in which the same was given, would pay the defendants therein such damages as they might sustain by reason of said order, "if the Court shall finally decide that the said plaintiffs were not entitled thereto." The Court has never decided that plaintiffs in that suit were not entitled to the restraining order, and until there is such decision there is no breach by appellants of their undertaking.

3. Respondents called C. H. Bradford, to prove that money was worth in the market two per cent. per month during the time the money hereinbefore mentioned was in the hands of the Clerk. The Court found that money was worth that rate of interest, and therefore gave judgment against appellants for damages for the loss of the use of said money at that rate. Our statute (R. L., p. 109) has fixed the legal rate of interest in the absence of any agreement in writing, and thereby the value of money and its use is fixed by law.

Moore & Welty for Respondents.

Appellants complain that the Court below found damages equal to

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two per cent. per month for the time that the money was detained in obedience to the restraining order.

It is shown by the evidence, that during all the time the money was so detained, the use of money was worth two per cent. a month on call. If that was the value of the use of the money, were not plaintiffs damaged to that amount? and if damaged to that amount, then, it follows that respondents ought and must pay that amount in order to comply with their undertaking, which is, to pay them (plaintiffs) all damages which they must sustain by reason of the order, if the Court shall finally decide, etc.

In the case of *Smith v. Griffith*, 3 Hill, 333, Nelson, Justice, on the subject of damages, says: "The damages should afford the plaintiff an adequate indemnity for the loss sustained at the time the injury happened;" and this is certainly in accordance with *right* and *reason*. If the value of the use of money (as is proved) was two per cent. per month, respondents could have got that much for the use of their money; and unless they can recover that amount in damages, they will have been placed against their will in that position—an anomaly in the common law—to suffer an injury without a remedy.

FIELD, J., after stating the facts, delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The appellants make the following points: *First*. That the restraining order was void, because made before the complaint in the suit of the creditors was filed; *Second*. That the Court has never decided that the plaintiffs in that suit were not entitled to the restraining order; and, *Third*. If the defendants are liable upon the undertaking, the rule of damages must be the legal interest of ten per cent. a year upon the money in Court.

The first point is untenable. The order could only take effect upon the filing of the complaint, and the bond or undertaking required, and it was unnecessary to delay the application to the Judge until after the complaint had been filed. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint, in advance of the filing, to the Judge, and obtain the order of the allowance of the writ; and with this practice the statute

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does not conflict. The order or writ can then be issued with the summons. Prac. Act, sec. 113.

The second point is also untenable. The Court, in adjudging that the judgment of the plaintiffs against Arronson was valid, and not fraudulent or collusive, and that they were entitled to the money in Court in substance, if not in terms, decided that the other creditors were not entitled to the restraining order.

But the third point is well taken. The only damages which the law allows for the detention of money under its process is the legal interest. The rule of damages, in such cases, like the one which obtains in actions upon promissory notes, is a fixed and arbitrary one. The actual loss occasioned may be much greater than the interest, but the consequences beyond that the law does not inquire into (Sedgwick on Damages, chap. 8). It would indeed often be impossible to determine the actual damages resulting from the detention of money; the party entitled to it may in consequence have been compelled to borrow on ruinous rates of interest; he may have become embarrassed in his business operations, ruined in credit, and perhaps driven into insolvency; but of these possible consequences the Courts cannot take notice. The legal interest in such cases is the only measure which can be followed with certainty, and, as a general rule, with safety. The judgment, therefore, must be modified. The allowance of the three hundred dollars was proper (*Summers v. Farish*, 10 Cal. 353). This sum added to the interest on the money deposited in Court at the rate of ten per cent. a year from December 15, 1856, to April 29, 1857, must constitute the amount to which the judgment is to be reduced.

The cause is remanded to the Court below, with directions to modify the judgment in accordance with this opinion; the costs of the appeal to be allowed to the respondents.

Fowler v. Fisk.

FOWLER v. FISK *et al.*

Where a sale of a vessel is made, part cash, and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of the vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement.

APPEAL from the Twelfth District, County of San Francisco.

This was an action to recover an unpaid balance of the purchase money of a vessel. The facts appear in the opinion of the Court. Plaintiff had judgment, and defendants appealed.

G. F. & W. H. Sharp for Appellants.

I. The appellants ask for a reversal of the judgment, for that the delivery of a good title and register was made a condition precedent to the payment of the balance of \$2,200; consequently the respondent's action was prematurely brought. *Cunningham v. Morrell*, 10 J. R. 203; *Green v. Reynolds*, 2 J. R. 207; *McIntyre v. Clark*, 7 Wend. Rep. 330; *Northrup v. Northrup*, 6 Cow. Rep. 276; *Gaze v. Price*, 16 John. Rep. 267; *Rob v. Montgomery*, 20 J. R. 203.

It is no answer to say, as was contended in the Court below, that title to a ship may pass by parol; consequently the appellants had a good title without the bill of sale and register from the last owner. The answer to all this is, that respondent had agreed to give something more, and he was bound to do it.

II. Again: a good title and register to the vessel was to be given "*within ninety days*, and before the payment of the \$2,200."

The time fixed upon was also of the *essence* of the contract. The respondent was not ready or willing at the time fixed to complete the sale, consequently the appellants could not be compelled to complete the agreement. *Berry v. Young*, 2 Exp. Ca. 640, note; *Benedict v. Lynch*, 1 John. Ch. Rep. 370.

Robert Rankin for Respondent.

I. Where a sale is absolute and unconditional, as in this case, goods sold cannot be returned, but suit must be brought on the warranty.

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"On sale with warranty, and warranty broken, plaintiffs might recover price, and defendants must sue on warranty, or recoup damages." *Ruiz v. Norton*, 4 Cal. R. 355.

"A promise to pay and a warranty are independent covenants, and the enforcement of one is not dependent on the performance of the other." *Norton v. Jackson*, 5 Cal. R. 60.

II. Defendants cannot resist payment of the price or claim damages till evicted.

"Want of title in the vendor of personal property is no defense to an action for the recovery of the purchase money, where there has been no recovery by the owner against the purchaser." *Case v. Hall*, 24 Wend. 102; *Kennebec L. D. Co. v. Burrill*, 6 Shep. 314.

III. "The purchaser of personal property cannot, while retaining possession of such property, resist the recovery of the purchase money by the vendor, on the ground of ownership in a third person at the time of sale." 3 U. S. Dig. 357, sec. 17.

"A purchaser in possession cannot reclaim the purchase money unless evicted or disturbed." *Salmon v. Hoffman*, 2 Cal. R. 138.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

Plaintiff sold defendants a vessel for \$4,400, the possession of which vessel he delivered. At the time of sale the vessel was registered as the property of another, so that a proper transfer could not be made at the time. In consequence of this it was agreed that \$1,000 of the purchase money should be paid in cash, \$1,200 within twelve days, and the remaining \$2,200 upon the delivery by plaintiff to defendants of a good title and register of the vessel. \$1,200 was paid by the defendant as by agreement. No title or register has ever been delivered or tendered to the defendants; nor is it shown that the plaintiff has ever been in a condition to make such title. The agreement between the parties was, that the money should be paid upon the delivery of the title; and in order to entitle the plaintiff to recover, he must show an offer on his part to comply with the agreement. 1 Chitty Pleadings, 297.

Judgment reversed.

In the matter of the Estate of Tompkins.

IN THE MATTER OF THE ESTATE OF TOMPKINS,
DECEASED.

Upon the death of a married man, the whole of the common property is assets of the deceased, to be administered upon by his personal representatives.

The Legislature intended that the whole common property should be subject to the payment of the debts of the deceased.

The homestead does not constitute any portion of such assets.

The homestead estate is a sort of joint tenancy, with the right of survivorship as between husband and wife, and cannot be destroyed except by the concurrence of both in the manner prescribed by law.

APPEAL from the Probate Court of the City and County of San Francisco.

The following are the facts upon which this appeal is based, as they appear in the opinion of the Court:

The administratrix, who is the widow of the deceased, presented her final account for settlement to the Probate Court. In this account she charged herself only with one moiety of the common property, omitting to account for the other part of the common property or the homestead, or its rents and profits.

The Probate Court approved the account as rendered, except as to the omission to charge the administratrix with the whole of the common property, as well as the homestead, and ordered that a new account be filed charging the administratrix with the whole of the property of intestate, including the homestead. From this order an appeal is taken.

The questions presented are: *First*. Whether the whole of the common property is assets of the deceased husband to be administered by his personal representative; *Second*. Whether the homestead constitutes a portion of such assets.

R. B. Provines for Administratrix and Appellant.

The following points are raised:

1. Whether the estate of the widow in the common property is assets of the estate of the deceased husband, to be administered by his personal representatives? and,

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II. Whether the *homestead* is assets to be so administered?

FIRST, THEN: Is the estate of the widow in the common property, assets of the estate of her deceased husband to be taken and administered by his personal representatives?

The Constitution of this State, Article XI, sec. 14, declares what shall constitute the *separate* property of the wife, and provides that laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to *that held in common with her husband*. And the Legislature, in pursuance of this provision, by the Act of April 17th, 1850, "defining the rights and duties of husband and wife," section 2, has declared what property of husband and wife shall be *common property*; and by section 11 of the same Act, provision is made for the disposition of the common property in case of the dissolution of the community by the death of either party, and it is declared that "Upon the dissolution of the community, by the death of either husband or wife, *one-half of the common property shall go to the survivor*, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased." Now, had there been a colon or semicolon after the word "survivor" in this sentence, there never could have been any doubt as to the intention and meaning of the Legislature, nor, consequently, as to the proper construction to be placed upon it. It would then have been perfectly clear, that the Legislature intended to charge that portion of the common property going "to the descendants of the deceased husband and wife," and that only, with "the debts of the deceased party;" and, we think, that the punctuation of this sentence, as it is found in the Statute Book — adopted, as it may have been, by the printer — is not sufficient of itself to render that construction improper, or to cast a doubt upon the meaning of the Legislature. Indeed, it is not only clearly susceptible of the construction above mentioned, but such would seem to be the only construction which can reasonably and fairly be placed upon it.

Now let us suppose, for a moment, that it is the *wife* who dies — indebted on contracts made by her before marriage — leaving no separate estate, and that her debts so contracted exceed the value of the whole common property, — is the whole common property in that case

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to be applied to the payment of the debts of the wife, thus contracted, without regard to the rights of the husband, who has mainly contributed to its acquisition, or to the rights of his creditors? Is such the meaning and intention of this statute? It cannot be. The Legislature cannot be supposed to have intended such injustice. It is absurd. And why, then, should the rule be different when the case is reversed, and the husband dies? Should not the law be more careful to protect the widow, and to provide support and maintenance for her, than for the surviving husband? And is it not much more consistent with reason, and with the rules of property in analogous cases, that that portion of the property which *descends* to the heirs of the deceased, should alone be chargeable with the debts of the deceased?

The descendant *inherits from the deceased*, and therefore takes subject to equitable liens and incumbrances created by the deceased. But here the survivor, the widow, *does not take from the deceased* in any sense. She only has that which before was hers, only that now she has it separate, and divested of all contingencies arising from the power of the husband over it while living. Her interest in the common property vests in her before the husband's death, and does not in any sense *descend* to her upon his death. The question is not, therefore, whether the property of the deceased party should be charged with that party's debts, but the question here is, whether the property of *another person* should be charged therewith, merely because that prior to the death of the former the latter held that property "*in common*" with him. As to the common property, the husband and wife are mere *tenants in common*, without any other qualification than this, that during the husband's life the wife's power over the property is suspended, but her *estate or interest* in it is perfect and complete all the time. The Constitution speaks of "*property held in common with her husband*," not in partnership, but *in common*, and the statute declares it "*common property*."

The statute declares what shall constitute that "*property of the wife held in common with her husband*," of which the Constitution speaks, and gives to the husband the entire management and control of it whilst the relation of husband and wife subsists. It then provides, (Wood's Digest, p. 488, secs. 11 and 12) that where that relation is

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dissolved, "*the common property shall be equally divided between the parties,*" if both be living; and if one be dead, the survivor is to take his or her half, "*and the other half is to go to the descendants of the deceased, subject to the payment of the debts of the deceased.*" That such is the meaning and intention of the Legislature is perfectly evident when the 11th and 12th sections are considered together. The 12th section, as it stood before the amendment of 1857, provided that "upon the dissolution of the marriage by decree of any Court of competent jurisdiction, the common property should be equally divided between the parties." Nothing was said about the wife's part being chargeable with the husband's debts, or with any part or proportion of them; but the property was to be equally divided or sold, and the proceeds equally divided, leaving creditors, should there be any, to their remedy against the party indebted to them; and the *proviso* inserted by way of amendment, by the Act of 1857, was not intended as any protection to creditors, or to make any provision for them, but simply as a sort of penalty to be imposed upon the guilty party, as a protection of each, against the commission of the acts there mentioned by the other. There can be no doubt but that the Legislature intended to make the husband and wife simply *tenants in common* of the common property, *as respects the estate*, but as respects the power of disposition, during the continuance of the marriage, to prefer the husband. By the 10th section of the Act, the common law estate of the husband, as tenant by courtesy, upon the death of the wife, and the dower of the widow, upon the death of the husband, are forever taken away; and no provision whatever is made for the widow, if by the 11th section she is not to have one-half the common property.

Fortunately, we are not wholly without a guide, in the form of judicial decision, in the investigation of this subject. We have, at least, one great leading case which throws a flood of light upon the whole subject. The case of *Beard v. Knox*, 5 Cal. 252, is directly in point. By this decision we have clear judicial construction given to these 10th and 11th sections of this Act.

It is declared that the husband and wife are jointly seized of the common property, and that one-half interest therein remains over to the surviving wife upon the death of the husband.

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It is not said that the interest of the surviving wife is subject to the payment of the deceased husband's debts, but the very reverse is held; for the estate was still unsettled, and there was no separate property belonging to the deceased, out of which the debt could be paid: all the property was common property, and still the widow was held entitled to recover the one-half in gross. And it is also held in that case, that the interest of the wife in the common property "*is a present, vested and certain interest, which becomes absolute at the death of the husband,*" and that it is subject to one contingency only, viz., "*the husband's disposal during their joint lives.*"

It is furthermore declared that this provision of the law is "a liberal provision" — that it is a "humane and beneficial law," intended for the benefit of the wife, etc.

Now, it is very clear that it is no provision at all for the wife, if it is to be consumed in the payment of the deceased husband's debts contracted both before and after marriage; for the law nowhere makes any distinction between these two classes of debts. It is perfectly clear, that the intention of this humane and beneficent law *would* be defeated by adopting such a rule of construction. But the Court in that case further held, that the statute has substituted this half interest in the common property *in lieu of dower* which it has expressly taken away. And that this was the intention of the Legislature, and is the fair and legitimate conclusion to be drawn from these two sections, (10 and 11) cannot admit of any question. How does the case then stand? The question is reduced to this: Can the widow's dower be subjected to the payment of the deceased husband's debts? Who will undertake to maintain the affirmative of this proposition! Of all rights, and of all estates known to the common law, the most sacred and inviolable was that of the widow to her dower. It could not be defeated by *any* act of the husband, whether in the nature of an alienation, or a charge without the assent of the wife freely and duly given. And hers was the only estate upon which, when derived from the King's debtor, the King could not distrain for his debt. It was also exempt from tolls and taxes. And it is said there are three things favored in law — life, liberty and dower; that dower is a legal, an equitable, and a moral right, favored by the law, and next to life and lib-

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erty held sacred. 4 Kent's Com. 50; Black. Com., book 2d, p. 138; Co. Lit., book 1, ch. 5, sec. 36; 1 Hil. on Real Prop. 127.

In *Beard v. Knox*, it is held in that case that the husband cannot dispose of more than one-half (his own) of the common property by devise, because "such a conveyance can only operate after his death; upon the very happening of which the law determines the estate, and the wife becomes seized of one-half of the property." This reason would apply just as well to a *charge* upon the common property, created by will, as to a conveyance of it; and just as clearly will apply to the creation of any lien upon it which can only attach after the husband's death; for the creditor at large has no *lien* upon the property during the life of the husband, and the lien of the administrator, for the payment of debts, cannot attach until *after the death*, as was said in *Beckett v. Selover*, 7 Cal. 215, and, of course, can only attach upon the property of the deceased, and not that of the widow, for upon the very happening of the death her estate becomes absolute, as we have before seen.

The statute has nowhere provided that the deceased husband's *separate property* shall first be applied to the payment of his debts before resort is had to the common property for that purpose.

The creditor has only the right which the law gives him, and that is, to have his demand satisfied *out of the estate of the deceased*, if there is sufficient for that purpose; and even then he must take the rank assigned him by the statute, and wait his turn to be paid: and if the whole fund is exhausted before it reaches him, he is without remedy, either against the administrators or the creditors previously paid; for the statute prefers certain classes of creditors of deceased persons, but not with respect to the community, or the community property. Wood's Digest, p. 415, art. 2334.

But it will be urged again, that the "*community debts*" are to be paid out of the community property." But the obvious reply is, the law does not say so. The law says, that the debts of the deceased are to be paid out of *his* property, and goes no further. And then again, there is no such thing as a "*community debt*" in this State. There is no such term known to our law. There is no such word in the Stat-

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ute Book. There is none such in the Constitution, or in any decision of this Court. There is no such *idea* to be found in any part of our law; none such can be fastened upon it. It is clearly excluded by the terms of the statute, "subject to the payment of *the debts of the deceased.*" See Laws of Texas on the same subject.

Creditors at large have no rights *as against the property.* They must acquire some lien upon it, either statutory, or by contract, or by legal relation, before the happening of the contingency which divests the debtor of the estate, otherwise their recourse against the estate so divested is thereby lost to them forever.

Now this act is an innovation upon the common law—the prevailing law of the land at the time of its passage. It is therefore to be construed strictly, and no loose notions of right and property are to be lugged in with it under the name of incidents or consequences, which are not clearly provided for by the Act itself.

Respondent's counsel has cited the cases of *Beckett v. Selover*, 7 Cal. 238; *Harwood v. Marye*, 8 Cal. 580, and *Gray v. Gray*, April T. 1858, for the purpose, as is supposed, of showing that the lien and possession of the administrator for the payment of debts attaches upon the whole common property. But those cases affirm no such doctrine: no such point is raised in either of them. They go no further than to hold that the administrator is entitled to the possession of, and has a lien upon, the whole of the *estate of the deceased* for the payment of debts.

II. Is the "homestead" assets of the intestate to be administered by his personal representatives?

By the Act of April 21st, 1851, "to exempt the homestead, etc. from forced sale," etc., (Wood's Dig., p. 483) and the judicial construction which that Act has received, a peculiar estate has been created in the husband and wife in the premises, answering to the description of homestead. And it matters not whether the property was originally common property of husband and wife, or the separate property of the former; so soon as it acquired the character of "homestead" by the residents of the family upon it, the *nature of the estate became changed*, and it was turned into a sort of joint tenancy; (*Taylor v.*

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Hargous, 4 Cal. R. 273) so that it was no longer common property, but a *joint estate*. In the language of the case last cited, "it is turned into a sort of joint tenancy, as between husband and wife." Now, what sort of a joint tenancy was this? It was a sort of joint tenancy known to the common law; differing from it, it is true, in the manner of its creation, but in that only, and not in its nature, incidents or consequences. This peculiar sort of joint tenancy was created at common law, by the grant of an estate to husband and wife; and the consequence of it was, that neither the husband or the wife could dispose of any part of the estate without the assent of the other, so that neither could by his or her own act destroy the joint tenancy. And in this particular — its indestructibility by the act of either party — it differed from the most usual sort of joint tenancy, which would be destroyed by the act of either party, that is, by the alienation of that party's interest, so that the parties themselves could not possibly prevent or avoid the grand incident or consequence — *the right of survivorship* — except by a joint conveyance. Black. Com., book 12, ch. 2; Jackson v. Stevens, 16 J. R. 115; Doe *ex dem.* Depuyster v. Howland, 8 Cow. 283; Jackson v. McConnell, 19 Wend. 175; Faul v. Campbell, 7 Yerg. 319.

In some of these authorities it is said, that the husband and wife in such a case are not tenants in common, nor yet joint tenants, strictly speaking, since each is seized of the entirety, and holds *per tout et not per my*. Whatever name may be deemed most suitable for this peculiar estate, one thing is certain — the grand incident of joint tenancy — the right of survivorship attaches to it, so that upon the death of the husband, the wife succeeds to the whole estate by the right of survivorship. Taylor v. Hargous, 4 Cal. 268; Estate of Buchanan, deceased, 8 Cal., p. 509; Revalk v. Kraemer, 8 Cal. 72.

In all of these cases, the doctrine of the right of survivorship between husband and wife, as to the homestead, is affirmed. It follows, therefore, that upon the instant of intestate's decease the appellant, being the survivor, took the whole estate; and such being the conclusion, the homestead never was, in any sense, assets of the intestate's estates, however it may be held with respect to the common property. See *Lies v. De Diblar*, Post 327.

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W. W. Theobalds for Respondents.

Does Mary M. Tompkins take one-half of deceased's estate in her own right, immediately upon his death, as his wife, or only after final settlement and accounting for the *whole* thereof, as administratrix? and does she take the homestead, also, as *her own property*, immediately after his death? or only jointly *with* and *in trust for* the minor heirs, and therefore *accountable to them* (though not to creditors) for the disposal, use and profits thereof?

Respondents hold her bound to account in both cases; in the first case, for the *whole estate* directly for the benefit of creditors, and remotely to the heirs; and in the second case, directly and only to the heirs, and for the following reasons:

1. Upon the death of the husband, one-half the common property rests immediately in the wife, and one-half in their children; but in each case "subject to the payment of the debts of the deceased," and to the possession of the administrator for that purpose; until which payment by the administrator, and a final settlement in the Probate Court, neither the wife nor the children can know the amount and subject matter of their respective shares.

The general rule of partnership settlements holds good here — the creditors must be paid before either partner can know how much or what is theirs, or claim their individual shares. Section 11 of Act concerning Husband and Wife, and secs. 194 and 216 of Act concerning Estates of Deceased Persons, declare it the duty of the administratrix to account for the *whole* of the *property* and *profits* of the estate. *Beard v. Knox*, 5 Cal., page 252, cited by appellant, does not impugn this view. Dower at common law was only a *life estate* of the wife in *one-third* of her husband's *lands*.

In California, by our liberal laws the *joint seizin* and *ownership* of husband and wife during coverture of *all* the common property, becomes the absolute seizin and *ownership* of the wife in her *sole right*, upon his death, of *one-half* thereof, but subject to the lien and prior possession of the administratrix, to pay the *joint* debts and settle the estate. *Beckett v. Selover*, 7 Cal. R., p. 238-9; *Gray v. Gray et al.*, April Term, 1858; *Harwood v. Mary et al.*, 2 Cal. 580.

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2. So far as creditors are concerned, there is no necessity for the administratrix to charge herself with the homestead and other property exempt from execution. It is exempted by law, and *set apart* by the Probate Court for the *wife and children*, expressly to free it from the claim of creditors. But *here* the question is *between the administratrix and the minor heirs*. As against them, her account rendered for final settlement of the estate should show the existing facts. She should not be allowed therein to claim as hers what belongs to them, but show what is hers in her own right, and what she holds only in trust for them, *i. e.*, what is theirs, and thus prepare the way for a just and legal partition and distribution of all the estate.

Section 10 of the Homestead Act says: "The homestead and other property" of the deceased husband, "exempt from forced sale, shall be set apart *for the benefit* of the surviving *wife and his own legitimate children*." Sec. 124 of the Act concerning Estates of Deceased Persons, designates what is the exempt property to be "set apart for the use of the widow or minor children," or for both; and not "subject to administration," so far as creditors are concerned. The homestead (not to exceed five thousand dollars in value) is included in the enumeration; and sec. 125 of the same Act shows to whom this exempt property belongs.

In the case of *Taylor v. Hargous*, 4 Cal., p. 268, the Court says: "The homestead is a *sort* of joint tenancy, with the right of survivorship, *at least*, as between husband and wife." True, it is so as *between them*; but the very end and object of this joint tenancy in them, and of this survivorship in one of them, is the *protection* of the property embraced by it *against all others for the benefit of the family and children, not against them or either of them*.

In *Revalk v. Kraemer*, 8 Cal. R., p. 72 — 74, the Court says: "The leading idea of the Constitution and statute is, the *protection of the family*." The protection is given to the *capacity*, "as *head of a family*." The homestead is directed to be set apart *for her and the children*. Could she *alone* sell or incumber it? If it is hers, in her own right, of course she can both sell and incumber it. But if she owns only an undivided interest, and holds the whole jointly with and for others, until division of interest—meanwhile, however, controlling,

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managing and taking the benefits of the whole — then clearly she is responsible and accountable for the whole, proceeds and rents included; and this should all be made to appear in her final account, in order that after all the debts and expenses of the estate and of administration are paid, and the rights and claims turned into assets in possession, the heirs may all obtain their respective shares in all the remaining property, real and personal, of whatever class or kind, homestead and exempt property as well as common property.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

The questions presented are, 1st. Whether the whole of the common property is assets of the deceased husband to be administered by his personal representative?

2d. Whether the homestead constitutes a portion of such assets?

By our statute, the entire common property is subject to the absolute disposition and control of the husband during coverture, and is liable to execution for his debts. It is also provided, that "upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased."

Appellant contends that by a proper construction of this section only that portion of the common property which descends to the heirs of deceased is subject to the payment of the debts of the intestate.

This position is not tenable. During the lifetime of the parties the whole of the common property is subject to the debts of the husband, and the Legislature will not be presumed to have intended that the death of the party should deprive his creditors of recourse against one-half of the common property, unless such a construction is required by the obvious meaning of the language employed.

We are satisfied, however, that no such intention can be legitimately gathered from the language of the section; on the contrary, it sufficiently appears that the Legislature intended that the whole common property should be subjected to the payment of the debts of deceased. Whatever ambiguity there may be in the language of that part of the

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section quoted in appellant's brief, is explained, and the meaning of the section made clear by the remaining portion, which he seems to have overlooked: "If there be no descendants of the deceased husband or wife, the whole shall go to the survivor subject to such payment."

On the second point, we are satisfied that the homestead is not assets in the hands of the administrator.

Under the decisions of this Court, the homestead estate is a sort of joint tenancy, with the right of survivorship as between husband and wife, and cannot be destroyed except by the concurrence of both in the manner prescribed by law. *Taylor v. Hargous*, 4 Cal. 268.

Upon the death of the head of the family it is made the duty of the Probate Court to set apart the homestead, for the benefit of the wife and legitimate children of the deceased. After this is done the Court has no further control over it.

Whether the appellant succeeded to the homestead in her own right, or in trust for the children of deceased, is a question which does not arise in this proceeding, inasmuch as the jurisdiction of the Probate Court does not extend to such questions.

The judgment, so far as it requires appellant to charge herself with the homestead, and its rents and profits, is reversed, and in other respects it is affirmed.

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The Supreme Court will reverse the judgment below, where the facts found by the Court are not sufficient to support the judgment.

APPEAL from the County Court of San Mateo County.

This was an action of assumpsit to recover the amount due on two several promissory notes, and a balance due on an account for goods, wares and merchandise sold by plaintiffs to defendants.

The defendant, Caldwell, denied the indebtedness, and plead an

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account against the plaintiffs as a set-off. The cause was tried in the Court below without a jury. The Court found, as a matter of fact, that defendants did owe the full amount of plaintiffs' account, and that defendants were entitled to offset the same by the account set up in their answer, which, at the time of commencing suit, was due from plaintiffs to defendants. The facts upon which the conclusions of the Court are based are not found. Defendants had judgment, and the plaintiffs appealed to this Court.

C. N. Fox for Appellants.

W. F. Gough for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

Judgment reversed for want of a sufficient finding of facts.

CONNER *v.* HUTCHINSON.

Where two persons are employed by the claimants of a tract of land under a Mexican grant, as agents to procure the confirmation of the grant in the United States Courts, and services are thus rendered and expenses incurred by the agents: *Held*, that such service and expense are individual in their character, and not joint, and that separate actions may be maintained by such agents for their expenses thus incurred.

APPEAL from the Sixth District, County of Sacramento.

A statement of facts appears in the opinion of the Court.

Winans & Hyer for Appellant.

John Heard for Respondent.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

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This was an action upon a promissory note of the defendant. The answer set up, as an offset, a claim for services rendered and moneys expended on behalf of the plaintiff. It appears, from the evidence, that the parties and several other persons were tenants in common of a large tract of land situated in Yolo county, claiming title under an alleged Mexican grant, and that in March, 1856, the claimants entered into an agreement for the partition of the premises, and the prosecution of proceedings for a confirmation of the grant in the United States Courts, and, to carry into effect its provisions, appointed the defendant and Jerome Davis agents, stipulating that the expenses attendant upon the execution of the agreement should be borne by the claimants, in proportion to the interest which each possessed in the property. Under this agreement, valuable services were rendered, and large expenditures incurred by the defendant; and the offset set up by him arises out of his claim against the plaintiff, as one of the claimants to the land and parties to the agreement. Proof of this claim was excluded by the District Court. The ground of the exclusion is not stated in the record; but, from the argument of counsel, it appears to have been based upon the impression that the claim presented was necessarily joint in its character, to be asserted by both the agents, and not available for either individually. Assuming this to have been the case, and no other ground is alleged, we think the Court below erred, so far, at least, as the claim arises from the expenditure of moneys. Whether a charge for the services rendered can be maintained under the agreement, it is unnecessary to determine. The expenditures were individual in their character, and required no joint action. The agents were not partners, and they possessed no common fund to meet their outlays. Their relation to the claimants was not unlike that of two lawyers, of different firms, employed to attend to the common interest of the claimants, and acting in concert with each other, but entitled, separately, to charge for their services and expenditures. The question is not whether either agent could, without the other, make any valid contracts for the claimants, but whether, for individual expenses incurred in the execution of the objects of the agency, an individual charge can be made. Upon this we have no doubt; and our conclusion in this respect leads to a reversal of the judgment. (See *Bunn v.*

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Morris, 3 Caine's, 54; Pearson v. Parker, 3 N. H. 366; Doremus v. Selden, 19 John. 213; Lombard v. Cobb, 14 Maine, 222.) Upon the sufficiency of the testimony offered to establish the claim, we are not called upon to pass, as it was excluded on the trial as irrelevant under the previous ruling of the Court. All testimony as to an individual claim must, under that ruling, have been irrelevant.

Judgment reversed, and cause remanded for a new trial.

CLOUD v. EL DORADO COUNTY.

Where a judgment was rendered by confession in open Court upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one, not a party to the judgment, be invoked to set aside or show the judgment a nullity.

Where a Court has jurisdiction both of the parties and the subject matter, the manner of exercising that jurisdiction cannot make void the action of the Court.

The title of a purchaser of real estate, at Sheriff's sale, does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect.

The purchaser rests for title upon the judgment, execution, levy, sale and deed; and he need show no more to entitle him to whatever rights the defendant in execution had in the property sold.

Where a Sheriff's deed is executed by a Deputy, in the name of the Sheriff, whose term of office had expired at the time of the execution of the deed, the authority of the Deputy must be shown to authorize such deed to be read in evidence in an action of ejectment.

APPEAL from the Eleventh District, County of El Dorado.

The facts, as disclosed by the opinion of the Court, are as follows:

This was an ejectment for a lot in the town of Coloma. The facts are, that L. W. Hastings and Peter Wimmer, on the sixth of July, 1850, confessed judgment in the District Court for Sacramento county for more than \$9,000. The judgment was rendered in open Court. On the twenty-ninth of August, 1850, an execution of *fi. fa.* issued, directed to the Sheriff of El Dorado county, returnable in forty-two days from date; which writ came to the hands of the Sheriff on the thirty-first of August, 1850, on which he indorsed the following return.

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viz.: "31st August, 1850, levied on Wimmer's house, advertised to be sold, October 7th, 1850; also the log house occupied by Mrs. Brown, on the Hangtown road. W. Rogers, Sheriff, by L. H. McKenney, Dept.; came to hand on the 19th day of September, 1850; on the 20th day of September I levied the within described property, the new house situated in the town of Coloma, on Main street, opposite the dwelling that Peter L. Wimmer lives in, to be sold on the 14th day of October, 1850. The within sale postponed until the 24th day of October, 1850. Wm. Rogers, Sheriff, by A. J. Moore, Dept." It does not appear by the evidence where Wimmer resided at the time of the levy, or had his dwelling house. A Sheriff's deed, dated on the twenty-fourth day of October, 1850, purporting to be executed by Wm. Rogers, by Samuel Todd, Dept., was offered, but the signature not being proven, and the acknowledgment being defective, the same was ruled out. The plaintiff offered and read in evidence a deed in confirmation, dated the sixteenth day of May, A. D. 1857, executed by Wm. Rogers, late Sheriff of El Dorado county, by Samuel Todd, his Deputy, which, after referring to the judgment, execution, etc., in the case of *Henley et al. v. Wimmer et al.* contains the following recital, viz.: "I, the said Sheriff, did, by virtue of and in obedience to said execution, levy upon, take and seize all the estate, right, title and interest of the said Wimmer of, in and to the lands, tenements, real estate and premises hereinafter particularly described and set forth, together with the appurtenances." The deed then sets out and particularly describes the premises in dispute, and conveys the same to the plaintiff hereto as the purchaser at the sale.

In 1849 Wimmer was in possession of the lot in the deed mentioned, and so continued until the early part of the year 1850, and during this period erected thereon a frame building. One S. S. Brooks was next in part possession of said house until about the month of July, 1851, at which time the County of El Dorado took possession of said building, to be used as a Court House and for County Offices, and has since occupied the same for said purposes until April, 1857; the rents of the building during the occupancy of the county are found.

The cause was tried without a jury, and judgment rendered for the defendant, from which plaintiff appealed to this Court.

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Sanderson & Hewes for Appellant.

As the property was Wimmer's at the time of our purchase, we will consider the judicial proceedings against him to ascertain whether we have acquired Wimmer's title.

1st. The judgment against him was one by confession rendered in strict compliance with the Practice Act of 1850; the Act which was in force at the time, and which continued in force long after our purchase of the property. Stat. of 1850, page 454, sec. 293. No irregularities in those proceedings are pointed out by defendant, nor are there any apparent from the record. But if there were irregularities, they could not prejudice this plaintiff. *Smith v. Randall*, 6 Cal. 47; *Lowe v. Adams*, 6 Cal. 277; 4 Wend. 462, 474 and 585; *Allen v. Portland Stage Co.*, 8 Maine, 166; *Jackson ex dem. Saunders v. Cauldwell*, 1 Cowen, 622; *Cox v. Nelson*, 1 Monroe, 94; *Webber et al v. Cox*, 6 Monroe, 111; *Parker v. Anderson*, 5 Monroe, 453; *Richards v. McMillen*, 6 Cal. 419; *Welch v. Sullivan*, 8 Cal. 165.

2d. The execution. It is not insisted that this writ is in any respect defective.

3d. The return. We contend that no return of levy whatever was necessary to give validity to our purchase.

The Act of 1850, sec. 8, is as follows: "The Sheriff shall return every execution at the time therein directed, endorsing on it a certificate of his acts done under authority of the writ."

The present Act has no such or similar provision; if it had, there might be a question as to whether it would be necessary in cases of this kind for the plaintiff to show in evidence a return. The law in force at the time of the trial must govern the introduction of evidence; and if there be no law requiring the Sheriff to certify his acts upon the execution, it is unnecessary to show one.

But even under the law of 1850 this was not necessary. The statute is directory, and a failure of a ministerial officer to make a return cannot defeat the title of the purchaser, especially where he is not a party to the judgment. This has been decided in several States where the law required the Sheriff to make a return. *Jackson ex dem. Ten Eyck v. Walker et al.*, 4 Wend. 462.

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"The purchasers depend upon the judgment, the levy, and the deeds; all other questions are between the parties to the judgment and the Marshal. Whether the Marshal sell before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return." *Wheaton v. Sexton*, 4 Wheat. Rep. 503, 506; *Lessee of State v. Macalister*, 9 Ohio, 19; *Gwynne on Sheriffs*, p. 336. In Tennessee, it is held that the purchaser's title cannot be made to depend upon the officer's return. *Mitchell v. Lipse*, 8 George, 179. The return, however, may be used as a link in claim of title. *Nichol v. Ridley*, 5 Yerg. 65; *Smith v. Randall*, 6 Cal. 47.

In Massachusetts, Connecticut and Maine, decisions can be found that the officer's return must be shown, and cannot be aided or changed by parol.

But it will also be found, that in all those cases the purchasers derived title under a *Statute extent*, or *elegit*, or title of record.

When the rule prevails that everything essential to the title must appear on record. *Metcalf v. Gillett*, 5 Conn. 400; *Sullivan v. McKean*, 1 New Hamp. 372; *Ladd v. Blunt*, 4 Mass. 402; *Emerson v. Powle*, 5 Maine, 197.

At common law, the officer need make no return on final process. *Chasley v. Barnes*, 10 East, 291; *Beals v. Guernsey*, 8 John. 52. Our present statute does not change this rule, for it does not require any return upon final process. The Act of 1850 is merely directory, and the omission of the officer to endorse his acts upon the execution cannot, as we have before endeavored to show, prejudice the purchaser.

The only objection to the deed of May 16th, 1857, seems to be, that it was executed long after the officer went out of office.

The doctrine is too well settled to be now controverted, that an officer may, after the expiration of his term of office, do any act necessary to complete his duty in regard to his unfinished official business. *Adams v. Robinson*, 1 Pick. 461; *Welsh v. Joy*, 13 Pick. 477; *Wells v. Battelle*, 11 Mass. 476; *Thatcher v. Miller*, 11 Mass. 413; *Jackson v. Collins*, 3 Cowen, 89; *People v. Baker*, 20 Wend. 602; *Tuttle v. Jackson*, 6 Wend. 224.

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A Deputy may execute a deed for property sold under execution. 3 Cal. 266; 10 John. 223; 18 John. 7.

Section 209, p. 447 of the Act of 1850, does not conflict with this rule. That section has reference merely to the executions in the Sheriff's office unreturned, and not to the execution of deeds in cases where the whole business of the execution has been accomplished.

William H. Brumfield for Respondent.

1st. The transcript in *Hastings et al. v. Wimmer et al.* This shows that a judgment by confession was rendered in that case on the sixth day of July, 1850, and upon this judgment the execution upon which the sale was had was issued.

At this time we had no statute on the subject of confession of judgments; no suit was pending before the Court who rendered the judgment, nor was any proceeding pending or instituted according to any mode known to our statute. Statute of 1850, 428, secs. 1 and 22; *Hoover v. Hanna*, 3 Blackford, 48; *Dewhurst v. Coulthard*, 3 Dall. 409.

2d. The second or confirmatory deed. This deed is dated in May, 1857. If its contents were admissible in evidence, it could have no effect as a deed, for the Deputy executing it had no power to do so at the time he did — after the expiration of the term of office of his principal. The power of completing the execution of the writ is given to the successor of the Sheriff. Statutes of 1850, 447, sec. 209. And if the principal had no power to act in such case after the expiration of his term, the deputy had none, of course. But it may be said that this statute does not change the common law, and notwithstanding the successor may complete the service of the *fi fa.*, still this statute does not prevent the old Sheriff or his Deputies from doing whatever is yet undone under it at the time of the change of officers, provided the proceeding had been commenced before the change. Neither the deeds or the return show that the statute had been complied with. *Welch v. Joy*, 13 Pick. 477.

As to the powers of the Deputy after the expiration of the term of his principal. *Billingall v. Duncan et al.*, 3 Gillman, 477; *Tuttle v.*

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Jackson, &c., 3 Wendell, 213—224; Elkin *et al.* v. The People, 3 Scam. 208, 551; Jackson v. Collins, 3 Cowen, 89.

This whole proceeding has been against one principle established by the authorities — that the officer who *begins* the *execution* of the writ must do *all* that is to be done under it.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Upon the statement in this case several questions arise:

1. It is argued that the judgment confessed by Wimmer *et al.* in the suit of Henley & Co. against him and others is void. We think not. The judgment having been rendered in open Court upon an allegation of indebtedness, and an appearance by the parties, whatever errors intervened, they cannot, at the instance of any one not a party to the judgment, be invoked to set aside or show the judgment a nullity. The Court had jurisdiction both of the parties and the subject matter, and no manner of exercising that jurisdiction makes void the action of the Court. We are not satisfied that under the statute of 1850 (p. 454, sec. 293) there was any substantial error in the proceedings connected with and including the judgment confessed; but it is wholly immaterial whether there were or not, or how many, or how gross, the jurisdiction having attached, the judgment could not be collaterally attacked by a stranger. Smith v. Randall, 6 Cal. 47; Lowe v. Adams, 6 Cal. 277, in this Court; Saunders v. Caldwell, 1 Cowen, 622.

2. The next objection by the defendant below is, that there was no return by the Sheriff on this execution of his proceedings under it after the levy. But it has been often held that this is not indispensable. While it is undoubtedly the duty of the Sheriff to make this return, and while it is important as evidence of a permanent and authentic character that he should do so, the title of the purchaser does not depend upon his performance of this duty. The purchaser has no control over the conduct of the officer in this respect; nor is it just or reasonable that he should be responsible for the remissness or negligence of the Sheriff in the discharge of such an office. The purchaser rests for title upon the judgment, execution, levy, sale and deed; and he need show no more to entitle him to whatever rights the defendant

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in execution had in the property sold. The authorities are uniform, we believe, on this subject. See *Ten Eyck v. Walker*, 4 Wend. 462, and cases.

3. One point taken, however, is fatal to the plaintiff's recovery. The deed purporting to be executed in 1857, long after the expiration of the Sheriff's term of office, is signed and acknowledged by one Todd, as Deputy of the Sheriff Rogers. But it nowhere appears that he had any authority to execute the deed in the name of the Sheriff, or that he was ever the Deputy of the Sheriff, or ever had anything to do with the levy or sale. No authority is adduced to show that a man, merely by his own act, professing to be the Deputy Sheriff of another — that other out of office — can, by signing and acknowledging a deed in the name of the old Sheriff, give effect to such deed as a conveyance of land sold, or pretended to be sold, under execution, during his principal's term. There is no evidence, except this deed, that this land ever was sold under execution; and the proceedings, so far as they go, seem to have been conducted by a different Deputy from Todd. If the old Sheriff could, under these circumstances, have given a deed which would have been *prima facie* evidence of the facts it recited — a point we do not decide — certainly a person professing merely to be or to have once been his Deputy, has no such power under the facts disclosed in the record. If Todd had any authority, either by virtue of his office, or otherwise, to execute a deed in the name of Rogers, the authority ought to have been produced.

Judgment is affirmed.

 CITY OF SACRAMENTO v. THE CALIFORNIA STAGE COMPANY.

A Stage Company engaged in carrying passengers to and from Sacramento City, is liable to pay to the city a license tax under the provisions of Section 22 of "An Ordinance authorizing and regulating the issue of Licenses and the collection of a License Tax."

The mere fact that the business of carrying the passengers is not within the municipal limits, does not make the receiving and discharging of them and for contracting them less a business in the city.

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APPEAL from the County Court of Sacramento County.

This was an action for the recovery of a license tax claimed by the plaintiffs under the provisions of an ordinance of the city, which is as follows:

"SEC. 22. Every person, company, corporation or co-partnership firm engaged in the business of carrying passengers to and from the City of Sacramento, for hire, by means of stage or stages, coach or coaches, or other modes of land conveyance, shall pay for a license to do the same as follows."

Plaintiffs had judgment, and the defendants appealed. The other facts appear in the opinion of the Court.

Winans for Appellants.

I. Have plaintiffs the right to frame *any ordinance whatever* imposing a license tax on defendants for the transportation of passengers to and from Sacramento?

II. If they have such right could it be claimed or enforced under section 22 of the present License Ordinance, upon which section this suit is based?

1. Have plaintiffs the right to frame *any ordinance whatever* imposing this tax on defendants?

Decidedly not. Their charter only gives them the right "to fix and collect a license tax on all theatres or other places of amusement, trades, professions and *business* not prohibited by law, *having regard to the amount of business done by such person or firm thus licensed.*"—Charter of Sacramento, sec. 7.

And this is the only provision in the charter in reference to the city's right to impose a license tax of any kind on any pursuit whatever. Does this provision in the charter give plaintiffs the authority in question? It will be admitted that all rights conferred by a charter are to be construed strictly, and not to be extended by implication. Now this provision authorizes the imposition of a tax upon "*business,*" (which is the only term used therein under which the pursuit in question, viz., carrying passengers for hire, could be embraced), "*having regard to the amount of business done by such person or firm thus*

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licensed." This plainly refers to business carried on within the city limits, the amount of which could therefore be ascertained. But how could any amount of business be ascertained in defendants' case? They carry passengers to and from the city, and the whole journey to and from the termini is a unit. The journey from Sacramento to Nevada is a unit. The journey from Marysville to Sacramento is a unit. A public corporation has no jurisdiction whatever beyond its municipal limits. *Waterhouse v. Dorr*, 4 Greenleaf, 333; *Hartford Fire Ins. Co. v. Hartford*, 3 Conn. 15; *Richards v. Daggett*, 4 Mass. 557.

As the right to tax is restricted to the city limits, there is a palpable want of jurisdiction in the present case. The calling of defendants is not exercised within the city limits. They do not even receive any hire for bringing passengers within the city or taking them out of it. As far as defendants are concerned the city is a point.

As to the second point.—It will be observed that the License Tax is for carrying passengers to or from Sacramento, not for selling tickets in that city.

Now these words "to" or "from" either signify "to or from," or else "into or out of." Plaintiffs' counsel contends that the proper interpretation of the word "to" is "into," and of the word "from" is "out of." But plaintiffs themselves did not so construe the meaning of those words, for by reference to their printed ordinances it will appear that shortly after the commencement of this suit, and after the defense therein had been divulged, they amended the section under review by substituting for the words "to" and "from," the words "into" and "out of."

But either construction of the words "to and from," as used in the section of the ordinance now under examination, whether you take that of the defendants or that contended for by plaintiffs' counsel, (which, to say the least of it, is very far fetched and forced) would be equally fatal to plaintiffs' right to recover in this case.

George R. Moore for Respondents.

There is legitimately but one question for discussion in this case. The controversy, by the pleadings, is narrowed down to one single

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point. The complaint charges that defendants are members of and compose a certain corporation known as the California Stage Company. That said Company have an office in the City of Sacramento, where they carry on and transact their business, and that they are constantly engaged in the business of carrying passengers, for hire, to and from said city, and that under and by virtue of the ordinance referred to they are liable for the license tax charged by plaintiffs. All these facts defendants admit to be true.

Here it will be seen, defendants admit that a part of their business (to wit, carrying passengers by means of stages to and from said city) is transacted and carried on within the limits and territorial jurisdiction of the city. No one will for a moment contend that the city has a right to tax the defendants for that portion of the business transacted outside of her jurisdiction; nor do we believe that any one can entertain a serious doubt that the city has the right and power to tax the Stage Company upon that portion of their business transacted here. We do not believe there is a wholesale house in Sacramento that does not transact a large portion of their business outside of the city. Many of them have branch stores in the mountains, which they supply from their stores here. Yet they pay a license tax upon all their business without a question as to the right of the Council to levy the same. Defendants' business is co-extensive with the limits of the State; they are not confined to any particular place, and therefore pay no taxes anywhere.

But, says appellants' counsel, the ordinance says "to and from the city." That certainly cannot mean *to within* and *from within*; it cannot reach beyond the outside limits, and therefore the City Council has no jurisdiction. But this attempt to torture language and pervert obvious meaning cannot for a moment be countenanced by this Court.

"Statutes should not in any case be so strictly construed as to defeat the obvious intention of the Legislature." *Randolph v. The State*, 9 Texas, 521.

"When the literal interpretation of a statute would lead to a gross absurdity of restriction, the Court will extend its operation to cases within the same equity, though at the expense of forcing the construction of the words." *Henry v. Tilson*, 17 Vermont, 478.

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Here the meaning and intention of the Common Council cannot be misunderstood. The license tax is levied upon business transacted within the city limits. She has that right as a power, a sovereignty.

Defendants have their office in Sacramento; they sell their tickets and transact their business here. They are protected by our laws, and receive all the privileges and benefits of other citizens, and are morally and legally bound to contribute their just proportion for the support of government.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Under a provision of the City Charter, the authorities have power "to levy and collect a license tax on theatres, and on trades, professions and business," etc. Under this section of the Charter, they imposed the tax on the defendants, who are a Company whose office and place of business is in the city, but whose business is the carriage of passengers from and to the city. The question is made whether, inasmuch as the larger portion of this work of transportation is done without the territorial limits of the city, the authorities have a right to levy this tax upon them; and, on this question, we have no doubt. The Company receive and discharge their passengers, and make contracts here for their conveyance, and they have their offices and property here, within the protection of the municipal laws. The mere fact that the business of carrying the passengers is not within the municipal limits, does not make the receiving and discharging of them and for contracting for them less a business here.

If this business is not a business in Sacramento, it is difficult to say where it is. The Company have as much need of the protection of the laws of the corporation, and are as much interested in the police expenditures, especially for streets, roads, etc., as any other persons, and we think are within the words and spirit of the taxing power.

Judgment is affirmed.

Mudgett v. Day.

MUDGETT v. DAY.

An agent for the collection of a note is confined to the taking of money in payment, and has no power, unless special authority is given, to take goods in payment.

The maker of the note having knowledge of the agency, is bound to inquire into the extent of the powers of such agent.

APPEAL from the Sixth District, County of Sacramento.

This was an action upon a promissory note made by the defendant and payable to the plaintiff or bearer. The note was dated on the twenty-first of September, 1857, and by its terms was to become due on the first day of January, 1858. The suit was commenced on the first of February following.

The defense set up was, that one Charles D. Humphries was the owner and holder of the note, and that he had agreed with defendant, prior to the maturity of the note, for a valuable consideration, to extend the time for the payment of the same, which extended time had not expired when the suit was commenced, and also that defendant had an offset to the note as against Humphries.

The other facts sufficiently appear in the opinion of the Court.

Smith & Hardy for Appellant.

Latham & Sunderland for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Day made his note to Mudgett or bearer, for \$278. It seems that the plaintiff put this note in the possession of one Humphries, and before it was due, as his agent, Humphries made an agreement, in his own name, with Day, for 1,272 pounds of barley, "to be credited on Mudgett's note in Humphries' hands." It appears that Day afterwards had express notice of the character in which Humphries acted; that he requested Humphries to extend the time of payment, which Humphries told him he had no authority to do. The inference from

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this is, that he considered the contract with Humphries not obligatory on Mudgett.

Judgment was given for the plaintiff; and rightly. Day having been apprised that Humphries only held the note for collection, and as the agent of Mudgett, as is clearly indicated by the agreement, was bound to inquire into the extent of his agency. He was bound to ascertain whether he had any right to make such an agreement as that set up in defense. There was no proof that he had. An agent for the collection of a note is confined to the taking of money in payment, and has no power to make executory contracts of this sort unless special authority be given, of which there is no proof.

Judgment affirmed.

PICO v. WEBSTER.

An action brought by an agent, in his own name, for a trespass, in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin.

APPEAL from the Fifth District, County of San Joaquin.

A statement of facts appears in the opinion of the Court.

Hall & Huggins for Appellant.

Bridges & Hall for Respondent.

BALDWIN, J., delivered the opinion of the Court—FIELD, J., concurring.

This action was for the forcible taking and conversion of an amount of gold coin, the property of plaintiff, and taken from his possession by the defendant. The defendant answered, denying generally the allegations of the complaint, and setting up for further answer, that one Brodie had before sued and recovered judgment for one dollar on the

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same identical cause of action; that Brodie was the agent of Pico; that suit was brought at the instance of Pico and for his benefit; that the jury in this case of Brodie, found, among other things, that the money sued for was taken by Webster from the possession of Brodie; that the money was the money of Pico, and that Pico was a delinquent tax-payer of San Joaquin county, and that, by this taking, the plaintiff, Brodie, sustained damages to the amount of one dollar, for which judgment was rendered. The answer avers that the gold coin was, in truth, and in fact, the property of the plaintiff (Pico) at the time it was seized by defendant, and was in the custody of Brodie, his agent, and the judgment inured to his (Pico's) benefit and use.

The testimony was brief: Brodie was examined as a witness, and he swore that he believed that the money taken from Webster was his own; that he was the agent and attorney, in fact, of Pico, and this money was a part of the proceeds of sale of Pico's land, and he claimed the money by virtue of some arrangement with Pico; that since the trial of the suit brought by himself, he did not believe that he was the owner of the money; that the first suit was brought by him for the money as his own property, and for his own benefit, and not on Pico's account or for his use.

The plaintiff introduced the record of recovery in the case of Brodie against Webster, showing the facts before recited. The record showed that the jury found that the money was the property of Pico. There is no pretense that Webster had any authority to seize the money, but the seizure seems to have been a naked trespass.

The fact that Brodie was the agent of Pico, and that the money came from the sale of Pico's land, even against the assertion of Brodie that he believed when he brought his suit that he was the owner of the money, was evidence to go to the jury as to the right, even if the record introduced by the defendant himself to support his own averment in his answer, that Pico was the owner, was no evidence of Pico's ownership. The defendant contends it was no evidence, because the general denial in the answer put in issue all the allegations of the complaint—this of the ownership among others—and that the special defense, already set out, averring Pico's ownership, is no admission of any of the facts therein stated. It is not necessary to controvert this

McConnell v. McCormick.

position; for, if it be true, it can scarcely be maintained that the evidence introduced by the defendant himself of the facts in this special defense does not tend to prove the facts which that evidence asserts — at least as against the party offering the evidence. We think there *was* evidence which the jury might consider of the fact of the ownership of Pico.

There was no evidence — certainly no conclusive proof — that the suit of Brodie was brought at the instance or for the use of Pico. The failure of Brodie's suit, therefore, especially on the ground that the money belonged to Pico, was no bar to the action of Pico. It would present a strange anomaly if a suit were brought by one and defeated on the ground that the property belonged to another, and then the other sued, if the last suit were defeated on the ground that the first concluded the last plaintiff.

There was no error to the prejudice of the appellant in the instructions, and the Court did not err in refusing a new trial.

Judgment affirmed.

McCONNELL v. McCORMICK.

Where the principal of a line of stages, by letter to one acting as his agent in such business, wrote, "You will do better by getting new drivers, and agents, and horses," and such agent employed a sub-agent, and subsequently the principal was informed of such employment and made no objection; in an action for the wages of the sub-agent, *Held*: That the facts were sufficient to authorize the jury to find the fact of authority in the agent to employ the plaintiff.

APPEAL from the Sixth District, County of Sacramento.

The facts appear in the opinion of the Court.

L. Sanders, Jr., for Appellant.

Henry H. Hartley for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Cordier v. Schloss & Heilbronner.

This was an action for the recovery of a sum of money alleged to be due for wages. The plaintiff below claims that one Grim was authorized by the defendant to employ him in the stage business, and even if he was not, that the defendant ratified the contract. The question is one of fact on which the jury passed. The defendant appeals from the overruling of her motion for a new trial, and her counsel contends that there was no evidence to support the verdict.

We think there was enough in the testimony of Kauffman and Grim, and in the letters of the defendant herself, to Grim, to be left to the jury for them to find the fact of authority in Grim to employ the plaintiff. In one of the letters she says: "You will do better by getting new drivers, and agents, and horses." It seems, after her return from the Atlantic States, she was informed of the acts of Grim, and made no objection at the time. The nature of the business, too, would seem to require some general powers in the agent having the control and direction of it.

We see no objection to the instructions given, which announce general rules as to agency, which were not erroneous in the relation in which they stand to the proofs.

The judgment is affirmed.

CORDIER v. SCHLOSS & HEILBRONER.

Richards v. McMillan et al., (6 Cal. Rep. 419) affirmed.

The Legislature did not intend any more definiteness of particularity in cases of confession of judgment, than in complaints upon the same cause of action in the ordinary course of procedure. BALDWIN, J.

The old rules of Chancery pleading are superseded by the Practice Act. *Id.*

APPEAL from the Fourth District, County of San Francisco.

This action in the Court below was Ernest Cordier v. M. Schloss, Joseph Heilbronner, Joseph S. Kohn, Morris Kohn and David Scannell.

At the date of the transactions in the case, the defendants, M. Schloss and Joseph Heilbronner (who are the only appellants), were

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merchants in New York, residing there and doing business under the name of Schloss & Heilbronner. The other defendants, Joseph S. Kohn and Morris Kohn, were dealers in San Francisco or Sacramento, under the name of Joseph S. Kohn & Brother, and insolvent. The remaining defendant, David Scannell, was Sheriff of the County of San Francisco.

On February 18th, 1857, a judgment by confession for \$2,616, with \$13.75 costs, in favor of the defendants, Schloss & Heilbronner, against the defendants, Joseph S. and Morris Kohn, was entered up in the District Court of the Fourth Judicial District.

The statement on which the judgment was entered is as follows:

STATEMENT.

<p>“SCHLOSS & HEILBRONNER, Consisting of M. SCHLOSS & JOSEPH HEILBRONNER, JOSEPH S. KOHN, MORRIS KOHN, Partners under the firm name of KOHN & BROTHER.</p>	}
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“The defendants state and admit that they are justly indebted to the plaintiffs in the sum of two thousand and four hundred dollars, and interest thereon at the rate of one per cent. per month, from the fifteenth day of May, 1856, for which amount they consent that judgment may be entered against them by the Clerk of said District Court, in his office; and the facts out of which said indebtedness accrued, are as follows, to wit: That the plaintiffs are the owners of the following promissory note, made by said defendants, to wit:

““SACRAMENTO, May 15th, 1859.

““\$2,400.

““Eight months after date we promise to pay to the order of ourselves, in the City of New York, two thousand and four hundred dol-

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lars, at the rate of one per cent. (1 pr. ct.) per month until paid, value received.

“(Signed) JOSEPH S. KOHN & BRO.’

“That the said note was given by the said defendants to the said plaintiffs for goods sold and delivered to the defendants by the firm of Schloss & Heilbronner, the plaintiffs aforesaid, and money had and received by defendants; that the consideration for said promissory note was said money and goods, sold by plaintiffs to, and received by them, the defendants aforesaid.

“That the sum above by us confessed, is justly due to the said plaintiffs, on the foregoing note, after allowing all just credits and offsets, without any fraud whatever, for which amount they do hereby authorize the Clerk of said Court to enter up judgment against them, the said defendants.”

Dated, SAN FRANCISCO,

the day of February, 1857.

City and County of San Francisco, ss:

“Joseph S. Kohn and Morris Kohn, the defendants aforesaid, each for himself, being sworn, says that the above statement of confession is true.

(Signed) JOSEPH S. KOHN,
MORRIS KOHN.

Sworn to before me, this eighteenth day of February, A. D. 1857.

P. K. WOODSIDE,
Dep. Co. Clerk.”

Upon this judgment, execution was, on the same day, issued to the defendant. Scannell, under which he levied on all the property of the defendants Kohn, being the entire stock of dry goods in their store in San Francisco.

The next day, February 19th, 1857, the plaintiff in this action commenced suit in the same Court, against the defendants Kohn, for goods sold and delivered, and money lent and advanced, and issued an attachment for the amount to Scannell, Sheriff. In this latter action

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judgment was, in due course, recovered by the plaintiff for \$1,795, with \$74 costs.

The goods in the hands of the Sheriff having been sold, produced about \$2,400. This being insufficient to satisfy the execution of Schloss & Heilbroner, and the attachment of the plaintiff, the latter, on March 28th, 1857, commenced the present action (in equity) against all the defendants above named, to set aside the judgment by confession in favor of Schloss & Heilbroner, as fraudulent and void in law and in fact; to have the levy of their execution postponed to the levy of the plaintiff's attachment, and to have the proceeds of the sale in the Sheriff's hands subjected first to the plaintiff's attachment, and for general relief; also for a temporary injunction.

To the complaint, which was verified, separate demurrers were interposed by the defendants, Schloss & Heilbroner. The demurrers were overruled, and they answered separately, as did also the defendants Kohn. The case was tried before the Court without a jury, and the Court decreed that the judgment by confession, so far as it affects the lien and judgment of the plaintiff in this action, be set aside.

Schloss & Heilbroner appealed to this Court.

Many points were raised by the record and argued by counsel, which this Court declined to pass upon, deeming it sufficient to reverse the judgment of the Court below upon the authority of the case of *Richards v. McMillan et al.*, 6 Cal. 419.

Shattuck, Spencer & Reichert for Appellants.

Eugene Casserly and Harmon & Labatt for Respondent.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring in a separate opinion.

This is a proceeding to set aside a confession of judgment made by Kohn & Co. in favor of Schloss & Heilbroner.

The allegations of fraud in the complaint are sufficiently controverted by the answer; and the evidence shows that the amount for which judgment was confessed was actually due Schloss & Heilbroner by Kohn & Co.

The case is entirely analogous to that of *Richards v. McMillan et al.*

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(6 Cal. 418) and as we see no reason to question the correctness of that decision, the judgment of the Court below is reversed.

BALDWIN, J.—I agree with the Chief Justice in the conclusion at which he has arrived. After an attentive examination of the case, I think we are precluded by the case of *Richards v. McMillan*, from holding that the failure to state more specifically the cause of action in the affidavit avoids the judgment. The want of this more complete statement is, at most, only *prima facie* evidence of fraud. Indeed, if disposed at all to interfere with that case, I should feel disposed, notwithstanding the New York cases, to question whether a judgment so confessed was even *prima facie* fraudulent, mainly for the reason that the rule invoked, if such it can be called, requiring a fuller statement of the facts, wants the essential element of certainty. It is better to have a rule less correct than one better in the abstract, but more difficult of ascertainment and application. The question is not easy of answer, if the brief, general statement in this case is not sufficiently certain, what would be essential. How minute ought to be the statement of the transaction out of which the indebtedness confessed grows? Is it to be governed by the circumstances of each particular case? Then we should probably have litigation in each case to determine the sufficiency of the statement in that case. I cannot think the Legislature intended any more definiteness of particularity in case of confession of judgments than in complaints upon the same cause of action in the ordinary course of procedure. But as this is a question of practice, and many judgments have probably been taken under it, we consider it better to let the decision in the case of *Richards v. McMillan* stand.

The other points made in the learned and elaborate brief of the appellants' counsel, I think are not well taken. It is impossible in the pressure of business to consider at length the various questions raised. I think that the old rules of Chancery pleading are superseded by the Practice Act; that the material charges of fraud are all substantially denied in the answer. Those insufficiently stated, if admitted, are not sufficient to establish the fraud charged: that the deposition of the book-keeper of defendants having been taken on examination and

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cross-examination, was properly admissible; at any rate we could not review the error, if any, in the Court in refusing to exclude it; and that the proof made by defendant, tended strongly to sustain the judgment and remove the presumption of fraud raised by the form and circumstances of the judgment.

As, however, the Court below decided the question, apart from any question of these proofs, on the first point, and thereby the plaintiff may have omitted to introduce testimony on the other points, on the next trial the parties may be allowed to try the case fully on the facts unaffected by this judgment.

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The evidence of the circumstances under which a deed was executed is admissible beyond question. These circumstances place the Court in the position of the parties, and enable it to interpret intelligently the language used by them. It is not to contradict or vary the terms of the instrument that the evidence is received, but to apply them to the subject matter. For this purpose, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty until it has been examined with all the light which cotemporaneous facts may furnish. If these render the intention clear, and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed, and the instrument enforced.

The declarations of the grantor are admissible, not only as against himself but against parties claiming under him. The subsequent claimants are considered as standing in his place, and as having taken the title *own owners*, subject to the same changes and restrictions which attached to it in his hands. It matters not whether the declarations relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises, or lessen his own title, they are admissible.

Where the declarations of the grantor controlled the conduct of the grantee in the purchase of land, the grantor, and those subsequently claiming under him, are estopped from the assertion of any interest in the land in opposition to the title of such grantee.

The assertion of quantity in a deed must yield to a description by metes and bounds, or by name or number.

In the description of the land conveyed by deed, designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by

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extrinsic evidence, this is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property sold, the date of the transfer, and the price paid, was sufficient to pass the title. Where a person purchasing land has actual notice of a former conveyance of the same land, he is not entitled to protection as a purchaser for value without notice; nor are his partners in the purchase, although they at the time knew nothing of such purchase. A party in taking a conveyance in the name of his associates, must be considered as having acted as their agent, and notice to him is equally notice to them.

APPEAL from the Seventh District, County of Napa.

This was an action of ejectment. The cause was tried by a jury, and verdict and judgment for the plaintiff. Defendants moved the Court for a new trial, which was denied, and they appealed to this Court.

A statement of facts sufficient to elucidate the points decided, appear in the opinion of the Court.

Crocker, McKune, Robinson and Curry for Appellants.

I. The description in the deed from Higuera to Fallon, under which plaintiff claims, is as follows:

"A certain quantity of land lying, being and situate in the district and territory above mentioned, (District of Sonoma, and Territory of Alta California) in the valley of Napa, containing more or less *one mile square of land* in the place known as the 'Rincon de los Cameros,' commencing in the wagon road and ending at the point of the hill at the east. To have, etc."

Under this description we contend —

1st. That in any event it does not convey more than "one mile square."

2d. That it is so uncertain and indefinite, that even that amount cannot be located with any certainty, and it was therefore void.

The most definite terms in the description are — "a certain quantity

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of land " containing more or less "one mile square of land;" and, although as a general rule, quantity is not usually material in a description, yet where the boundaries are doubtful it becomes material, as it affords evidence of the intention. 4 Phil. Ev., C. & H. notes, 550; 3 Murphy, 539; 4 Devereux, 374; 2 Caine's, 146; 11 Illinois, 279; 2 Richardson (S. C.) Rep. 543; Cooke, 460.

Words indicating quantity yield when they conflict with words of more accurate description; otherwise they are part of the description, and are not qualified by the words more or less. *Pierce v. Torrence*, 37 Maine, 63. And words of quantity may be the most essential part of the description, as—seventy acres lying and being in the southwest corner of a certain section. The seventy acres will be laid off in a square. 2 Hammond, 327; Wright, 366. So a deed of "my acre lot," the grantor having an acre and a half acre lot. 4 Devereux, 370. So, in the present description, it was evidently the intention of the parties to sell and convey "one mile square of land in the Rincon de los Cameros;" and if it had been their intention to convey the whole Rincon, they would have expressed it in very different terms.

But respondent urges that these words respecting quantity should be rejected as false. If this is done, you reject the only portions which are in any way definite or certain.

But he insists that the words "more or less" show that it was not the intention to limit it to one mile.

We admit that the authorities sustain the following position: that where the description clearly conveys a certain tract of land by clear, well-defined boundaries, the whole tract will pass with or without the words "more or less;" subject, however, to be corrected by a Court of Equity in cases of fraud or mistake. But the decisions limit it to cases where the boundaries are certain and definite. Where the description is uncertain as to the boundaries, then quantity becomes material in ascertaining the intention, and the words "more or less" will not qualify it.

In the case of the *United States v. Fossatt*, 20 Howard, the words "more or less" were rejected as surplusage, for this reason: as one of the boundaries could only be located by taking the quantity specified as a guide

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These words cannot be construed to enlarge the boundaries mentioned in the deed. 3 J. J. Marshall, 421.

For these reasons we insist that the claim of plaintiff must be limited to one mile square. But the description is so uncertain and indefinite that it is impossible to locate even one mile square with any reasonable certainty; and the paper, therefore, is entirely void for uncertainty.

It says, "commencing at the wagon road," but it fails to state at what point on the wagon road it is to commence. Plaintiff claims that this point is the "crossing of Cameros Creek;" but if such was the intention, it would have been easy to have so expressed it; and the fact that it was not stated is conclusive that such was not the intention.

This Court, in *Mesick v. Sunderland*, 6 Cal. Rep. 297, has laid down the rule upon this subject with clearness and precision. It says: "The thing granted cannot vest in parol, but must be shown with that distinctness of description that will enable it to be identified.

"The general rule upon this subject is, that every conveyance must, either on its face, or by words of reference, give to the subject intended to be conveyed such a description as to identify it; if land, it must be shown so as to afford the means of locating it. *Neil v. Hughes*, 10 Gill & Johns. 7." Again, it is said that "if the description in a deed be so imperfect that it cannot be understood what land is intended to be conveyed, the deed is void."

To the same effect are the following: 2 *Parsons on Contracts*, 72; 4 *Bacon Abr. Grant (H)*, 521; 4 *Comyn's Dig. Grant E*, 14; 4 *Kent*, 453; *Adams' Ej.* 25 and notes.

In entries of public lands it is held, that they must be located so precisely that others may be able with certainty to locate other tracts upon the adjacent residuum, or they will be fatally defective. 1 *Wheaton*, 130; *Ken. Dec.* 66, 231; *Hardin*, 89, 261; 6 *J. J. Marsh.* 253; 1 *A. K. Marsh.* 605; 2 *A. K. Marsh.* 409; 3 *A. K. Marsh.* 195; 3 *Littell*, 438.

We give the following instances of defective descriptions:

1 *Cowan*, 285: The deed merely described various lines, but they did not close, and no land was actually included in the supposed boundaries.

An entry gave a base line sufficiently certain, and "then at right angles from the extremity of each line," was held invalid, because it

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these are the essential requisites of a conveyance under our American law.

III. The admissions and declarations of Higuera are inadmissible.

In no case is a declaration by the grantor as to his intentions in using the words in the deed allowed to be received as evidence. 2 Phil. Ev. 282, 285, 300, 326, 332, 334; 4 Phil. Ev., C. and H. notes, 534.

Parol evidence, that at the time of making the deed the parties were on the land, and the grantor pointed out a place as the boundary, is inadmissible. *Peasely v. Gee*, 19 N. H. 273.

But it is urged that Higuera, and all claiming under him, are estopped by these alleged admissions. We admit that there are cases where a party and his privies are estopped by his admissions; but this is only where the subject matter of the admission is a subject of parol proof. But where the law requires the subject matter to be in writing, as in this case, then parol proof even of a solemn admission is not admissible.

Admissions to operate as an estoppel must be such as relate to matters which may be proved by parol, and do not apply to such as can only be proved by written evidence. *Mason v. Clark*, 3 Scammon, 532; 2 Scammon, 48 and 49; 3 Phil. Ev., C. and H. notes, 266.

There are cases, also, where parties have been in possession of adjoining tracts, and their acts and admissions respecting the location of the boundary lines between them, have been held to operate as an estoppel; but these cases do not apply here, because there never was any actual possession of any tract by Fallon under this paper, or any of those claiming under him.

This parol evidence of Fallon is clearly inadmissible, for all previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties; and by it, in the absence of fraud, their rights and liabilities are to be determined. *Peabody v. Phelps*, 9 Cal. 213.

IV. The paper to Fallon not being under seal conveyed only an equity, and the plaintiff counts upon a legal title. *Clark v. Elvey*, 11 Cal. 154; *Dupont v. Wertheman*, 10 Cal. 354.

V. Defendants had no notice of the paper to Fallon.

There are two kinds of notice: 1st. Actual; 2d. Constructive.

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This Court has already held, in numerous cases, that the only kind of constructive notice permissible under our registry laws, is that arising from the recording of the conveyance under the statute. *Call v. Hastings*, 3 Cal. Rep. 179; 6 Cal. 297; *Bird v. Dennison*, 7 Cal. 297; *Stafford v. Lick*, 7 Cal. 479.

And that deeds made prior to the Registry Law must be recorded to give constructive notice. *Call v. Hastings*, 3 Cal. Rep. 179; *Stafford v. Lick*, 7 Cal. 479.

There is not the least evidence, or the least pretense, that Crocker & Robinson ever had the least intimation that Fallon ever had any deed.

Purchasers without notice will be protected as well at law as in equity. 1 Story Eq., secs. 165, 381, 434.

Purchase by one who had notice of one who had no notice, will be protected. 1 Story Eq., secs. 409, 410.

Implied or constructive notice of a prior deed must be, not merely a probable but a necessary inference from the facts proved. 3 Pick. 149.

Actual notice must be actual knowledge of the conveyance. 6 Cal. Rep. 670.

Fallon, or those claiming under him, never had possession; so the doctrine of constructive notice by possession does not apply.

In Massachusetts and Maine, it is held that actual notice of an unregistered deed is necessary, and that it is not sufficient to prove facts that would put the party upon inquiry. He is not bound to inquire; but it must be shown that he had actual notice or knowledge of such deed. *Pomroy v. Steevens*, 11 Metcalf, 244; *Spafford v. Weston*, 29 Maine, 140.

Notice of an unregistered conveyance is not binding unless given by a person interested in the property, and in the course of the treaty for the purchase. He will not be bound by notice in a previous transaction which he may have forgotten. *Gray v. Woods*, 4 Blackford, 432.

Even constructive notice of an unrecorded deed must be so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of the other party. 1 Story Eq., sec. 398.

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judgment was, in due course, recovered by the plaintiff for \$1,795, with \$74 costs.

The goods in the hands of the Sheriff having been sold, produced about \$2,400. This being insufficient to satisfy the execution of Schloss & Heilbroner, and the attachment of the plaintiff, the latter, on March 28th, 1857, commenced the present action (in equity) against all the defendants above named, to set aside the judgment by confession in favor of Schloss & Heilbroner, as fraudulent and void in law and in fact; to have the levy of their execution postponed to the levy of the plaintiff's attachment, and to have the proceeds of the sale in the Sheriff's hands subjected first to the plaintiff's attachment, and for general relief; also for a temporary injunction.

To the complaint, which was verified, separate demurrers were interposed by the defendants, Schloss & Heilbroner. The demurrers were overruled, and they answered separately, as did also the defendants Kohn. The case was tried before the Court without a jury, and the Court decreed that the judgment by confession, so far as it affects the lien and judgment of the plaintiff in this action, be set aside.

Schloss & Heilbroner appealed to this Court.

Many points were raised by the record and argued by counsel, which this Court declined to pass upon, deeming it sufficient to reverse the judgment of the Court below upon the authority of the case of *Richards v. McMillan et al.*, 6 Cal. 419.

Shattuck, Spencer & Reichert for Appellants.

Eugene Casserly and Harmon & Labatt for Respondent.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring in a separate opinion.

This is a proceeding to set aside a confession of judgment made by Kohn & Co. in favor of Schloss & Heilbroner.

The allegations of fraud in the complaint are sufficiently controverted by the answer; and the evidence shows that the amount for which judgment was confessed was actually due Schloss & Heilbroner by Kohn & Co.

The case is entirely analogous to that of *Richards v. McMillan et al.*

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(6 Cal. 418) and as we see no reason to question the correctness of that decision, the judgment of the Court below is reversed.

BALDWIN, J.—I agree with the Chief Justice in the conclusion at which he has arrived. After an attentive examination of the case, I think we are precluded by the case of *Richards v. McMillan*, from holding that the failure to state more specifically the cause of action in the affidavit avoids the judgment. The want of this more complete statement is, at most, only *prima facie* evidence of fraud. Indeed, if disposed at all to interfere with that case, I should feel disposed, notwithstanding the New York cases, to question whether a judgment so confessed was even *prima facie* fraudulent, mainly for the reason that the rule invoked, if such it can be called, requiring a fuller statement of the facts, wants the essential element of certainty. It is better to have a rule less correct than one better in the abstract, but more difficult of ascertainment and application. The question is not easy of answer, if the brief, general statement in this case is not sufficiently certain, what would be essential. How minute ought to be the statement of the transaction out of which the indebtedness confessed grows? Is it to be governed by the circumstances of each particular case? Then we should probably have litigation in each case to determine the sufficiency of the statement in that case. I cannot think the Legislature intended any more definiteness of particularity in case of confession of judgments than in complaints upon the same cause of action in the ordinary course of procedure. But as this is a question of practice, and many judgments have probably been taken under it, we consider it better to let the decision in the case of *Richards v. McMillan* stand.

The other points made in the learned and elaborate brief of the appellants' counsel, I think are not well taken. It is impossible in the pressure of business to consider at length the various questions raised. I think that the old rules of Chancery pleading are superseded by the Practice Act; that the material charges of fraud are all substantially denied in the answer. Those insufficiently stated, if admitted, are not sufficient to establish the fraud charged: that the deposition of the book-keeper of defendants having been taken on examination and

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cross-examination, was properly admissible; at any rate we could not review the error, if any, in the Court in refusing to exclude it; and that the proof made by defendant, tended strongly to sustain the judgment and remove the presumption of fraud raised by the form and circumstances of the judgment.

As, however, the Court below decided the question, apart from any question of these proofs, on the first point, and thereby the plaintiff may have omitted to introduce testimony on the other points, on the next trial the parties may be allowed to try the case fully on the facts unaffected by this judgment.

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The evidence of the circumstances under which a deed was executed is admissible beyond question. These circumstances place the Court in the position of the parties, and enable it to interpret intelligently the language used by them. It is not to contradict or vary the terms of the instrument that the evidence is received, but to apply them to the subject matter. For this purpose, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty until it has been examined with all the light which cotemporaneous facts may furnish. If these render the intention clear, and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed, and the instrument enforced.

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Where the declarations of the grantor controlled the conduct of the grantee in the purchase of land, the grantor, and those subsequently claiming under him, are estopped from the assertion of any interest in the land in opposition to the title of such grantee.

The assertion of quantity in a deed must yield to a description by metes and bounds, or by name or number.

In the description of the land conveyed by deed, designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by

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extrinsic evidence, this is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property sold, the date of the transfer, and the price paid, was sufficient to pass the title. Where a person purchasing land has actual notice of a former conveyance of the same land, he is not entitled to protection as a purchaser for value without notice; nor are his partners in the purchase, although they at the time knew nothing of such purchase. A party in taking a conveyance in the name of his associates, must be considered as having acted as their agent, and notice to him is equally notice to them.

APPEAL from the Seventh District, County of Napa.

This was an action of ejectment. The cause was tried by a jury, and verdict and judgment for the plaintiff. Defendants moved the Court for a new trial, which was denied, and they appealed to this Court.

A statement of facts sufficient to elucidate the points decided, appear in the opinion of the Court.

Crocker, McKune, Robinson and Curry for Appellants.

I. The description in the deed from Higuera to Fallon, under which plaintiff claims, is as follows:

"A certain quantity of land lying, being and situate in the district and territory above mentioned, (District of Sonoma, and Territory of Alta California) in the valley of Napa, containing more or less *one mile square of land* in the place known as the 'Rincon de los Cameros,' commencing in the wagon road and ending at the point of the hill at the east. To have, etc."

Under this description we contend —

1st. That in any event it does not convey more than "one mile square."

2d. That it is so uncertain and indefinite, that even that amount cannot be located with any certainty, and it was therefore void.

The most definite terms in the description are — "a certain quantity

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1st, 1850, and a deed from the Sheriff of Napa county, executed March 21st, 1857, upon a sale made under an execution issued upon a judgment recovered against Martin.* The judgment became a lien upon the premises, December 9th, 1854, and by the deed the estate and interest which Martin possessed on that day, passed to the plaintiff. The subsequent conveyances of Martin and Fallon to the plaintiff, dated respectively May 25th, 1856, and June 15th, 1857, may be dismissed from notice, as they do not add to his title.

The defendants claim through a deed from Higuera and wife to Ramon de la Riva, executed February 7th, 1852, and a deed from Riva to Encarnacion Cacho, and Marta Frias, daughters of Higuera, executed March 28th, 1852. The daughters partitioned the property between themselves, October 13th, 1852; after which, on the eighth of November, 1852, Encarnacion conveyed her interest to the defendant Green, and on the twenty-eighth of June, 1854, Green conveyed a part of the land claimed by him under deed from Encarnacion, to the defendants, McKune, Crocker and Robinson. The other defendants are tenants of either Frias, or Green, or McKune. Crocker and Robinson. The will of Higuera may be passed over in the consideration of the case, as it cannot affect the claim of the defendants. It was made after the sale to Fallon; and, if this were otherwise, it could only take effect upon the death of the testator, and operate upon property which he then possessed.

The principal question presented for consideration relates to the description of the premises contained in the deed of November 13th, 1847, to Fallon, which the counsel of appellants insists is void for uncertainty. It reads as follows: "A certain quantity of land, lying being and situate in the District of Sonoma, and territory of Upper California, in the valley of Napa, containing, more or less, one square mile of land, in the place known as the Rincon de los Cameros, commencing at the wagon road and ending at the point of the hill on the east."

It appears that the term Rincon de los Cameros was used to designate generally the land lying between Napa river on the one side, and the Arroyo on the other. The two streams meet at an angle, forming the two sides of a triangle; and some distance above their junction, the old road leading from Napa to Sonoma crosses the Arroyo. It

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further appears, that previous to the execution of the conveyance to Fallon, and pending a proposition of Higuera to sell the Rincon, the parties went over the ground in company, Fallon being at the time ignorant of its location; and there, after its extent and upper line had been pointed out, the purchase was concluded, with the clear understanding that it was to embrace the entire "pocket," as it is sometimes termed in the evidence, from the line down. It also appears that on the day following, the parties, including the wife of Higuera, applied to the Alcalde of Sonoma to draw the conveyance; that Higuera desired it to be written in Spanish, and, as the Alcalde was ignorant of the language, he employed a person who understood it, for that purpose. The Alcalde then dictated the deed, from such information as was given to him by Higuera. When they came to the mention of quantity, neither party could state the exact amount. They called it a mile square, more or less, but with the understanding that it was to include the entire tract of the Rincon.

In addition to this, the record discloses repeated declarations of Higuera to different parties, as to his sale of the premises, and the position of the upper line; in 1849, to John Walker, who was desirous of purchasing, and had a copy of the deed to Fallon, and for whom Higuera made a sketch or plot of the land; in 1850, to Martin, who held at the time a power of attorney from Fallon, to sell, and who himself shortly afterwards became the purchaser, and with whom Higuera rode over the land, pointing out its boundaries; and to Joseph Walker, who was employed to have a survey made of the premises for Martin, after his purchase, and to whom Higuera pointed out the land sold to Fallon, and the commencement of its upper line.

If we now look at the description of the premises in the deed to Fallon in the light of these circumstances, the uncertainty, which is the subject of objection, disappears. Rincon de los Cameros designates the land embraced between the streams forming, as we have seen, two sides of a triangle, and the line commencing on the road and drawn to the point of the hills on the east, sufficiently indicates the third side. The description is evidently intended to embrace land in the Rincon below the specified line, and is to be construed as if it read, "A certain quantity of land situated within the Rincon, commencing

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at a line running from the wagon road to the point of the hills on the east, be the same one square mile, more or less."

That the evidence of the circumstances under which the deed was executed is admissible, does not admit of a question. These circumstances place the Court in the position of the parties, and enable it to interpret intelligently the language used by them. It is not to contradict or vary the terms of the instrument, that the evidence is received, but to apply them to the subject matter. For this purpose, extrinsic evidence must be admissible in the interpretation of every instrument; and the law will not declare the instrument void for uncertainty, until it has been examined with all the light which contemporaneous facts may furnish. If these render the intention clear, and the words of the instrument are, by fair rendering, susceptible of a construction to uphold such intention, then they will be so construed, and the instrument enforced. "If the meaning of the instrument, by itself," says Parsons, "is affected with uncertainty, the intention of the parties may be ascertained by extrinsic testimony;" (of the circumstances under which the instrument was made) "and this intention will be taken as the meaning of the parties expressed in the instrument, if it be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. But if it be incompatible with such interpretation, the instrument will then be void for uncertainty or incurable inaccuracy." (On Contracts, 2 vol., 78) "For the purpose of applying the instrument," says Baron Parke in *Shore v. Wilson*, (9 Cl. & Fin. 556) "to the facts, and determining what passes by it, and who takes an interest under it, a second description of evidence is admissible, viz., every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. See also *Hasbrook v. Paddock*, 6 Barb. 635; *Hildebrand v. Fogle*, 20 Ohio, 157; 1 *Greenleaf Ev.*, sec. 286; *Cowen & Hill's Notes to Phillips*, Part II, notes 263 and 269, and authorities there cited.

The declarations of Higuera to Fallon, made at the time of the sale, were admissible to show the location of the Rincon de los Came-

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ros, and to identify the tract sold; and his subsequent declarations to the Walkers and Martin, were admissible against himself as the owner of adjoining property on the question of boundary. It is to be observed that at the time these subsequent declarations were made, Higuera was the owner of the entire tract of Entre Napa, excepting that previously conveyed to Fallon, and these declarations show the position of the dividing line between the land retained by himself and that which had passed to Fallon. So far as the tract south of the line commencing at the road is concerned, they were against his title.

That such declarations of the grantor are admissible not only as against himself, but against parties claiming under him, is a familiar principle. The subsequent claimants are considered as standing in his place, and as having taken the title *cum onere*, subject to the same charges and restrictions which attached to it in his hands. It matters not whether the declarations relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises or lessen his own title, they are admissible. Cowen & Hill's Notes to Phillips, Part II, note 194, and cases there cited; 1 Greenl. Ev., sec. 189.

Aside from this, the declarations to Martin evidently controlled his conduct in making the purchase from Fallon, which followed at an interval of only a few days, and are effectual by way of estoppel against the assertion of any interest by Higuera and his vendees in the premises in controversy, in opposition to the title of Martin and those claiming under him. If we add the conduct of Higuera when the survey was made by Martin after his purchase, in pointing out the starting point, and indicating the line to be followed in the survey, all question as to the extent of the premises would seem to be conclusively set at rest. It would, we think, be difficult to find a case parallel to this in the clear and distinct and repeated recognitions, in a variety of forms, by the grantor, of the extent, location and boundaries of land conveyed by him, where the description was not more specific than the one contained in his deed.

The words "containing more or less, one square mile of land," are merely descriptive of the premises, and not words of limitation upon

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the quantity conveyed. This is the construction placed upon the adjudged cases upon the statement of quantity accompanying a description of premises by metes and bounds, or by a designation of number or place. Thus in *Jackson v. Defendorf*, (1 Caines, 493) the deed purported to convey lot number two, in a certain patent on the south side of the Mohawk river, referring to a map for boundaries, containing two hundred acres. Upon a survey, the lot was found to contain more than the designated quantity, and the question presented was whether the whole passed. The Court said, "the intent was to convey the whole lot. It referred to the map. Where the quantity of acres is mentioned, it is only a description of the lot, according to the common acceptation." In *Jackson v. Moore*, (6 Cowen, 706) the conveyance purported to convey two tracts of land in the County of Ontario, "being township No. 3, in the 5th range; also, No. 4 in the 6th range; to be six miles square, and containing twenty-three thousand and forty acres each, and *no more*;" but as these tracts were in fact six by eight miles in size, the Court held that the whole passed. Sunderland, J., in delivering the opinion said: "It is perfectly settled, that when a piece of land is conveyed by metes and bounds, or any other certain description, all included within those bounds, or that description, will pass, whether it be more or less than the quantity stated in the deed. And when the quantity is mentioned in addition to a description of the boundaries or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity being the least certain part of the description, must yield to the boundaries or number, if they do not agree. (*Jackson v. Barringer*, 15 John. 471; *Powell v. Clark*, 5 Mass. Rep. 355.) If a man lease another the meadows in D and S, containing ten acres, and they, in truth, contain twenty, all shall pass. 13 Vin. Abr. 79, plac. 24."

In *Jackson v. McConnell* (19 Wend. 175) the deed described the premises by courses and distances, beginning at a specified point, and concluding with the words "*Containing two hundred acres, strict measure, and no more*." It appeared that the description contained about nine acres more than the quantity thus specified, and the Court held that the grantee was entitled to the whole.

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In *Hathaway v. Power*, (6 Hill, 453) the defendant gave in evidence a deed containing the following description, viz.: "All that certain tract or parcel of land situate in township No. 11, in the third range of townships, County of Ontario, and State of New York, it being one hundred and sixty acres of land in lot No. 14, with all the hereditaments and appurtenances thereunto belonging." It was proved on the trial that the lot contained one hundred and eighty-five acres, and the Court held the whole passed. In delivering the opinion, Beardsley, J., said: "The embarrassment in the case has arisen from laying too great stress on the words '*Containing one hundred and sixty acres of land.*' It is assumed that this clause must be strictly true; and then as lot No. 14 contains one hundred and eighty-five acres, it is argued that a part of it only was intended to pass. But these words are descriptive of quantity, and nothing more, and no deed was ever held void for a mistake in this respect.

"Undoubtedly, effect should be given, if practicable, to every part of the description. Still, if some part is inapplicable or untrue, and enough remains to show what was intended, the deed must be upheld. The false or mistaken part should be rejected, and when that happens to be a mere statement of the quantity, it will be done without the least hesitation. I understand this deed to be in effect the same as if the description had been *all the land in lot number fourteen, being one hundred and sixty acres.* Such a description, although mistaken as to the quantity, would, beyond all doubt, have carried the entire lot." See, also, *Jackson v. Berringer*, 15 Johns. 471; *Howe et al. v. Bass*, 2 Mass. 380; *Powell v. Clark*, 5 Mass. 355; *Smith v. Hodge*, 2 N. H. 303; *Large v. Penn.*, 6 Seargt. & Raw. 488; *Belden v. Seymour*, 8 Conn. 19; *Benedict v. Gayland*, 11 Conn. 382; *Brown v. Parish*, 2 Dana, 6.

The counsel of the appellants do not question the correctness of the general doctrine as to the immateriality of the affirmation of quantity in conveyances, when there is other description by metes and bounds, but insist that, in the present case, the doctrine does not apply, as there are no specific boundaries given. In this his position is untenable. A designation of the tract by a particular name or number is sufficient; and if it can be rendered certain by extrinsic evidence, this

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is as good a description as one by metes and bounds. It is undoubtedly essential to the validity of a conveyance, that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. *Castro v. Gill*, 5 Cal. 42; *Blake v. Doherty*, 5 Wheat. 359.

The argument of counsel is based upon an erroneous construction of the language of the deed to Fallon. It does not purport to convey one square mile of land lying in the place known as "Rincon de los Cameros," as part thereof, but to convey the entire tract lying therein, be the same one square mile more or less. This is the construction which the plainest rules require, which does no violence to the language of the instrument, and which effectuates the intention of the parties. There is no doubt that Higuera intended to give to Fallon an effective conveyance. He received a valuable consideration for the deed. He always admitted that he intended to transfer the land within the forks of Napa river and the Arroyo — in the "Pocket," as some of the witnesses term it — and not a mere right to select "one square mile more or less" from the tract.

It would be a waste of time to comment upon the various cases cited by counsel of the appellants, in which conveyances have been held void for uncertainty of their description of the premises. They are all easily distinguishable from the case at bar, and apply to an entirely different state of facts.

The objection to the want of a seal to the conveyance to Fallon is not tenable. No seal was requisite under the civil law. Any instrument which contained the names of the parties, a designation or description of the property sold, the date of the transfer, and the price paid, was sufficient to pass the title. *Pastin v. Rassette*, 5 Cal. 467; *Hayes v. Bond et al.*, 7 Cal. 153.

The defendants claim title from Higuera, through his deed to Riva. This deed was executed February 7, 1852, and, in terms, excepts from its operation all land previously sold and conveyed. The claim of defendants is thus defective in its very origin. The land in controversy had been sold and conveyed nearly five years previously. The deed to Riva only purports to transfer his remaining interest, and its

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legal effect is precisely the same as if, in the description of the premises, it had given boundaries necessarily excluding the land previously sold. *Adams v. Cuddy*, 13 Pick. 460. This single fact concludes the defense.

The deeds from Riva to the daughters of Higuera contain a similar exception. The defendants had notice of that exception, for these deeds were on record; and even if the defendants had never seen or heard of the conveyance to Fallon, they could only have taken the remaining interest of Higuera. Whenever that conveyance appeared, it would enable the defendants to ascertain and fix the limits of the remaining interest, which, alone, they ever took.

But even had the deed to Riva, and by him to the daughters, contained no exception in terms, neither they, or the other parties claiming through them, could have held the premises against the plaintiff. Riva was not a purchaser. He paid nothing for the conveyance. This he states himself. He says that he took the conveyance under a parol trust, for the benefit of the daughters. The conveyances to them were executed in the performance of this trust, and upon no other consideration. The partition deeds between the daughters placed their title in no better position. The legal operation of the several conveyances was to effect a gift to the daughters from Higuera of the separate parcels held by them. This disposes of the case so far as Martha Frias is concerned.

The defendant Green is in no better position, for he purchased of Encarnacion, with actual notice of Martin's claim. Of this there was sufficient evidence to go to the jury, and the fact is involved in their finding.

The defendants, McKune, Robinson and Crocker, are not entitled to protection as purchasers for value without notice. The deed to them recites only a nominal consideration of ten dollars, and no proof of any other consideration was given or offered. McKune was Law Agent of the United States at the time the claim of Martin for the land in controversy was pending before the Land Commission, and, as such officer, he was present at the taking of the deposition of Walker in relation to the same, and cross-examined the witness on the subject. It would, indeed, be unjust to charge McKune with notice of all pro-

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ceedings, which his duties as an officer required him to take general charge of; but it is otherwise in relation to matters to which his attention was particularly called, and in which he directly and personally participated. The deed was drawn by him; and though his law partners, Crocker and Robinson, do not appear to have known of its execution until long afterwards, they must hold their interest subject to the same rights of third parties. In taking the conveyance in the name of his associates, he must be considered as having acted as their agent, and notice to him was equally notice to them. Story's Equity, Secs. 408, 409. It would, indeed, be singular, if the legal effect of notice could be obviated by so easy a subterfuge as the insertion of the names of other parties in the conveyance.

We do not perceive any error either in the refusal of the instructions requested, or in those given which operated to the prejudice of the defendants. Taken together they were as favorable to the defense as the facts justified.

Judgment affirmed.

CONNER v. CLARK.

Where a party signs a promissory note with the addition to his name of the word "trustee," he is personally liable; nor can evidence be admitted to show that at the time of the execution of the note there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. The rule is, that the written contract is considered the definitive agreement of the parties, and parol conversations and understandings are all merged in it. Nor will it do to say that such evidence is admissible, as showing a want of consideration, for it does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

APPEAL from the Sixth District, County of Sacramento.

This was an action brought upon a promissory note in the words following:

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"§700.

SACRAMENTO, Dec. 26th, 1856.

"On or before the first day of November, 1857, next ensuing, I promise to pay to the order of Henry Conner, seven hundred dollars, for value received.

"ROBERT C. CLARK, TRUSTER."

On the trial, defendant offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund, of which he was trustee. This evidence was rejected by the Court as inadmissible, and judgment rendered for the plaintiff; from which defendant appealed to this Court.

Winans & Hyer for Appellant.

1st. The Court erred in refusing to permit defendant to prove by parol testimony at the trial, that at the time of the execution of the lease in evidence, and the note sued on, it was expressly agreed between plaintiff and defendant that he (plaintiff) would look alone to the proceeds of the trust property for payment of said note, and not to defendant individually, and that defendant did not and would not become individually bound for the payment of said note.

2d. The Court erred in refusing to permit defendant to prove by parol all the facts set forth in his answer.

John Heard for Respondent.

The respondent insists that the note is the note of Clark alone; no one being named as the maker except himself. See Story on Prom. Notes, secs. 63, 64, 65 and 68; Story on Agency, secs. 147, 156, 275 and 278.

The note being the note of Clark alone, parol evidence to contradict it would be directly opposed to the Statute of Frauds, and to the adjudication of the whole world.

The case of *Sayre v. Nicholls* is not an authority for the appellant. In that case the name of the principal appeared on the face of the bill, and the amount of the bill, when paid, was to be charged to the office

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of the principal named in the bill; and Nicholls signed as agent. See that case, 7 Cal. Reports, page 535.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant made his promissory note, signing it "R. C. Clark, Trustee." On the trial he offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund, of which he was trustee. This evidence was rejected by the Court as inadmissible, and the defendant appeals.

It will be perceived, that the tendency of the proffered testimony was in effect, to deny to the note the obligation it imported. The evidence proposed alters so far the contract as it appears, as to show that instead of Clark's being bound to pay at all events, or individually, he was only to pay out of a particular fund, and, of course, not to pay it at all if the fund failed. If the word trustee had not been affixed to the signature of Clark, it is clear that no such proof could be made, for it would clearly contradict the writing. It is argued, however, that the addition of this term is sufficient to vary the rule.

Story on Promissory Notes, sec. 63, says: "As to trustees, guardians, executors and administrators, and other persons, acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words 'as executor,' or 'as administrator,' he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate." Story on Agency, p. 176, asserts the same doctrine.

The question here is not, as the counsel for the appellant has ingen-

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iously suggested, whether a principal can be bound on an unsealed contract, where the writing intimates and notifies, by general words, the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound; but he wishes to prove that he was to be bound only in a certain way, that is, to pay out of a particular fund. It is not pretended that any one else was bound by this contract. No authority is shown in Clark to bind the beneficiaries in this trust by this note. In form and legal effect the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund; and this, he wishes to prove, was a contemporaneous parol agreement. But the rule is, that the written contract is considered definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties.

Nor will it do to say that the evidence is admissible, as showing a want of consideration for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

It is, at last, the common case of an attempt to contradict the terms of a written contract by parol.

Judgment affirmed.

DABOVICH & CO. v. EMERIC.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of such contract, where no special damage is alleged, the measure of damage is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then if the vendee is prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when vendee went there to gather the fruit, and if those persons forbade him or his agents and servants

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from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold the defendant responsible on the guaranty, as he was not bound to take a portion of his contract.

A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.

APPEAL from the Fourth District, County of San Francisco.

This was an action in the Court below for a breach of contract. **The plaintiffs, who are fruit dealers in San Francisco, purchased of the defendant, for the sum of four hundred dollars, sixteen-fortieths of the pears growing in a certain orchard. After such sale, the defendant, for the consideration of fifty dollars, executed the following guaranty:**

“Having this day sold to Messrs. Nicholas Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to Nicholas Dabovich & Co. that the said three shares and one-fifth of one share will be at their disposal on the trees, free of trouble or annoyance from other parties to them.

“JOSEPH EMERIECH.

“San Francisco, June 14, 1856.”

The plaintiffs alleged a demand and refusal on the part of the defendant. To this complaint there was a demurrer, which was overruled, and a judgment for the plaintiffs.

From this judgment the defendant appealed to this Court, and at the January Term, 1857, (see 7 Cal. Rep. 209,) this Court reversed the judgment of the Court below, and remanded the cause with leave to the plaintiff to amend his complaint.

On the remanding of the case, the plaintiffs amended their complaint. The pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms.

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and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by a jury, under the directions of the Court.

The Court gave to the jury, at the request of the plaintiff, the following instructions:

1st. "That if the jury should find for plaintiff, then the measure of damages is the highest value or market price of the pears on the trees, since the first demand for the delivery of the same."

2d. "That in the estimate of damages, they shall also allow the loss of time, value of services, and wages caused by the failure of defendant to perform his contract."

3d. "That the contract and guaranty was entire, and the plaintiffs had the right to refuse to receive a portion of the fruit without the whole."

The defendant requested the Court to give to the jury six written instructions, all of which were refused. The first three are in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers.

The fourth and fifth instructions are in substance that the true rule of damages in the case was, that if the plaintiffs were molested or annoyed in gathering some of the pears, but not all of them, then they could only recover for the value of the pears on the trees, as to such portions to which the molestation and annoyance extended.

The sixth instruction is as follows: "That to enable plaintiffs to recover at all, the evidence must satisfy the jury that the plaintiffs were so far annoyed or molested in gathering the pears thus bought, that further persistence on their part to gather them would have been repelled by force, or have led to a breach of peace."

Plaintiffs had verdict and judgment. Defendant moved the Court for a new trial, which was denied, and he appealed to this Court.

Sloan & Hartman for Appellant.

The Court erred in giving plaintiffs' instructions to the jury.

I. The first part of the first instruction, as to the measure of damages, is probably correct, disconnected with the latter part of the instruction as to the demand and refusal. The instruction, as it stands, proceeds upon the hypothesis that a demand and refusal is necessary to fix a liability. The Supreme Court has already decided in the case that a demand and refusal was no breach of contract; yet in the very outset we find this same thing clinging, like the shirt of Nessus, to the plaintiffs' case.

The second instruction is clearly erroneous. It is instructing the jury to give special damages. No claim for special damages is claimed in the amended complaint; and certainly plaintiffs cannot recover more than they claim. The only damages claimed were for the value of the pears; yet here we have the Court instructing the jury that, in addition to that they shall also allow for loss of time, value of services, and wages!

The third instruction is clearly erroneous, and that it tended to the injury of the defendant on the trial there can be no question. From the testimony of nearly every witness examined, it appears that the plaintiffs might have received a portion, if not all their fruit, had they seen proper so to do. A portion, at least, was at their disposal, even had they been troubled and molested in procuring the balance. The instrument in question, given by the defendant to the plaintiffs, and which is the basis of the action, is precisely what it purports to be, and nothing more or less, to wit, a guaranteeing or indemnifying instrument, and intended to make plaintiffs whole as to such part of the fruit as they should not be able to procure without trouble or molestation. If they could not procure a portion of the fruit, for that portion the defendant was bound to indemnify them, and no more. If they could not procure any, then the defendant was bound to them for the whole.

II. The Court erred in refusing to give to the jury the instructions prayed for by the defendant.

The first three of these instructions we shall examine together.

They are, in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers. In other words, that the instrument did not guarantee against wrongful acts or trespasses of all the world, but against the trouble and annoyance only of such parties as had an interest or title, paramount, or otherwise, in the property. This is apparent from the instrument itself, as well as from analogous principles.

The covenant in the instrument at bar is similar to the covenant in a deed for quiet enjoyment. In fact, a covenant against trouble and annoyance is nothing more or less than a covenant for quiet enjoyment. *Rawle on Covenants for Title*, p. 147; *Greenby v. Wilcox*, 2 J. R., p. 1; *Folliard v. Wallace*, 2 J. R., p. 402; *Kent v. Welch*, 7 J. R., p. 258; *Walter v. Hele*, 2 Saund. 180, n. 10.

The correctness or incorrectness of the refusal to give the sixth instruction depends upon a simple proposition — did the sale in the case pass the defendant's title in the property to plaintiffs? If so, then the plaintiffs had the right to reduce their property to possession; and if they found their property in the possession of a wrongdoer, who was disposed to hold it by force, then they had a right to use force against force. The instruction prayed for did not even go to this extent, and we submit that it was error in the Court to refuse it.

P. L. Edwards for Respondents.

I. There was no error in the first instruction prayed for by the respondents. That this instruction announces the true rule of damages in the case, is shown by *Sedgwick on the Measure of Damages*, 258, *et seq.*

If this instruction assumed that a demand for the pears, and a refusal to deliver, was necessary to give a cause of action to the respondents, as intimated by the appellant, then there may be error in the record, but not such as he can assign; for it was against the respondents.

The contract of sale was, exactly speaking, precedent to that of the guaranty, but in legal effect they were cotemporaneous acts. Perhaps in the view of the counsel, it would have been more accurate

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to have instructed the jury to give the highest market price after the sale; but surely this is not an error of which the appellant can complain; for if the two acts were not cotemporaneous, that of the sale was first in time, and thus the instruction might have prejudiced the respondents, while it was impossible that it could prejudice the appellant. See particularly, *Baldwin v. Burnett*, 4 Cal. 392.

II. The second instruction is said to be "clearly erroneous"; and we as earnestly think it clearly correct. The guaranty was that the pears should be at the disposal of the respondents on the trees, "free of trouble or annoyance from other parties." Any damages which might ordinarily, and did result from the breach, ought to be allowed; and such damages ought to be given under the general averment of damages. As we understand the learned counsel, the objection does not go so much to the damages themselves as to their being given under the state of pleadings in this case. In all this we think the counsel are wrong. The record does show such averments, perhaps not so technical or artistic as such averments should be made, but still sufficient for all purposes after verdict. Such damages are clearly allowable. *Kenyon v. Goodall*, 3 Cal. 257.

III. The third instruction given is said to be clearly erroneous. Now, the fair presumption is, that the purchasers had in view their general business as fruit dealers, as well as certain particular contracts which they had assumed to perform, all of which would have been accommodated by their getting the whole of the fruit, while a small part of it would have been valueless and even prejudicial to them! And yet it is gravely argued that the respondents ought to have taken just so much as the caprice or interest of the appellant would allow. In other words, they were obliged to receive just so much as was to the advantage of the appellant, although at their sacrifice, while he was permitted to retain as much as would have been to their advantage. Such a view of the instrument is too absurd to be tolerated! The respondents had the right to treat the contract as entire, and they did so.

IV. The first three instructions prayed by the appellant are considered together. They are to the effect that the guaranty of the appellant "extended only to the acts of himself or others interested

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in the property, and not as against the acts of strangers. In other words, that the instrument did not guarantee against the wrongful acts or trespasses of all the world," etc. The guaranty thus restricted in its import would be worse than idle, and valueless. The seller of a chattel is always bound upon his implied warranty of title. By the mere force of law, there was already an undertaking of the effect now ascribed to the guaranty. The respondents had already paid the four hundred dollars, and the property, as held by the Court, had already vested in them; but they were doubtful of the appellant's ability to perform, and anxious for further assurance against the interference of other persons, and therefore gave the additional fifty dollars for the guaranty which expressly provided that the fruit should be on the trees and at the disposal of the respondents "free of trouble or annoyance from other parties." If not intended to indemnify against the acts of strangers, for what purpose was it intended? From all the circumstances characterizing the transaction, as well as the natural and obvious import of the terms, it is difficult even to imagine that anything other than the interference of strangers was intended to be provided against. There was in fact nothing else necessary to the safety of the respondents.

We submit that the error of the counsel for the appellant consists mainly in their considering the guaranty "as similar to a covenant for quiet enjoyment." It is said that it would be unreasonable that a "man should covenant against the tortious acts of strangers which he could not foresee or prevent," etc. Now, the simple answer to all this is, that there is no sort of analogy between a covenant for quiet enjoyment of real estate and that now under review. The purchasers were never permitted to take the possession, so that there is wanting the very first fact to warrant the assertion of the supposed analogy. There was a constructive possession in respondents by virtue of the sale; but that does not relieve the appellant here; for the respondents were to have the pears on the trees at their disposal, "free of trouble or annoyance from other parties;" but the fruit was not at their disposal, nor free of trouble or annoyance of other parties. There was, therefore, a breach of the guaranty.

Sedgwick on the Measure of Damages, already cited, will through-

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out show the dissimilarity between personal and real contracts as to the right and remedy.

V. The fifth instruction prayed by the appellant but raises again in a form little varied the question as to the entirety of the contract, and has been sufficiently considered.

VI. The sixth instruction. It is an anomalous doctrine that after a man has paid his money for property, and taken an express guaranty that it shall be at his disposal "free of trouble or annoyance of other parties," he must fight, or at least hazard a fight for it before he can have any remedy over! The appellant had contracted to guard against the interference of others, and cannot now transfer the burden which he was paid for assuming, to those who paid him.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J. concurring.

This controversy, which has been going on a long time, and been heretofore before this Court, grew out of a contract in these words:

"Having this day sold to Messrs. Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to said Nicholas Dabovich & Co., that the said three shares and one-fifth of one share of said pears will be at their disposal on the trees, free from trouble and annoyance from other parties to them.

"(Signed,)

JOS. EMERIE.

"June 14th, 1856."

When the case was before this Court (January T., 1858) this contract was construed. They say, "from the very nature of the first contract of sale, the delivery took place as soon as the sale was made. So far as the sale was concerned, they became the owners of the fruit upon the trees, and could only maintain an action against the defendant in case he converted the property or interfered with them in picking it. As to the guarantee, its effect was simply that the pears should be on the trees at the disposal of the plaintiffs, and that they should not be disturbed in their right to gather them by third persons. To recover on this contract, it was necessary to allege and

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prove either that the fruit was not on the trees, or that the plaintiffs had been interfered with by third parties gathering it. There was no necessity for any demand upon the defendant unless for the purpose of enabling him to comply with the terms of his guarantee."

This opinion was given on appeal from the Superior Court of San Francisco after the first trial, which resulted in verdict and judgment for the plaintiffs.

On the remanding of the case, the plaintiffs amended their complaint. This pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms, and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by jury under the directions of the Court. Sundry instructions were given and refused. These form the main subject of review here.

It has been seen that the complaint does not aver any causes of special damages. Only such damages, then, as were the natural and necessary consequence of the breach of the agreement can be recovered. The whole guarantee, as we understand it, amounts to this: that the defendant owned a certain portion of the pears growing or hanging on the trees of the orchard; this proportion was sold to plaintiffs, with a right to go and gather them, and the defendant warranted that the plaintiffs should not be disturbed or hindered in getting them. The plaintiffs wanted no trouble, difficulty or law suits about the matter, and the defendant insured them against this. An opposition by force, or the appearance of it, authorized the plaintiffs to desist from going on the premises, or prosecuting their errand in gathering or attempting to gather the fruit; and this opposition gave the plaintiffs a right of action. The measure of damages was the injury done, which was the loss of the pears. The value of these was the standard of

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of the principal named in the bill; and Nicholls signed as agent. See that case, 7 Cal. Reports, page 535.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant made his promissory note, signing it "R. C. Clark, Trustee." On the trial he offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund, of which he was trustee. This evidence was rejected by the Court as inadmissible, and the defendant appeals.

It will be perceived, that the tendency of the proffered testimony was in effect, to deny to the note the obligation it imported. The evidence proposed alters so far the contract as it appears, as to show that instead of Clark's being bound to pay at all events, or individually, he was only to pay out of a particular fund, and, of course, not to pay it at all if the fund failed. If the word trustee had not been affixed to the signature of Clark, it is clear that no such proof could be made, for it would clearly contradict the writing. It is argued, however, that the addition of this term is sufficient to vary the rule.

Story on Promissory Notes, sec. 63, says: "As to trustees, guardians, executors and administrators, and other persons, acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words 'as executor,' or 'as administrator,' he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate." Story on Agency, p. 176, asserts the same doctrine.

The question here is not, as the counsel for the appellant has ingen-

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iously suggested, whether a principal can be bound on an unsealed contract, where the writing intimates and notifies, by general words, the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound; but he wishes to prove that he was to be bound only in a certain way, that is, to pay out of a particular fund. It is not pretended that any one else was bound by this contract. No authority is shown in Clark to bind the beneficiaries in this trust by this note. In form and legal effect the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund; and this, he wishes to prove, was a contemporaneous parol agreement. But the rule is, that the written contract is considered definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties.

Nor will it do to say that the evidence is admissible, as showing a want of consideration for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

It is, at last, the common case of an attempt to contradict the terms of a written contract by parol.

Judgment affirmed.

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In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of such contract, where no special damage is alleged, the measure of damage is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then if the vendee is prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when vendee went there to gather the fruit, and if those persons forbade him or his agents and servants

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from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold the defendant responsible on the guaranty, as he was not bound to take a portion of his contract.

A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.

APPEAL from the Fourth District, County of San Francisco.

This was an action in the Court below for a breach of contract. **The plaintiffs, who are fruit dealers in San Francisco, purchased of the defendant, for the sum of four hundred dollars, sixteen-fortieths of the pears growing in a certain orchard. After such sale, the defendant, for the consideration of fifty dollars, executed the following guaranty:**

“Having this day sold to Messrs. Nicholas Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to Nicholas Dabovich & Co. that the said three shares and one-fifth of one share will be at their disposal on the trees, free of trouble or annoyance from other parties to them.

“JOSEPH EMERIEH.

“San Francisco, June 14, 1856.”

The plaintiffs alleged a demand and refusal on the part of the defendant. To this complaint there was a demurrer, which was overruled, and a judgment for the plaintiffs.

From this judgment the defendant appealed to this Court, and at the January Term, 1857, (see 7 Cal. Rep. 209,) this Court reversed the judgment of the Court below, and remanded the cause with leave to the plaintiff to amend his complaint.

On the remanding of the case, the plaintiffs amended their complaint. The pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms.

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and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by a jury, under the directions of the Court.

The Court gave to the jury, at the request of the plaintiff, the following instructions:

1st. "That if the jury should find for plaintiff, then the measure of damages is the highest value or market price of the pears on the trees, since the first demand for the delivery of the same."

2d. "That in the estimate of damages, they shall also allow the loss of time, value of services, and wages caused by the failure of defendant to perform his contract."

3d. "That the contract and guaranty was entire, and the plaintiffs had the right to refuse to receive a portion of the fruit without the whole."

The defendant requested the Court to give to the jury six written instructions, all of which were refused. The first three are in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers.

The fourth and fifth instructions are in substance that the true rule of damages in the case was, that if the plaintiffs were molested or annoyed in gathering some of the pears, but not all of them, then they could only recover for the value of the pears on the trees, as to such portions to which the molestation and annoyance extended.

The sixth instruction is as follows: "That to enable plaintiffs to recover at all, the evidence must satisfy the jury that the plaintiffs were so far annoyed or molested in gathering the pears thus bought, that further persistence on their part to gather them would have been repelled by force, or have led to a breach of peace."

Plaintiffs had verdict and judgment. Defendant moved the Court for a new trial, which was denied, and he appealed to this Court.

Sloan & Hartman for Appellant.

The Court erred in giving plaintiffs' instructions to the jury.

I. The first part of the first instruction, as to the measure of damages, is probably correct, disconnected with the latter part of the instruction as to the demand and refusal. The instruction, as it stands, proceeds upon the hypothesis that a demand and refusal is necessary to fix a liability. The Supreme Court has already decided in the case that a demand and refusal was no breach of contract; yet in the very outset we find this same thing clinging, like the shirt of Nessus, to the plaintiffs' case.

The second instruction is clearly erroneous. It is instructing the jury to give special damages. No claim for special damages is claimed in the amended complaint; and certainly plaintiffs cannot recover more than they claim. The only damages claimed were for the value of the pears; yet here we have the Court instructing the jury that, in addition to that they shall also allow for loss of time, value of services, and wages!

The third instruction is clearly erroneous, and that it tended to the injury of the defendant on the trial there can be no question. From the testimony of nearly every witness examined, it appears that the plaintiffs might have received a portion, if not all their fruit, had they seen proper so to do. A portion, at least, was at their disposal, even had they been troubled and molested in procuring the balance. The instrument in question, given by the defendant to the plaintiffs, and which is the basis of the action, is precisely what it purports to be, and nothing more or less, to wit, a guaranteeing or indemnifying instrument, and intended to make plaintiffs whole as to such part of the fruit as they should not be able to procure without trouble or molestation. If they could not procure a portion of the fruit, for that portion the defendant was bound to indemnify them, and no more. If they could not procure any, then the defendant was bound to them for the whole.

II. The Court erred in refusing to give to the jury the instructions prayed for by the defendant.

The first three of these instructions we shall examine together.

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They are, in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers. In other words, that the instrument did not guarantee against wrongful acts or trespasses of all the world, but against the trouble and annoyance only of such parties as had an interest or title, paramount, or otherwise, in the property. This is apparent from the instrument itself, as well as from analogous principles.

The covenant in the instrument at bar is similar to the covenant in a deed for quiet enjoyment. In fact, a covenant against trouble and annoyance is nothing more or less than a covenant for quiet enjoyment. Rawle on Covenants for Title, p. 147; *Greenby v. Wilcox*, 2 J. R., p. 1; *Folliard v. Wallace*, 2 J. R., p. 402; *Kent v. Welch*, 7 J. R., p. 258; *Walter v. Hele*, 2 Saund. 180, n. 10.

The correctness or incorrectness of the refusal to give the sixth instruction depends upon a simple proposition — did the sale in the case pass the defendant's title in the property to plaintiffs? If so, then the plaintiffs had the right to reduce their property to possession; and if they found their property in the possession of a wrongdoer, who was disposed to hold it by force, then they had a right to use force against force. The instruction prayed for did not even go to this extent, and we submit that it was error in the Court to refuse it.

P. L. Edwards for Respondents.

I. There was no error in the first instruction prayed for by the respondents. That this instruction announces the true rule of damages in the case, is shown by Sedgwick on the Measure of Damages, 258, *et seq.*

If this instruction assumed that a demand for the pears, and a refusal to deliver, was necessary to give a cause of action to the respondents, as intimated by the appellant, then there may be error in the record, but not such as he can assign; for it was against the respondents.

The contract of sale was, exactly speaking, precedent to that of the guaranty, but in legal effect they were cotemporaneous acts. Perhaps in the view of the counsel, it would have been more accurate

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to have instructed the jury to give the highest market price after the sale; but surely this is not an error of which the appellant can complain; for if the two acts were not cotemporaneous, that of the sale was first in time, and thus the instruction might have prejudiced the respondents, while it was impossible that it could prejudice the appellant. See particularly, *Baldwin v. Burnett*, 4 Cal. 392.

II. The second instruction is said to be "clearly erroneous"; and we as earnestly think it clearly correct. The guaranty was that the pears should be at the disposal of the respondents on the trees, "free of trouble or annoyance from other parties." Any damages which might ordinarily, and did result from the breach, ought to be allowed; and such damages ought to be given under the general averment of damages. As we understand the learned counsel, the objection does not go so much to the damages themselves as to their being given under the state of pleadings in this case. In all this we think the counsel are wrong. The record does show such averments, perhaps not so technical or artistic as such averments should be made, but still sufficient for all purposes after verdict. Such damages are clearly allowable. *Kenyon v. Goodall*, 3 Cal. 257.

III. The third instruction given is said to be clearly erroneous. Now, the fair presumption is, that the purchasers had in view their general business as fruit dealers, as well as certain particular contracts which they had assumed to perform, all of which would have been accommodated by their getting the whole of the fruit, while a small part of it would have been valueless and even prejudicial to them! And yet it is gravely argued that the respondents ought to have taken just so much as the caprice or interest of the appellant would allow. In other words, they were obliged to receive just so much as was to the advantage of the appellant, although at their sacrifice, while he was permitted to retain as much as would have been to their advantage. Such a view of the instrument is too absurd to be tolerated! The respondents had the right to treat the contract as entire, and they did so.

IV. The first three instructions prayed by the appellant are considered together. They are to the effect that the guaranty of the appellant "extended only to the acts of himself or others interested

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in the property, and not as against the acts of strangers. In other words, that the instrument did not guarantee against the wrongful acts or trespasses of all the world," etc. The guaranty thus restricted in its import would be worse than idle, and valueless. The seller of a chattel is always bound upon his implied warranty of title. By the mere force of law, there was already an undertaking of the effect now ascribed to the guaranty. The respondents had already paid the four hundred dollars, and the property, as held by the Court, had already vested in them; but they were doubtful of the appellant's ability to perform, and anxious for further assurance against the interference of other persons, and therefore gave the additional fifty dollars for the guaranty which expressly provided that the fruit should be on the trees and at the disposal of the respondents "free of trouble or annoyance from other parties." If not intended to indemnify against the acts of strangers, for what purpose was it intended? From all the circumstances characterizing the transaction, as well as the natural and obvious import of the terms, it is difficult even to imagine that anything other than the interference of strangers was intended to be provided against. There was in fact nothing else necessary to the safety of the respondents.

We submit that the error of the counsel for the appellant consists mainly in their considering the guaranty "as similar to a covenant for quiet enjoyment." It is said that it would be unreasonable that a "man should covenant against the tortious acts of strangers which he could not foresee or prevent," etc. Now, the simple answer to all this is, that there is no sort of analogy between a covenant for quiet enjoyment of real estate and that now under review. The purchasers were never permitted to take the possession, so that there is wanting the very first fact to warrant the assertion of the supposed analogy. There was a constructive possession in respondents by virtue of the sale; but that does not relieve the appellant here; for the respondents were to have the pears on the trees at their disposal, "free of trouble or annoyance from other parties;" but the fruit was not at their disposal, nor free of trouble or annoyance of other parties. There was, therefore, a breach of the guaranty.

Sedgwick on the Measure of Damages, already cited, will through-

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out show the dissimilarity between personal and real contracts as to the right and remedy.

V. The fifth instruction prayed by the appellant but raises again in a form little varied the question as to the entirety of the contract, and has been sufficiently considered.

VI. The sixth instruction. It is an anomalous doctrine that after a man has paid his money for property, and taken an express guaranty that it shall be at his disposal "free of trouble or annoyance of other parties," he must fight, or at least hazard a fight for it before he can have any remedy over! The appellant had contracted to guard against the interference of others, and cannot now transfer the burden which he was paid for assuming, to those who paid him.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J. concurring.

This controversy, which has been going on a long time, and been heretofore before this Court, grew out of a contract in these words:

"Having this day sold to Messrs. Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to said Nicholas Dabovich & Co., that the said three shares and one-fifth of one share of said pears will be at their disposal on the trees, free from trouble and annoyance from other parties to them.

"(Signed,)

JOS. EMERIO.

"June 14th, 1856."

When the case was before this Court (January T., 1858) this contract was construed. They say, "from the very nature of the first contract of sale, the delivery took place as soon as the sale was made. So far as the sale was concerned, they became the owners of the fruit upon the trees, and could only maintain an action against the defendant in case he converted the property or interfered with them in picking it. As to the guarantee, its effect was simply that the pears should be on the trees at the disposal of the plaintiffs, and that they should not be disturbed in their right to gather them by third persons. To recover on this contract, it was necessary to allege and

prove either that the fruit was not on the trees, or that the plaintiffs had been interfered with by third parties gathering it. There was no necessity for any demand upon the defendant unless for the purpose of enabling him to comply with the terms of his guarantee."

This opinion was given on appeal from the Superior Court of San Francisco after the first trial, which resulted in verdict and judgment for the plaintiffs.

On the remanding of the case, the plaintiffs amended their complaint. This pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms, and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by jury under the directions of the Court. Sundry instructions were given and refused. These form the main subject of review here.

It has been seen that the complaint does not aver any causes of special damages. Only such damages, then, as were the natural and necessary consequence of the breach of the agreement can be recovered. The whole guarantee, as we understand it, amounts to this: that the defendant owned a certain portion of the pears growing or hanging on the trees of the orchard; this proportion was sold to plaintiffs, with a right to go and gather them, and the defendant warranted that the plaintiffs should not be disturbed or hindered in getting them. The plaintiffs wanted no trouble, difficulty or law suits about the matter, and the defendant insured them against this. An opposition by force, or the appearance of it, authorized the plaintiffs to desist from going on the premises, or prosecuting their errand in gathering or attempting to gather the fruit; and this opposition gave the plaintiffs a right of action. The measure of damages was the injury done, which was the loss of the pears. The value of these was the standard of

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of the principal named in the bill; and Nicholls signed as agent. See that case, 7 Cal. Reports, page 535.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

The defendant made his promissory note, signing it "R. C. Clark, Trustee." On the trial he offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund, of which he was trustee. This evidence was rejected by the Court as inadmissible, and the defendant appeals.

It will be perceived, that the tendency of the proffered testimony was in effect, to deny to the note the obligation it imported. The evidence proposed alters so far the contract as it appears, as to show that instead of Clark's being bound to pay at all events, or individually, he was only to pay out of a particular fund, and, of course, not to pay it at all if the fund failed. If the word trustee had not been affixed to the signature of Clark, it is clear that no such proof could be made, for it would clearly contradict the writing. It is argued, however, that the addition of this term is sufficient to vary the rule.

Story on Promissory Notes, sec. 63, says: "As to trustees, guardians, executors and administrators, and other persons, acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words 'as executor,' or 'as administrator,' he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate." Story on Agency, p. 176, asserts the same doctrine.

The question here is not, as the counsel for the appellant has ingen-

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iously suggested, whether a principal can be bound on an unsealed contract, where the writing intimates and notifies, by general words, the fact of agency, and parol evidence explanatory of the fact intimated is given. But here there is no doubt that the person signing as trustee was bound; but he wishes to prove that he was to be bound only in a certain way, that is, to pay out of a particular fund. It is not pretended that any one else was bound by this contract. No authority is shown in Clark to bind the beneficiaries in this trust by this note. In form and legal effect the note binds him to pay this amount; but he wishes to add to this note another term, namely, that he was only to pay it out of a certain fund; and this, he wishes to prove, was a contemporaneous parol agreement. But the rule is, that the written contract is considered definitive agreement of the parties, and parol conversations and understandings are all merged in it. It is the only authentic evidence of the understanding of the parties.

Nor will it do to say that the evidence is admissible, as showing a want of consideration for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

It is, at last, the common case of an attempt to contradict the terms of a written contract by parol.

Judgment affirmed.

DABOVICH & CO. v. EMERIC.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of such contract, where no special damage is alleged, the measure of damage is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then if the vendee is prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when vendee went there to gather the fruit, and if those persons forbade him or his agents and servants

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from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold the defendant responsible on the guaranty, as he was not bound to take a portion of his contract.

A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.

APPEAL from the Fourth District, County of San Francisco.

This was an action in the Court below for a breach of contract. The plaintiffs, who are fruit dealers in San Francisco, purchased of the defendant, for the sum of four hundred dollars, sixteen-fortieths of the pears growing in a certain orchard. After such sale, the defendant, for the consideration of fifty dollars, executed the following guaranty:

"Having this day sold to Messrs. Nicholas Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to Nicholas Dabovich & Co. that the said three shares and one-fifth of one share will be at their disposal on the trees, free of trouble or annoyance from other parties to them.

"JOSEPH EMERICH.

"San Francisco, June 14, 1856."

The plaintiffs alleged a demand and refusal on the part of the defendant. To this complaint there was a demurrer, which was overruled, and a judgment for the plaintiffs.

From this judgment the defendant appealed to this Court, and at the January Term, 1857, (see 7 Cal. Rep. 209,) this Court reversed the judgment of the Court below, and remanded the cause with leave to the plaintiff to amend his complaint.

On the remanding of the case, the plaintiffs amended their complaint. The pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms.

and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by a jury, under the directions of the Court.

The Court gave to the jury, at the request of the plaintiff, the following instructions:

1st. "That if the jury should find for plaintiff, then the measure of damages is the highest value or market price of the pears on the trees, since the first demand for the delivery of the same."

2d. "That in the estimate of damages, they shall also allow the loss of time, value of services, and wages caused by the failure of defendant to perform his contract."

3d. "That the contract and guaranty was entire, and the plaintiffs had the right to refuse to receive a portion of the fruit without the whole."

The defendant requested the Court to give to the jury six written instructions, all of which were refused. The first three are in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers.

The fourth and fifth instructions are in substance that the true rule of damages in the case was, that if the plaintiffs were molested or annoyed in gathering some of the pears, but not all of them, then they could only recover for the value of the pears on the trees, as to such portions to which the molestation and annoyance extended.

The sixth instruction is as follows: "That to enable plaintiffs to recover at all, the evidence must satisfy the jury that the plaintiffs were so far annoyed or molested in gathering the pears thus bought, that further persistence on their part to gather them would have been repelled by force, or have led to a breach of peace."

Plaintiffs had verdict and judgment. Defendant moved the Court for a new trial, which was denied, and he appealed to this Court.

Sloan & Hartman for Appellant.

The Court erred in giving plaintiffs' instructions to the jury.

I. The first part of the first instruction, as to the measure of damages, is probably correct, disconnected with the latter part of the instruction as to the demand and refusal. The instruction, as it stands, proceeds upon the hypothesis that a demand and refusal is necessary to fix a liability. The Supreme Court has already decided in the case that a demand and refusal was no breach of contract; yet in the very outset we find this same thing clinging, like the shirt of Nessus, to the plaintiffs' case.

The second instruction is clearly erroneous. It is instructing the jury to give special damages. No claim for special damages is claimed in the amended complaint; and certainly plaintiffs cannot recover more than they claim. The only damages claimed were for the value of the pears; yet here we have the Court instructing the jury that, in addition to that they shall also allow for loss of time, value of services, and wages!

The third instruction is clearly erroneous, and that it tended to the injury of the defendant on the trial there can be no question. From the testimony of nearly every witness examined, it appears that the plaintiffs might have received a portion, if not all their fruit, had they seen proper so to do. A portion, at least, was at their disposal, even had they been troubled and molested in procuring the balance. The instrument in question, given by the defendant to the plaintiffs, and which is the basis of the action, is precisely what it purports to be, and nothing more or less, to wit, a guaranteeing or indemnifying instrument, and intended to make plaintiffs whole as to such part of the fruit as they should not be able to procure without trouble or molestation. If they could not procure a portion of the fruit, for that portion the defendant was bound to indemnify them, and no more. If they could not procure any, then the defendant was bound to them for the whole.

II. The Court erred in refusing to give to the jury the instructions prayed for by the defendant.

The first three of these instructions we shall examine together.

They are, in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers. In other words, that the instrument did not guarantee against wrongful acts or trespasses of all the world, but against the trouble and annoyance only of such parties as had an interest or title, paramount, or otherwise, in the property. This is apparent from the instrument itself, as well as from analogous principles.

The covenant in the instrument at bar is similar to the covenant in a deed for quiet enjoyment. In fact, a covenant against trouble and annoyance is nothing more or less than a covenant for quiet enjoyment. Rawle on Covenants for Title, p. 147; *Greenby v. Wilcox*, 2 J. R., p. 1; *Folliard v. Wallace*, 2 J. R., p. 402; *Kent v. Welch*, 7 J. R., p. 258; *Walter v. Hele*, 2 Saund. 180, n. 10.

The correctness or incorrectness of the refusal to give the sixth instruction depends upon a simple proposition — did the sale in the case pass the defendant's title in the property to plaintiffs? If so, then the plaintiffs had the right to reduce their property to possession; and if they found their property in the possession of a wrongdoer, who was disposed to hold it by force, then they had a right to use force against force. The instruction prayed for did not even go to this extent, and we submit that it was error in the Court to refuse it.

P. L. Edwards for Respondents.

I. There was no error in the first instruction prayed for by the respondents. That this instruction announces the true rule of damages in the case, is shown by Sedgwick on the Measure of Damages, 258, *et seq.*

If this instruction assumed that a demand for the pears, and a refusal to deliver, was necessary to give a cause of action to the respondents, as intimated by the appellant, then there may be error in the record, but not such as he can assign; for it was against the respondents.

The contract of sale was, exactly speaking, precedent to that of the guaranty, but in legal effect they were cotemporaneous acts. Perhaps in the view of the counsel, it would have been more accurate

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to have instructed the jury to give the highest market price after the sale; but surely this is not an error of which the appellant can complain; for if the two acts were not cotemporaneous, that of the sale was first in time, and thus the instruction might have prejudiced the respondents, while it was impossible that it could prejudice the appellant. See particularly, *Baldwin v. Burnett*, 4 Cal. 392.

II. The second instruction is said to be "clearly erroneous"; and we as earnestly think it clearly correct. The guaranty was that the pears should be at the disposal of the respondents on the trees, "free of trouble or annoyance from other parties." Any damages which might ordinarily, and did result from the breach, ought to be allowed; and such damages ought to be given under the general averment of damages. As we understand the learned counsel, the objection does not go so much to the damages themselves as to their being given under the state of pleadings in this case. In all this we think the counsel are wrong. The record does show such averments, perhaps not so technical or artistic as such averments should be made, but still sufficient for all purposes after verdict. Such damages are clearly allowable. *Kenyon v. Goodall*, 3 Cal. 257.

III. The third instruction given is said to be clearly erroneous. Now, the fair presumption is, that the purchasers had in view their general business as fruit dealers, as well as certain particular contracts which they had assumed to perform, all of which would have been accommodated by their getting the whole of the fruit, while a small part of it would have been valueless and even prejudicial to them! And yet it is gravely argued that the respondents ought to have taken just so much as the caprice or interest of the appellant would allow. In other words, they were obliged to receive just so much as was to the advantage of the appellant, although at their sacrifice, while he was permitted to retain as much as would have been to their advantage. Such a view of the instrument is too absurd to be tolerated! The respondents had the right to treat the contract as entire, and they did so.

IV. The first three instructions prayed by the appellant are considered together. They are to the effect that the guaranty of the appellant "extended only to the acts of himself or others interested

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in the property, and not as against the acts of strangers. In other words, that the instrument did not guarantee against the wrongful acts or trespasses of all the world," etc. The guaranty thus restricted in its import would be worse than idle, and valueless. The seller of a chattel is always bound upon his implied warranty of title. By the mere force of law, there was already an undertaking of the effect now ascribed to the guaranty. The respondents had already paid the four hundred dollars, and the property, as held by the Court, had already vested in them; but they were doubtful of the appellant's ability to perform, and anxious for further assurance against the interference of other persons, and therefore gave the additional fifty dollars for the guaranty which expressly provided that the fruit should be on the trees and at the disposal of the respondents "free of trouble or annoyance from other parties." If not intended to indemnify against the acts of strangers, for what purpose was it intended? From all the circumstances characterizing the transaction, as well as the natural and obvious import of the terms, it is difficult even to imagine that anything other than the interference of strangers was intended to be provided against. There was in fact nothing else necessary to the safety of the respondents.

We submit that the error of the counsel for the appellant consists mainly in their considering the guaranty "as similar to a covenant for quiet enjoyment." It is said that it would be unreasonable that a "man should covenant against the tortious acts of strangers which he could not foresee or prevent," etc. Now, the simple answer to all this is, that there is no sort of analogy between a covenant for quiet enjoyment of real estate and that now under review. The purchasers were never permitted to take the possession, so that there is wanting the very first fact to warrant the assertion of the supposed analogy. There was a constructive possession in respondents by virtue of the sale; but that does not relieve the appellant here; for the respondents were to have the pears on the trees at their disposal, "free of trouble or annoyance from other parties;" but the fruit was not at their disposal, nor free of trouble or annoyance of other parties. There was, therefore, a breach of the guaranty.

Sedgwick on the Measure of Damages, already cited, will through-

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out show the dissimilarity between personal and real contracts as to the right and remedy.

V. The fifth instruction prayed by the appellant but raises again in a form little varied the question as to the entirety of the contract, and has been sufficiently considered.

VI. The sixth instruction. It is an anomalous doctrine that after a man has paid his money for property, and taken an express guaranty that it shall be at his disposal "free of trouble or annoyance of other parties," he must fight, or at least hazard a fight for it before he can have any remedy over! The appellant had contracted to guard against the interference of others, and cannot now transfer the burden which he was paid for assuming, to those who paid him.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J. concurring.

This controversy, which has been going on a long time, and been heretofore before this Court, grew out of a contract in these words:

"Having this day sold to Messrs. Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to said Nicholas Dabovich & Co., that the said three shares and one-fifth of one share of said pears will be at their disposal on the trees, free from trouble and annoyance from other parties to them.

"(Signed,)

JOS. EMERIO.

"June 14th, 1856."

When the case was before this Court (January T., 1858) this contract was construed. They say, "from the very nature of the first contract of sale, the delivery took place as soon as the sale was made. So far as the sale was concerned, they became the owners of the fruit upon the trees, and could only maintain an action against the defendant in case he converted the property or interfered with them in picking it. As to the guarantee, its effect was simply that the pears should be on the trees at the disposal of the plaintiffs, and that they should not be disturbed in their right to gather them by third persons. To recover on this contract, it was necessary to allege and

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prove either that the fruit was not on the trees, or that the plaintiffs had been interfered with by third parties gathering it. There was no necessity for any demand upon the defendant unless for the purpose of enabling him to comply with the terms of his guarantee."

This opinion was given on appeal from the Superior Court of San Francisco after the first trial, which resulted in verdict and judgment for the plaintiffs.

On the remanding of the case, the plaintiffs amended their complaint. This pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms, and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by jury under the directions of the Court. Sundry instructions were given and refused. These form the main subject of review here.

It has been seen that the complaint does not aver any causes of special damages. Only such damages, then, as were the natural and necessary consequence of the breach of the agreement can be recovered. The whole guarantee, as we understand it, amounts to this: that the defendant owned a certain portion of the pears growing or hanging on the trees of the orchard; this proportion was sold to plaintiffs, with a right to go and gather them, and the defendant warranted that the plaintiffs should not be disturbed or hindered in getting them. The plaintiffs wanted no trouble, difficulty or law suits about the matter, and the defendant insured them against this. An opposition by force, or the appearance of it, authorized the plaintiffs to desist from going on the premises, or prosecuting their errand in gathering or attempting to gather the fruit; and this opposition gave the plaintiffs a right of action. The measure of damages was the injury done, which was the loss of the pears. The value of these was the standard of

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of the principal named in the bill; and Nicholls signed as agent. See that case, 7 Cal. Reports, page 535.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The defendant made his promissory note, signing it "R. C. Clark, Trustee." On the trial he offered to show that the agreement at the time he made it was, that he was not to be personally liable, but that the payment was to be made out of a trust fund, of which he was trustee. This evidence was rejected by the Court as inadmissible, and the defendant appeals.

It will be perceived, that the tendency of the proffered testimony was in effect, to deny to the note the obligation it imported. The evidence proposed alters so far the contract as it appears, as to show that instead of Clark's being bound to pay at all events, or individually, he was only to pay out of a particular fund, and, of course, not to pay it at all if the fund failed. If the word trustee had not been affixed to the signature of Clark, it is clear that no such proof could be made, for it would clearly contradict the writing. It is argued, however, that the addition of this term is sufficient to vary the rule.

Story on Promissory Notes, sec. 63, says: "As to trustees, guardians, executors and administrators, and other persons, acting *en autre droit*, they are by law generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers. It is true that they may exempt themselves from personal responsibility, by using clear and explicit words to show that intention; but, in the absence of such words, the law will hold them bound. Thus, if an executor or administrator should make or indorse a note in his own name, adding thereto the words 'as executor,' or 'as administrator,' he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate." Story on Agency, p. 176, asserts the same doctrine.

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Nor will it do to say that the evidence is admissible, as showing a want of consideration for the note. It does not tend to prove that there was no such consideration as is acknowledged by the terms of the note, but that there was no such contract as that alleged.

It is, at last, the common case of an attempt to contradict the terms of a written contract by parol.

Judgment affirmed.

DABOVICH & CO. v. EMERIC.

In a contract for the sale of a certain number of shares of fruit growing on the trees of an orchard, owned in shares, where the vendor guaranteed to the vendee that the shares of fruit should be at his disposal on the trees, free from trouble and annoyance from other parties; on breach of such contract, where no special damage is alleged, the measure of damage is the highest market price of the fruit on the trees at the orchard, if there is any market value for it there; if not, then if the vendee is prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage. If other persons were in possession of the orchard when vendee went there to gather the fruit, and if those persons forbade him or his agents and servants

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from going in and gathering the fruit purchased, and if the vendee could not have done so without risk of personal collision or violence, then the guaranty was broken, and though the vendee might have been permitted to gather a portion of the fruit bought, but not all, he had a right to come away and hold the defendant responsible on the guaranty, as he was not bound to take a portion of his contract.

A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters.

APPEAL from the Fourth District, County of San Francisco.

This was an action in the Court below for a breach of contract. The plaintiffs, who are fruit dealers in San Francisco, purchased of the defendant, for the sum of four hundred dollars, sixteen-fortieths of the pears growing in a certain orchard. After such sale, the defendant, for the consideration of fifty dollars, executed the following guaranty:

"Having this day sold to Messrs. Nicholas Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to Nicholas Dabovich & Co. that the said three shares and one-fifth of one share will be at their disposal on the trees, free of trouble or annoyance from other parties to them.

"JOSEPH EMERICH.

"San Francisco, June 14, 1856."

The plaintiffs alleged a demand and refusal on the part of the defendant. To this complaint there was a demurrer, which was overruled, and a judgment for the plaintiffs.

From this judgment the defendant appealed to this Court, and at the January Term, 1857, (see 7 Cal. Rep. 209,) this Court reversed the judgment of the Court below, and remanded the cause with leave to the plaintiff to amend his complaint.

On the remanding of the case, the plaintiffs amended their complaint. The pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms.

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and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by a jury, under the directions of the Court.

The Court gave to the jury, at the request of the plaintiff, the following instructions:

1st. "That if the jury should find for plaintiff, then the measure of damages is the highest value or market price of the pears on the trees, since the first demand for the delivery of the same."

2d. "That in the estimate of damages, they shall also allow the loss of time, value of services, and wages caused by the failure of defendant to perform his contract."

3d. "That the contract and guaranty was entire, and the plaintiffs had the right to refuse to receive a portion of the fruit without the whole."

The defendant requested the Court to give to the jury six written instructions, all of which were refused. The first three are in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers.

The fourth and fifth instructions are in substance that the true rule of damages in the case was, that if the plaintiffs were molested or annoyed in gathering some of the pears, but not all of them, then they could only recover for the value of the pears on the trees, as to such portions to which the molestation and annoyance extended.

The sixth instruction is as follows: "That to enable plaintiffs to recover at all, the evidence must satisfy the jury that the plaintiffs were so far annoyed or molested in gathering the pears thus bought, that further persistence on their part to gather them would have been repelled by force, or have led to a breach of peace."

Plaintiffs had verdict and judgment. Defendant moved the Court for a new trial, which was denied, and he appealed to this Court.

Sloan & Hartman for Appellant.

The Court erred in giving plaintiffs' instructions to the jury.

I. The first part of the first instruction, as to the measure of damages, is probably correct, disconnected with the latter part of the instruction as to the demand and refusal. The instruction, as it stands, proceeds upon the hypothesis that a demand and refusal is necessary to fix a liability. The Supreme Court has already decided in the case that a demand and refusal was no breach of contract; yet in the very outset we find this same thing clinging, like the shirt of Nessus, to the plaintiffs' case.

The second instruction is clearly erroneous. It is instructing the jury to give special damages. No claim for special damages is claimed in the amended complaint; and certainly plaintiffs cannot recover more than they claim. The only damages claimed were for the value of the pears; yet here we have the Court instructing the jury that, in addition to that they shall also allow for loss of time, value of services, and wages!

The third instruction is clearly erroneous, and that it tended to the injury of the defendant on the trial there can be no question. From the testimony of nearly every witness examined, it appears that the plaintiffs might have received a portion, if not all their fruit, had they seen proper so to do. A portion, at least, was at their disposal, even had they been troubled and molested in procuring the balance. The instrument in question, given by the defendant to the plaintiffs, and which is the basis of the action, is precisely what it purports to be, and nothing more or less, to wit, a guaranteeing or indemnifying instrument, and intended to make plaintiffs whole as to such part of the fruit as they should not be able to procure without trouble or molestation. If they could not procure a portion of the fruit, for that portion the defendant was bound to indemnify them, and no more. If they could not procure any, then the defendant was bound to them for the whole.

II. The Court erred in refusing to give to the jury the instructions prayed for by the defendant.

The first three of these instructions we shall examine together.

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They are, in effect, that the guaranty or indemnity of the defendant extended only to the acts of himself or others interested in the property, and not against the acts of strangers. In other words, that the instrument did not guarantee against wrongful acts or trespasses of all the world, but against the trouble and annoyance only of such parties as had an interest or title, paramount, or otherwise, in the property. This is apparent from the instrument itself, as well as from analogous principles.

The covenant in the instrument at bar is similar to the covenant in a deed for quiet enjoyment. In fact, a covenant against trouble and annoyance is nothing more or less than a covenant for quiet enjoyment. Rawle on Covenants for Title, p. 147; *Greenby v. Wilcox*, 2 J. R., p. 1; *Folliard v. Wallace*, 2 J. R., p. 402; *Kent v. Welch*, 7 J. R., p. 258; *Walter v. Hele*, 2 Saund. 180, n. 10.

The correctness or incorrectness of the refusal to give the sixth instruction depends upon a simple proposition—did the sale in the case pass the defendant's title in the property to plaintiffs? If so, then the plaintiffs had the right to reduce their property to possession; and if they found their property in the possession of a wrongdoer, who was disposed to hold it by force, then they had a right to use force against force. The instruction prayed for did not even go to this extent, and we submit that it was error in the Court to refuse it.

P. L. Edwards for Respondents.

I. There was no error in the first instruction prayed for by the respondents. That this instruction announces the true rule of damages in the case, is shown by Sedgwick on the Measure of Damages, 258, *et seq.*

If this instruction assumed that a demand for the pears, and a refusal to deliver, was necessary to give a cause of action to the respondents, as intimated by the appellant, then there may be error in the record, but not such as he can assign; for it was against the respondents.

The contract of sale was, exactly speaking, precedent to that of the guaranty, but in legal effect they were cotemporaneous acts. Perhaps in the view of the counsel, it would have been more accurate

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to have instructed the jury to give the highest market price after the sale; but surely this is not an error of which the appellant can complain; for if the two acts were not cotemporaneous, that of the sale was first in time, and thus the instruction might have prejudiced the respondents, while it was impossible that it could prejudice the appellant. See particularly, *Baldwin v. Burnett*, 4 Cal. 392.

II. The second instruction is said to be "clearly erroneous"; and we as earnestly think it clearly correct. The guaranty was that the pears should be at the disposal of the respondents on the trees, "free of trouble or annoyance from other parties." Any damages which might ordinarily, and did result from the breach, ought to be allowed; and such damages ought to be given under the general averment of damages. As we understand the learned counsel, the objection does not go so much to the damages themselves as to their being given under the state of pleadings in this case. In all this we think the counsel are wrong. The record does show such averments, perhaps not so technical or artistic as such averments should be made, but still sufficient for all purposes after verdict. Such damages are clearly allowable. *Kenyon v. Goodall*, 3 Cal. 257.

III. The third instruction given is said to be clearly erroneous. Now, the fair presumption is, that the purchasers had in view their general business as fruit dealers, as well as certain particular contracts which they had assumed to perform, all of which would have been accommodated by their getting the whole of the fruit, while a small part of it would have been valueless and even prejudicial to them! And yet it is gravely argued that the respondents ought to have taken just so much as the caprice or interest of the appellant would allow. In other words, they were obliged to receive just so much as was to the advantage of the appellant, although at their sacrifice, while he was permitted to retain as much as would have been to their advantage. Such a view of the instrument is too absurd to be tolerated! The respondents had the right to treat the contract as entire, and they did so.

IV. The first three instructions prayed by the appellant are considered together. They are to the effect that the guaranty of the appellant "extended only to the acts of himself or others interested

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in the property, and not as against the acts of strangers. In other words, that the instrument did not guarantee against the wrongful acts or trespasses of all the world," etc. The guaranty thus restricted in its import would be worse than idle, and valueless. The seller of a chattel is always bound upon his implied warranty of title. By the mere force of law, there was already an undertaking of the effect now ascribed to the guaranty. The respondents had already paid the four hundred dollars, and the property, as held by the Court, had already vested in them; but they were doubtful of the appellant's ability to perform, and anxious for further assurance against the interference of other persons, and therefore gave the additional fifty dollars for the guaranty which expressly provided that the fruit should be on the trees and at the disposal of the respondents "free of trouble or annoyance from other parties." If not intended to indemnify against the acts of strangers, for what purpose was it intended? From all the circumstances characterizing the transaction, as well as the natural and obvious import of the terms, it is difficult even to imagine that anything other than the interference of strangers was intended to be provided against. There was in fact nothing else necessary to the safety of the respondents.

We submit that the error of the counsel for the appellant consists mainly in their considering the guaranty "as similar to a covenant for quiet enjoyment." It is said that it would be unreasonable that a "man should covenant against the tortious acts of strangers which he could not foresee or prevent," etc. Now, the simple answer to all this is, that there is no sort of analogy between a covenant for quiet enjoyment of real estate and that now under review. The purchasers were never permitted to take the possession, so that there is wanting the very first fact to warrant the assertion of the supposed analogy. There was a constructive possession in respondents by virtue of the sale; but that does not relieve the appellant here; for the respondents were to have the pears on the trees at their disposal, "free of trouble or annoyance from other parties;" but the fruit was not at their disposal, nor free of trouble or annoyance of other parties. There was, therefore, a breach of the guaranty.

Sedgwick on the Measure of Damages, already cited, will through-

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out show the dissimilarity between personal and real contracts as to the right and remedy.

V. The fifth instruction prayed by the appellant but raises again in a form little varied the question as to the entirety of the contract, and has been sufficiently considered.

VI. The sixth instruction. It is an anomalous doctrine that after a man has paid his money for property, and taken an express guaranty that it shall be at his disposal "free of trouble or annoyance of other parties," he must fight, or at least hazard a fight for it before he can have any remedy over! The appellant had contracted to guard against the interference of others, and cannot now transfer the burden which he was paid for assuming, to those who paid him.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J. concurring.

This controversy, which has been going on a long time, and been heretofore before this Court, grew out of a contract in these words:

"Having this day sold to Messrs. Dabovich & Co. three shares and one-fifth of one share of the pears standing on the trees of the orchard of San Pablo, which orchard is divided into eight shares, I hereby guarantee to said Nicholas Dabovich & Co., that the said three shares and one-fifth of one share of said pears will be at their disposal on the trees, free from trouble and annoyance from other parties to them.

"(Signed,)

JOS. EMERIC.

"June 14th, 1856."

When the case was before this Court (January T., 1858) this contract was construed. They say, "from the very nature of the first contract of sale, the delivery took place as soon as the sale was made. So far as the sale was concerned, they became the owners of the fruit upon the trees, and could only maintain an action against the defendant in case he converted the property or interfered with them in picking it. As to the guarantee, its effect was simply that the pears should be on the trees at the disposal of the plaintiffs, and that they should not be disturbed in their right to gather them by third persons. To recover on this contract, it was necessary to allege and

prove either that the fruit was not on the trees, or that the plaintiffs had been interfered with by third parties gathering it. There was no necessity for any demand upon the defendant unless for the purpose of enabling him to comply with the terms of his guarantee."

This opinion was given on appeal from the Superior Court of San Francisco after the first trial, which resulted in verdict and judgment for the plaintiffs.

On the remanding of the case, the plaintiffs amended their complaint. This pleading set out the contract in its words, and averred for a breach of it, that the plaintiffs went to the orchard to gather the pears from the trees on which they were, and that the plaintiffs were then and there troubled and annoyed, and were by force, and arms, and threats of violence, ejected from the orchard, and hindered and prevented from gathering the pears; that the defendant was duly notified of this hindrance; that the defendant utterly refused and neglected to deliver the pears to the plaintiffs, or place the same at the disposal of the plaintiffs, according to the terms of the contract, free from annoyance or trouble; and avers damages to the amount of \$3,000. Issues were joined on this complaint, and the case was tried by jury under the directions of the Court. Sundry instructions were given and refused. These form the main subject of review here.

It has been seen that the complaint does not aver any causes of special damages. Only such damages, then, as were the natural and necessary consequence of the breach of the agreement can be recovered. The whole guarantee, as we understand it, amounts to this: that the defendant owned a certain portion of the pears growing or hanging on the trees of the orchard; this proportion was sold to plaintiffs, with a right to go and gather them, and the defendant warranted that the plaintiffs should not be disturbed or hindered in getting them. The plaintiffs wanted no trouble, difficulty or law suits about the matter, and the defendant insured them against this. An opposition by force, or the appearance of it, authorized the plaintiffs to desist from going on the premises, or prosecuting their errand in gathering or attempting to gather the fruit; and this opposition gave the plaintiffs a right of action. The measure of damages was the injury done, which was the loss of the pears. The value of these was the standard of

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recovery. If there was no ascertained fixed value of the pears growing or on the trees at the orchard, the market value at San Francisco, less the cost of gathering and carriage, would furnish the rule of value.

The plaintiffs were not bound to take less than all of what they purchased. The defendant had no right to change the terms of the contract; the plaintiffs had a right to the contract as they made it. Even in cases of the sales of several articles by one contract for a sum in gross, the vendee is not bound to take a portion, but may rescind the contract if all are not delivered. This was in effect a sale of all the defendant's share of this fruit, and guarantee of uninterrupted access to all, and liberty to take all. The plaintiffs were not bound to take a part, when they were hindered from getting the rest. We cannot apportion the contract in this way; for the main inducement to the contract may have been to obtain the whole quantity of the fruit contracted for.

The contract did not merely provide against interruption from the parties having an interest in the orchard, but the guarantee is general, including interruption from every quarter.

Inasmuch as no claim was made in the complaint for loss of time, wages, etc., no recovery could be had on this account, and the Court erred in instructing the jury in this respect.

We think there was no error in the first instruction. Considering this contract to be in effect an agreement for the delivery of these pears, or, what amounts substantially to the same thing, a sale of them with a guarantee of peaceable and uninterrupted possession, the plaintiffs having paid the price in cash, were entitled to recover as the measure of damages for a breach of the agreement the highest market price of the pears on the trees, from the time of the delivery to the time of trial, if suit were not unreasonably delayed. *Sedg. on Damages*, page 264.

The principles upon which this protracted case may be finally disposed of have been given. To prevent misapprehension we repeat them.

If other persons were in possession of the orchard when plaintiffs went there to gather the fruit, and if those persons forbade the plaintiffs, or their agents and servants, from going in and gathering the fruit purchased, and if the plaintiffs could not have done so without risk of

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personal collision or violence, then the guarantee was broken; and though the plaintiffs might have been permitted to gather a portion of the fruit bought, but not all, they had a right to come away and hold the defendant responsible on the guarantee.

The measure of damages in that event would be the highest market price of the fruit on the trees at the orchard, if there was any market value for it there, and as it was; if not, then if the plaintiffs were prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage, would be the criterion of recovery.

But under the complaint the jury could not give compensation for any loss of time, remuneration for wages paid, etc., as there is no allegation in the complaint as to these matters.

The judgment is reversed and case remanded.

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Under the Act of Congress respecting the authentication of the record of a Court of one State to be used in another, it is only necessary that the certificate should state the main facts which are made necessary by the Act, when the offices of Judge and Clerk are both vested in one person.

A certificate of the proceedings of the Surrogate's Court of New York, which states that A. W. Bradford is Surrogate of the City and County of New York, and acting Clerk of the Surrogate's Court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law — in testimony whereof he sets his hand and affixes his seal of office — is sufficient.

In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the Court on its face, it is not necessary to aver jurisdiction.

An administrator of an estate in New York, has the right to assign, for a valuable consideration, a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this State.

APPEAL from the Fourth District, County of San Francisco.

This was an action brought on a judgment obtained in New York.

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One William Young recovered judgment in 1851, in the Court of Common Pleas of New York, against defendant. Afterwards, in 1853, Young having died, his son of the same name took administration on his estate in the Surrogate's Court of the City of New York. Young, the administrator, transferred and assigned to one Swartwout this judgment, who afterwards transferred it to the plaintiff, who instituted this suit. On the trial, plaintiff offered in evidence an exemplification of the proceedings of the Surrogate's Court of New York. The certificate of the Surrogate is as follows:

"STATE AND COUNTY OF NEW YORK, }
SURROGATE'S OFFICE. }

"I, Alexander W. Bradford, Surrogate of said County, and acting as Clerk of the Surrogate Court, do hereby certify that I have compared the foregoing copy of the petition, bond, letters of administration, etc., in the matter of granting letters of administration on the estate of William Young, deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record, and that this certificate is in due form of law.

"In testimony whereof I have hereunto set my hand and affixed my seal of office, this twelfth day of July, in the year of our Lord one thousand eight hundred and fifty-five, and of our Independence the eightieth.



A. W. BRADFORD,
Surrogate."

To the introduction of this transcript in evidence, the defendant objected, on the ground that the Surrogate's certificate was not sufficient under the Act of Congress, to admit it to evidence, and on the further ground that the complaint contained no averment that the Surrogate's Court had jurisdiction. The Court sustained the defendant's objection, and the transcript was not read in evidence.

Plaintiff then offered in evidence the assignment of the judgment by the administrator, which was admitted under the objection of the defendant that the administrator could not make the assignment.

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Defendant had judgment. Plaintiff moved the Court for a new trial, which was denied, and he appealed to this Court.

Thornton & Thornton for Appellant.

First. Judgments are assets where they are given or acknowledged. They then are *bona notabilia*, and are to be administered by the ordinary Courts of that jurisdiction. *Attorney General v. Bowen*, 4 Meeson & Wesley, p. 171, and note at the end of the case; 1st Wm. Errors, p. 171, citing *Dyer*, 305, *a* in margin; *Kegg v. Horton*, 1 Lutor, 401; *Gold v. Strode*, 3 Modern, 324; S. C. Carth. 148; *Adams v. Savage*, 2 Ld. Raymond, 855; S. C. 1 Salkeld, 140; *Carlisle v. Greenwood*, 7 Modern, 15; *Anon.*, 8 Mod. 244; 1 Saund. 275, *a* 3 to *Rex v. Sutton*.

Bonds are assets where they are at the time of the death of the testator or intestate. (1st Wms. on Errors, *ut supra*.) A judgment should be assets where recovered—it may ripen into an estate in lands. By the statute Westm. 2d, a statute so old as to constitute a part of the common law, it is a lien on land. Execution issues in the jurisdiction where the judgment is recovered, and can issue nowhere else. In *Cosby v. Gilchrist*, (7 Dana, p. 207) a judgment recovered in Kentucky is spoken of as assets locally situate in Kentucky, and to be there administered by the local administrator.

Second. If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased there situated, into his own possession, so that he has acquired the legal title thereto, according to the laws of that country, if that property should afterwards be found in another country, or be carried away and converted there against his will, he may maintain a suit for it there, in his own name and right, personally, without taking out new letters of administration, for he is to all intents and purposes the legal owner thereof, although he is so in the character of trustee for other persons. Story on Confl. of Laws, sec. 516.

Third. See Story's Confl. of Laws, sec. 517.

Fourth. The *lex fori* allows the action here in the name of the assignee. Prac. Act, sec. 4; *Harper v. Butler*, 2 Pet. 239; Story's

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Conf. of Laws, secs. 358-9, approving *Harper v. Butler*, and disapproving a Maine case; *Stearns v. Burnham*, 3 Greenl. 261.

Stanly & Hays for Respondent.

The Court below did not err in excluding the transcript of proceedings had in the Surrogate's Court of the County of New York; for,

First. The proceedings were not certified so as to entitle them to be read in evidence, either under the Act of Congress, or under section 450 of our Practice Act.

Second. There is no averment in the complaint, nor was there any proof, that the Surrogate's Court had jurisdiction to issue letters of administration upon the estate of the decedent, and it being a Court of special, limited and inferior jurisdiction, all the facts requisite to confer jurisdiction must be both averred and proved by those claiming any right through its decree.

Third. The Court could not admit in evidence or take notice of any letters of administration granted in another State.

They will not support an action out of, but are confined in their operation to, the territorial jurisdiction of the Court granting them.

First Point. The Act of Congress (U. S. Statutes at Large, vol. 1, page 122) and section 450 of our Practice Act, as to who the certificate is to be made by, and how it is to be made, are precisely alike, the latter being copied from the former. They provide that the records and judicial proceedings of the Courts of any other State, to entitle them to be admitted as evidence, shall have "the attestation of the Clerk and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice or Presiding Magistrate, as the case may be, that the same is in due form."

It has been uniformly held that parties wishing to avail themselves of this Act, must show a strict compliance with its requirements.

Does the certificate in question comply with the statute? Has it been attested to by "the Clerk," with the "seal of the Court," "together with a certificate of the Judge?"

It does not purport to come from the Court, but from the "Surro-

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gate's Office." It reads: "State and County of New York, Surrogate's Office, ss." It then proceeds: "I, Alexander W. Bradford, Surrogate of said county," (he might be Surrogate of the county, and yet not the Surrogate of the Court, or he might not be the sole, chief or presiding Surrogate) "and acting as Clerk of the Surrogate's Court."

A certificate by a person "acting as Clerk is not sufficient, for the Clerk who certifies the record, must be the Clerk himself of the same Court; or of its successor; the certificate of his under Clerk, in his absence, or of the Clerk of any other tribunal, office, or body, being held incompetent for this purpose." 1 Green. Ev., sec. 506, and cases there cited.

It does not appear but what the Court had a Clerk distinct and separate from the Judge, and the statute requires an attestation by the "Clerk, together with a certificate of the Judge."

"This, it is said, is founded on the supposition that the Court whose proceedings are to be thus authenticated, is so constituted as to admit of such officers." 1 Green. Ev., sec. 505; *Warren v. Flagg*, 2 Pick. 450.

The certificate proceeds: "In testimony whereof, I have hereunto set my hand and affix my seal of office."

The statute requires the "seal of the Court." It is no answer to this to say, "that the seal of office performs a double duty, that it is either the seal of office or the seal of the Court as occasion may require." This may be true, but if it can be made to serve in two characters, it must appear in which of them it was used. Here the certificate says, in effect, that the seal was intended as the seal of office of the Surrogate, and not as the seal of his Court.

The Surrogate may do many acts out of Court, to which he would affix his seal of office, while those acts done in Court would have the seal of the Court attached. The capacity in which the seal was used determines its character and effect. It is signed, "A. W. Bradford, Surrogate."

It therefore does not pretend to be "attested by the Clerk," but by the Surrogate alone. If he was both Surrogate and Clerk, it ought to have been, "Surrogate and Clerk," or "Surrogate and ex

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officio Clerk;" and then in addition there ought to have been a further certificate by him as Surrogate alone, for "the seal of the Court must be annexed to the record with the certificate of the Clerk, and not to the certificate of the Judge." 1 Green. Ev. sec. 506; *State of Ohio v. Henchman*, 27 Penn. State Rep. 480.

The certificate of the Judge is no part of the record. *Turner v. Waddington*, 3 Wash. C. C. Rep. 126.

Could a mere recital in the certificate of the different offices he filled affect the character of his signature?

The County Clerk of San Francisco county, is *ex officio* Clerk of the Fourth District Court, Twelfth District Court, County Court, Court of Probate and Court of Sessions. Would a certificate by him, containing this recital, and signed simply "Wm. Duer, County Clerk," be considered by this Court as a certificate of the Clerk of the Probate Court? Clearly not.

Second Point. "The jurisdiction of a Court or Magistrate of special and limited authority, is not to be presumed, but must be averred and proved."

"In such a case a general averment of jurisdiction is not sufficient, but the facts necessary to confer it must be set forth." *The People v. Koerber*, 7 Hill, 39; *Dakin v. Hudson*, 6 Cowen, 224.

"It necessarily results from the rule, that the jurisdiction of inferior Courts must appear affirmatively, and cannot be presumed; that all the facts requisite to confer jurisdiction must be averred and proved, whenever the proceedings of such tribunals are relied on, either as a defense or cause of action." 1 Smith's Leading Cases, p. 818, and cases there cited; *Cleveland v. Rogers*, 6 Wend. 440; *Cornwin v. Merritt*, 3 Barb. 343; *Bloom et al. v. Burdick*, 1 Hill, 130; *Cornell v. Barnes*, 7 Hill, 37, note c; *Barnes v. Harris*, 3 Barb. 605; *Turner v. Roby*, 3 Comst. 193.

In *Bement v. Wisner*, (1 Code Rep. N. S. 143) was that of a complaint on a judgment of the U. S. Circuit Court.

The complaint averred that the Court had jurisdiction and that the judgment was duly given. The defendant demurred, and claimed that the judgment was a foreign judgment, and that the plaintiff was bound to show that the Court had jurisdiction.

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The Court overruled the demurrer, but upon the ground that "jurisdiction is intended of the U. S. Circuit Courts."

The Court by this decision impliedly admitted that if the judgment had been a foreign one, the section of their Code would not have applied. *Hollister v. Hollister*, 10 How. and Practice Rep. 539; 3 Barb. 603.

"In a complaint upon a cause of action dependent upon the laws of other States, a general averment is insufficient. The laws relied upon must be averred and proved." *Throop v. Hatch*, 3 Abbott's Practice Rep. 23; *Pomeroy v. Ainsworth*, 23 Barb. 118.

Third Point. The Court could not admit in evidence or take notice of letters of administration granted in another State. They will not support an action out of, but are confined in their operation to the territorial jurisdiction of the Court granting them.

Chancellor Kent, in *Morrell v. Dickey*, (1 John. Ch. Rep. 156) says: "It is well settled that we cannot take notice of letters testamentary or of administration, granted abroad, and that they give no authority to sue here."

"This is not only the law in England, but it has been very generally adopted in this Country." *Williams v. Storrs* 6 John. Ch. R. on page 357; *Doolittle v. Lewis*, 7 John. Ch. Rep. on page 47; *Fenwick v. Sears' Administrators*, 1 Cranch. 259.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

One William Young recovered judgment in 1851, in the Court of Common Pleas of New York, against defendant. Afterwards, in 1853, Young having died, his son, of the same name, took administration on his estate in the Surrogate's Court of the City of New York. Young, the administrator, transferred and assigned to one Swartwout this judgment, who afterwards transferred it to the plaintiff. The questions made on the trial of the case in the Court below were these: 1. That the exemplification of the proceedings of the Surrogate's Court was not sufficient to admit it in evidence — the certificate not being in form or substance as prescribed by Act of Congress, or the statute of this State. 2. That the administrator in New York had

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no right to assign the judgment—the debtor residing at that time beyond the State of New York.

As to the first question: It seems that the Surrogate is Judge and Clerk of the Court. This being so, it is only necessary that the certificate should state the main facts which are made necessary by the Acts of Congress to the authentication of the records of a Court, which has both Judge and Clerk. In this case the certificate states that A. W. Bradford is Surrogate of the City and County of New York, and acting as Clerk of the Surrogate's Court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law.

In testimony of which he sets his hand and affixes his seal of office.

We do not see what more could be required to authenticate to us the records which the officer certifies. The papers show upon their face the jurisdiction of the Court. It is not necessary that the complaint should aver this jurisdiction, and if it were, the defect should have been noticed by demurrer, not by motion to exclude or objection to the admissibility of the transcript.

The second objection is equally untenable. We concede that the administrator has power over only those assets within the State where letters are granted; and we might concede that in the case of notes, bonds, etc., on debtors who live and have their property beyond the jurisdiction, the administrator has no jurisdiction or dominion. But this is not the case in respect to judgments. There can be no doubt if a debtor, against whom the intestate in his lifetime obtained judgment, though at the time of the death of the intestate the debtor was beyond the jurisdiction, afterwards came within the jurisdiction, the administrator might proceed to collect the money from him. The effect of a judgment, as such, unlike a note, is confined to the State where rendered. It is therefore record evidence of a debt. It may be sued on, it is true, out of the State. But it is not easy to see how an administrator of the creditor in California could take to himself as assets a judgment remaining on record in New York, merely from the fact that the debtor happened, for the time being, to reside in California. If the debtor went back to New York, or had property there, it is clear

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that the California administrator could not collect the money. If he collected anywhere, it would not be by virtue of the judgment in New York vesting in him any title to it, but merely because the transcript of the judgment gave him evidence upon which he might sue. The judgment is a record, and for any use to be made of it, or any power to enforce it, by execution or other process, must belong to the administrator in New York; or this anomaly would result: That the administrator in California would own the judgment for the purpose of suing on it in California, and the administrator in New York would own it for the purpose of collecting it by issuing execution in New York. We think no such doctrine can be maintained.

If the New York administrator owned it for one purpose — for the purpose of collecting it by execution in New York — he owned it for the purpose of receiving the money on it; if the defendant chose voluntarily to pay it, it matters not where the defendant resided at the time. If he could receive the money or collect it, he could assign it for value.

The authorities cited by the appellant maintain this distinction. (See particularly Attorney General v. Bowmens, 4 Meis. and W. 171.) Lord Abinger laid down the rule thus: "Whatever may have been the origin of the jurisdiction of the ordinary to grant probate, it is clear that it is a limited jurisdiction, and can be exercised in respect of those effects only, which he would have had himself to administer in case of intestacy, and which must therefore have been so situated as that he could have disposed of them *in pios usus*. As to the locality of many descriptions of effects, household and movable goods, for instance, there never could be any dispute; but to prevent conflicting jurisdictions between different ordinaries, with respect to choses in action and titles to property, it was established as law that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the debtor resides at the time of the testator's death; and it was also decided that, as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are merely evidences of title, the debts due on these instruments were assets where the debtor lived, and

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not where the instrument was found. In truth, with respect to simple contract debts, the only act of administration that could be performed by the ordinary would be to recover or to receive payment of the debt, and that would be done by him with whose jurisdiction the debtor happened to be." (So it said in *Vaughn v. Barrett*, 5 Vermt. 333.) "An idea seems to have been entertained, that the jurisdiction over the debt in this case followed the person of the creditor. But it is to be observed that jurisdiction or the right of administration in respect to debts due a deceased person, never follows the residence of a creditor. They are always *bona notabilia*, unless they happen to fall within the jurisdiction where he resided. (See *Bac. Ab. Exors E. Cro. Eliz.* 472.) Judgments are *bona notabilia* where the record is. (*Ld. Rayd.* 855; *Carth.* 149; 8 *Mod.* 244; *Anon* 6 *Geo. II.*, cited by *Selw.*) Specialties where they are at the time of the creditor's decease (*Sum. v. Dobson*, cited in *Selw. N. P.*; *Byon v. Byron*, *Cro. Eliz.* 472), and simple contracts where the debtor resides (*Carthew*, 373; *Salk.* 37; *Ld. Rayd.* 562)."

In this last case, one Matt recovered judgment in Vermont; administration was taken on the plaintiff's estate in that State; the plaintiff resided in New York at the time of judgment, and also at the time of his death; the defendant in the judgment procured and pleaded a release from the New York administrator. The Supreme Court of Vermont held the release ineffectual; and it was in answer to the argument that the debt followed the residence of the creditor, that the Court used the language above quoted. Had the judgment been obtained in New York, it is clear, from the reasoning and authorities cited by the Court, that it would have upheld the power of the New York administrator over the judgment, as assets of that jurisdiction. In fact, the right of the Vermont administrator is placed upon the fact of the rendition of the judgment there.

The industry of the counsel of respondents has collected numerous cases in which the power of administrators over assets of the estate has been declared, but he has cited no case which denies the right of the administrator of the creditor of the deceased to control or collect a judgment rendered within the jurisdiction where letters were granted, although the debtor resides in a different jurisdiction.

Jones v. Thompson.

The right of an administrator, at common law, to assign the choses in action of the intestate is not denied; and nothing in the legislation or jurisprudence of New York to the contrary has been shown.

The Court below excluded the record offered on the trial, and this was excepted to. This exclusion might have induced the plaintiff to decline introducing complete proof of the assignment, etc., as, if introduced under the ruling of the Court, it would have been insufficient to maintain the action.

The judgment of the Court below is reversed, and cause remanded.

JONES v. THOMPSON *et al.*

J. filed his bill in the District Court against T., alleging a partnership between them, and praying for an account of the partnership property. Subsequently, J. filed a petition in the same Court, setting forth the bill, and also that L. T. B. and H. B. had obtained judgment against T. the defendant, and that execution had issued on the judgment, and was levied on the partnership property of the plaintiff and defendant, and that the Sheriff was about to sell the property. The petition prayed that L. T. B. and H. B. might be made parties, and that an injunction might issue against L. T. B. and H. B. and the Sheriff; *Held*: That on the appeal of the case to this Court, it does not lie in the mouth of J. and T. to say that L. T. B. and H. B. are not parties to the suit, and have no right of appeal.

The interest of one partner in the partnership chattels, is the subject of levy and sale by the Sheriff, on an execution against one of the partners.

But the Sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein.

In such case, the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale, is dangerous as a precedent, and liable to great abuse in practice.

APPEAL from the Third District, County of Monterey.

The facts as disclosed by the opinion of the Court, are as follows:

This bill was filed in the District Court of the Second District, on the fourth day of April, 1856. The bill charges a partnership between the plaintiff and defendant, and prays an account. Thompson was

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the only defendant to the bill, and filed his answer denying the allegations of the bill. Neither the bill nor answer is verified.

Shortly after this time, plaintiff filed a petition in the District Court, setting forth the complaint, and also that Lewis T. Burton and Harvey B. Blake had obtained judgment in the First District Court, against A. B. Thompson, the defendant, and that execution had issued on the judgment, and been levied on certain cattle, the property of plaintiff and defendant Thompson, and that the Sheriff was threatening to sell the property by virtue of the execution. The petition prayed that the plaintiffs in the execution, Burton and Blake, might be made parties to that proceeding, and that an injunction might be issued against Burton and Blake and the Sheriff of Santa Barbara county, enjoining and restraining them, their agents and attorneys, from proceeding to sell or otherwise dispose of any of the cattle, horses and other property levied on. On the twenty-sixth of June, 1856, an injunction was granted according to the prayer of the petition, by the Judge of the Second District. On the twenty-seventh June, Burton and Blake appeared in Court and asked for a dissolution of the injunction, and that their names might be stricken from the record. The motion for the dissolution of the injunction was denied. Afterwards, on motion of the plaintiff's attorney, the cause was removed to the Third Judicial District, on the ground of incapacity of the Judge, he being related to the plaintiff.

On the twenty-sixth day of April, 1858, the Court entered a final decree, by which a receiver was appointed, and ordered to take immediate possession of the property and to sell so much of it at private sale as would bring the sum of \$7,370, and costs of suit and charges of the receiver, and divide the remaining property and cattle on the island between Jones and Thompson, and ordering the injunction to remain in full force and effect against Burton and Blake and the Sheriff.

Thompson, Irving & Pate for Appellants:

1. The first point we present to the consideration of the Court is, that the injunction in this case was irregularly issued, and Burton and Blake improperly made parties to this suit.

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The statute provides in what manner suits shall be commenced, and how injunctions shall issue. Practice Act, section 22, provides "that an action shall be commenced by filing a complaint and issuing a summons thereon." See sec. 113, Prac. Act.

In order to make Lewis T. Burton and Harvey B. Blake parties to this suit, there should have been filed a complaint verified by John C. Jones, or some one in his behalf, against Burton and Blake, and a summons issued thereon. This is the only mode known to our practice. Prac. Act, sec. 114.

In this case the only defendant, Thompson, had answered previously to the filing of the petition for the injunction, and the record nowhere shows any notice, or an order to show cause upon any of these defendants, before the issuing of the injunction.

But it shows conclusively that they did not have notice, nor was an order obtained to show cause, because the petition for the injunction was filed on the twenty-fourth day of June, 1856, and the injunction was issued on the twenty-fifth day of June, 1856.

The law requires that a notice of five days shall be given in all cases of motions, etc., unless the Judge prescribe a shorter period. The record here does not show that the Judge entered an order shortening the time, therefore the granting of the injunction was improper under this section of the statute.

2. Burton and Blake not being parties, no injunction could issue against them. Daniels' Ch. Practice, 3 vol. p. 1834-1837; Walker v. Deveraux, 4 Paige, 229; Fellows v. Fellows, 4 John. Ch. R. 25; Waller v. Harris, 7 Paige, 167.

3. The next point to which we call the attention of the Court is, that admitting for the sake of argument that Burton and Blake were regularly made parties to this suit, then we say, that a Court of Equity will not interfere to stop an execution at law, in cases of this character, until the partnership accounts have been taken. Sitler & Johnson v. Walker, 1 Freeman Ch., Kentucky, 77 Brewster v. Hammet, 4 Conn. 450.

The interest of each partner is his share of the surplus, subject to all the partnership accounts, and that interest is liable to the executions of a creditor. Dutton v. Morrison, 17 Ves. Jur., 1 Rose, 213.

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Nor in ordinary cases will the Court out of which the execution issues, interfere on motion. *Phillips v. Cook*, 24 Wend. 390, 401, 608.

So the rule seems to be well established, that a Court of Equity will not interfere to stop an execution at law.

And the only instances in which a Court of Equity ever interferes with an execution at law, is where the property is of a peculiar value, and the party could not be compensated in damages by the verdict of a jury. *Allen v. Freeland*, 3 Rand. 173.

The property levied on in this case is not of that peculiar value, so that the owner can not be compensated in damages by the verdict of the jury.

He has three distinct legal remedies; he could bring an action at law, to recover the property, against the purchaser, or sue the Sheriff for damages for the taking and detaining thereof, and an action on the indemnity bond.

The question seems to be whether a partner's interest in partnership effects, can be levied upon at all under a common law execution. That it can, principle, policy and authority agree: the first, because the partner has a legal interest in possession, which is leviable estate; the second, because otherwise a debtor by merely entering into a partnership might screen all his property from his creditors, and the third, by a series of cases and a continued practice from the earliest times. If an execution can be sustained at all, there is no mode in which it can be done but by a seizure of the goods and a levy and sale of the legal interest.

The respondents may say in this case, that Burton and Blake not being parties to the record, have no right to appeal. Should this point be raised, we will merely refer the Court to the case of *Adams v. Woods*, (8 Cal. 306, and 9 Cal., page 616) in which the Court says: "a party aggrieved by a judgment, has a right of appeal, although he is not a party to the record."

Saunders & Brent for Respondent Jones.

1. The appeal should be dismissed as not being taken by a party to the record.

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After the suit of Jones v. Thompson was commenced, the plaintiff, Jones, filed a petition for an injunction against Burton and Blake.

This petition is not entitled in this action and should not be regarded as a part thereof; it contains by itself a distinct cause of action, and makes new parties, and is in all respects a new cause, which is now pending, and should be regarded as distinct and separate from the one at bar. It cannot be considered as a part of the proceedings in this action because the plaintiff did not so ask it, because it is independent of it, because in order to be a part it will be necessary to regard the petition as a supplemental bill, which it does not purport to be, and for the filing of which no permission of the Court was asked or granted. Upon its face the injunction proceedings constitute a separate case by itself and should not be mixed or confounded with the present suit.

2. But if Burton and Blake are to be regarded as parties to this record, then they are to be subject to all the responsibilities that ordinarily attach to parties to a litigation.

The final decree was entered in April, but they only appealed four months after. They have made no motion for a new trial, nor have they prepared, nor has the Judge certified to, any statement to be used on appeal; so that the only case they are entitled to bring into this Court, is that made by the judgment roll alone.

3. The appellants claim that a Court of Equity will not interfere, at the instance of one partner, to stop a sale under an execution at law, issued by an individual creditor of the other partner, and levied on partnership property.

As applied to the present case, the claim of appellants is this: that notwithstanding Jones had gone into a Court of Equity, seeking an account and a dissolution of a partnership, consisting of horses, cattle and sheep, between himself and Thompson, and claiming that the partnership was indebted to him in the sum of \$60,000, yet the appellants, Burton and Blake, two months subsequent to the commencement of this suit, and after it was at issue, had a right to levy upon this common property for a separate debt of Thompson, and authorize the Sheriff to sell the same at public auction and deliver it to purchasers.

When a Sheriff, upon an execution against one partner, levies on and sells partnership property, he has a right to take possession of the

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whole property, and deliver it over to the purchaser or purchasers. *Phillips v. Cook*, 24 Wend. 389, 407-8; *Walsh v. Adams*, 3 Denio, 127.

So that the claim of appellants amounts to this: that Burton and Blake could have forced all these horses, cattle and sheep to sale by the Sheriff, could have required the Sheriff to deliver the same to forty or fifty purchasers, as the case may be, and thus require Jones, who had already commenced his action against Thompson, and who had a prior lien on the property, to pursue his rights by suing each one of the vendees of the Sheriff.

We submit that partners have an equitable lien upon partnership property for partnership debts, which lien is prior to the claim of the separate creditors of the individual partners. *Story's Eq.*, sec. 675; *Greenwood v. Brodhead*, 8 Barb. S. C. 596.

The interest of a partner in a firm can be attached at the suit of his separate creditors, and can be sold by the Sheriff unless enjoined, but this attachment is subject to the paramount claims of the partnership creditors, who, by a subsequent levy, can defeat the prior attachment.

All the authorities agree on this point. *Price v. Jackson*, 6 Mass. 242; *Story on Part.*, sec. 263; *Phillips v. Cook*, 24 Wend. 389; *Wilder v. Keeler*, 3 Paige, 167.

But our Supreme Court has affirmed the principle that partnership creditors are entitled to a preference in the distribution of joint property, over separate creditors of an individual partner. *Chase v. Steel*, 9 Cal. 66; see *Collyer on Part.*, secs. 825-6-7-8-9-30; also, sec. 831; 1 Madd: Ch. 131-6; 1 Eden on Injunctions, 53-6; *Gow on Part.*, ch. 4, sec. 1, p. 252; *Taylor v. Field*, 4 Vesey, 396; *Taylor v. Field*, 15 Vesey, 559, note; *Skip v. Sherwood*, 2 Swanst. 586.

The weight of American authority is the same way. *Story on Part.*, sec. 264; *Witter v. Richards*, 10 Conn. 37; *Moore v. Sample*, 3 Ala. R. N. 319; 1 Green, N. I. Ch. R. 163; *Place v. Sweetser*, 16 Ohio, 142; 1 *Story Eq.*, sec. 628.

In opposition to the unbroken current of English authority, and the influence of the American decisions, we have only two cases in conflict. *Moody v. Payne*, (2 John. Ch. R. 548). Here Chancellor

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Kent refused to issue an injunction to restrain a sale under an execution issued at the suit of a separate creditor of a partner, and levied on the partnership property.

He based his refusal upon the ground that it would produce delay and embarrassment to creditors, and says that the Court had never undertaken to restrain a Sheriff in a like case.

He quotes no authority where an injunction was repressed, and omits reference to the English cases where it was the constant practice to restrain execution, as appears by the authorities quoted. This decision was made in 1817, and not in a Court of final appellate jurisdiction, and though it has been the subject of earnest criticism by Mr. Justice Story, and elaborate defense by Chancellor Kent, in the note to p. 75, 3 Kent's Com. (8th edition) yet no antecedent authority has been shown to maintain it, and the only one bearing upon the question, (*Re Smith*, 16 John. 102) is directly opposed to it in principle, and no direct approval even in New York could be adduced; and the only subsequent case which could be found by the Chancellor, approving this decision, was *Phillips v. Cook*, (24 Wend. 389) already quoted, which was a case at law, not involving the powers of a Court of Chancery.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

Several errors are assigned by Burton and Blake, who are the appellants here. They are met, however, at the threshold, by the objection that they have no standing in Court, because the respondents' counsel say they are not parties to the record. We think the objection is not good. The petition was certainly a very irregular way to get them into the cause, but it is an irregularity of which the respondents cannot complain. The petition, though not entitled of the cause, was filed among the papers as a part of the record related to the subject matter of the suit, and was acted on by the Judge as a portion of the pleadings, and the final decree refers expressly to the injunction granted on the petition and in pursuance of its prayer, and makes that injunction perpetual. Being affected directly by the judgment, it certainly does not lie in the mouth of the plaintiff below to say the

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defendants, Burton and Blake, are not parties to it and have no right of appeal.

It is contended that the cattle, etc., of the partnership is not the subject of levy and sale by the Sheriff, on an execution against Thompson, one of the partners. We think the rule is otherwise. The interest of one partner in partnership property is such an estate under our statute as may be sold for his debts; it is a legal estate in chattels. It is true that, as between the partners, the interest of each is only the residuum of the property left after the settlement of the firm debts; and that the rights of firm creditors and the several partners are paramount to the claims of separate creditors of the firm.

But this interest of the partner thus defined, is held by the weight of authority subject to levy for his debts. Story on Partnership, (sec. 263) thus states the rule: "In cases of this sort, therefore, the real position of the parties, relatively to each other, seems to be this: The partnership property may be taken in execution upon a separate judgment and execution, against one partner; but the Sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. By such seizure the Sheriff acquires a special property in the goods seized; and the judgment creditor himself may, and the Sheriff, also, with the consent of the judgment creditor, may file a bill against the other partners for the ascertainment of the quantity of that interest, before any sale is actually made under the execution. The judgment creditor, however, is not bound, if he does not choose, to wait until such interest is so ascertained, but he may require the Sheriff immediately to proceed to a sale, which order the Sheriff is bound by law to obey. In the event of a sale, the purchaser at the sale is substituted to the rights of the execution partner, *quoad* the property sold, and becomes a tenant in common thereof; and he may file a bill, or a bill may be filed against him by the other partners, to ascertain the quantity of interest which he has acquired by the sale."

Chancellor Kent held in *Moody v. Payne*, (2 Johns. Ch. 548) that an injunction should not be granted to restrain a sale by the Sheriff, upon the ground that no harm is thereby done to the other partners; and the sacrifice, if any, is the loss of the judgment debtors only. Mr.

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Justice Story, (on Part., sec. 264) remarking upon this decision, says: "This does not seem to be a sufficient ground upon which an injunction should be denied. If the debtor partner has, or will have upon a final adjustment of the accounts, no interest in the partnership funds, and if other partners have a lien upon the funds, not only for the debts of the partnership, but for the balance ultimately due to them, it may most materially affect their rights whether a sale takes place or not. For it may be extremely difficult to follow the property into the hands of the various vendees; and the lien of the other partners may, perhaps, be displaced, or other equities arise by intermediate *bona fide* sales of the property in favor of the vendees, or other purchasers without notice; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees. To prevent multiplicity of suits and irreparable mischiefs, and to insure an unquestionable lien to the partners, it would seem perfectly proper, in cases of this sort, to restrain any sale by the Sheriff."

But this doctrine has no application to this case. The petition makes no case fit for the rule here laid down. It may safely be conceded that if the judgment debtor be indebted to the firm, or the firm be so indebted that on a settlement the debtor partner would not be entitled to any share of the common property, that the other partner might intervene to prevent a sale of the partnership assets. But it would be a great hardship, and would lead to enormous frauds if, merely because the account was unsettled and something due, however small the amount, the creditor should be postponed until an account was taken. No man with a small debt against such debtor, could afford to prosecute his claim; and the effect would be, in almost every case, to prevent or postpone a sale at the suit of the separate creditor.

The petition does not show any facts upon which the injunction was properly granted.

The decree shows a balance of some \$7,000 due from the defendant to the plaintiff; but this balance the decree itself shows is wrong. The amount is given as the excess of receipts of firm money over expenditures; but for this excess the defendant was only responsible to his partner for one-half, not for the whole. The bill shows a great num-

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ber of cattle, sheep, etc., of a value largely exceeding this comparatively small debt due the plaintiff. The appellants are interested in correcting this error, as the property, if sold by them, would be subject to this claim.

The decree is also erroneous in ordering a private sale of the firm property. The selling property of this sort in this way, is dangerous as a precedent, and liable to great abuse in practice. Only so much of the property as is necessary to pay the firm debts should be ordered to be sold, and the balance divided.

These principles being decisive of this case on the merits, it is not necessary to notice minor points.

The decree of the Court below is reversed, the order for injunction dissolved, and the cause remanded for a decree in pursuance of this opinion.

IN THE MATTER OF THE ESTATE OF E. KNIGHT, DECEASED.

An Administrator cannot pay out the money of the estate to remove an incumbrance from the property of the estate, which debt the estate is in no way responsible for.

He is to take care of, manage and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all incumbrances resting on the property, upon the notion that property may increase in value, and thereby a speculation may be made for the estate.

If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an incumbrance, it is not impossible that a Court of Chancery might order the expenditure of the money needed to remove such incumbrance.

If an Administrator undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure.

The Administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he cannot advance money to remove incumbrances, unless his intestate was bound to pay the money.

APPEAL from the Probate Court of the City and County of San Francisco.

In the matter of the Estate of E. Knight.

The facts, as disclosed by the opinion of the Court, are as follows:

The appeal is taken by the administrator from a decree of the Probate Court, disallowing a claim of \$2,000 and more. This claim originated under these circumstances: The intestate bought one-fifth of a tract of land called the Suscol Ranch. The ranch was incumbered in the hands of the vendees (from one of whom Knight purchased) for some \$25,000 of purchase money due by mortgage. Patterson, the administrator, to prevent the foreclosure of the mortgage, made an arrangement with Vallejo, the mortgagee, by which the general claim of Vallejo was removed from Knight's portion of the ranch, and that portion held for only its share; that is, for one-fifth of the sum; and by which arrangement the sale of the mortgaged premises was postponed. The administrator made a payment of the sum in controversy to Vallejo, in order to, and as a consideration for, this arrangement. Knight was not originally bound to pay this money; but the debt existed as an incumbrance upon the estate purchased by him from the vendee of Vallejo. This arrangement was made, and this money paid by the administrator without any order or sanction of the Court of Probate or any other Court, but at his own instance, and from considerations of advantage to the estate. The land was afterwards sold by order of the Probate Court, and for such a sum as left an entire loss to the estate of the sum paid by the administrator to Vallejo.

The Probate Court refused to allow the amount paid by the administrator to remove the incumbrance, and he appealed to this Court.

Sidney V. Smith for Appellant.

I. Under our laws, an administrator is obliged to take into his possession both personal and real estate. Sec. 194 of Act of 1851; *Harwood v. Marye*, Oct. T. 1857. And is bound to keep it until the estate be settled, or till it shall be delivered over by order of Court to the heirs, etc. Sec. 114 of same Act.

It is his duty to pay all the debts of the deceased out of the personal property, and can only sell real estate in case of deficiency. Sec. 115.

The reason and object of this last section is clear. It is nothing more than declaratory of the common law under which the personal property went to the administrator, the real to the heir; and the in-

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tention of our law, while vesting both in the administrator, is still to preserve the realty to the heir. So decided in *Belloc v. Rogers*, Jan. T. 1858.

The administrator is bound to keep the real estate in good order and repair. Sec. 114. And he is to be allowed all necessary expenses in the care of the estate, as also in its management. Sec. 219.

The word "care" is here placed in juxtaposition to the word "management;" so that it cannot be held to mean what the latter word does. Its meaning must be deeper; and it must be taken to mean "preservation," which is one of its significations.

"Care" is defined by Webster to mean "a looking to, heed or attention, with a view to safety or protection, as the care of property."

Taxes are not the personal debt of the decedent, nor are they of his creation; and still they are a lien on land, and if not paid, the land is sold, and thereby lost to the heir.

The mortgage due to Vallejo was not a debt created by the decedent, nor was it strictly one due by the estate; and yet it was a lien on land owned by the estate; and as with taxes, so with this mortgage: if it had not been paid, the land could have been sold under foreclosure by Vallejo.

The administrator, therefore, exercising "care" over the estate—over the land which was part of the assets of the estate—settled the mortgage to Vallejo in a manner which at the time was certainly highly beneficial to the estate; that is—by the payment of \$2,500 in case he retained to the estate that which was on the day of such payment worth to the estate \$20,000. This payment was therefore a necessary expense, without which the land could not have been then preserved to the widow and heirs.

If it had been a debt created or assumed by the decedent in his lifetime, it would have been under the entire control not only of the administrator but of the Court; it would have fallen within the rule laid down in *Ellison v. Halleck*, Oct. T. 1856, and subsequent cases. The reason for this is apparent. It is only the creditors of the deceased who are bound to present their claims to the administrator, or else be barred; and it is only they whom the administrator is bound to give notice to, to present their claims. Secs. 128, 129, 130, &c.

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A sale of real estate can only be made when the personal property is insufficient to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration.

Now, in no aspect was Vallejo a creditor of the deceased, nor had he a debt outstanding against the deceased. All he had was a mere lien on real estate owned by deceased.

If it were a valid claim against the estate, then the result would have been, that it would have been a debt due by the estate; and if the proceeds of the sale of the mortgaged property were insufficient to pay the whole of the debt, the residue would have had to be paid in due course of administration. See sec. 186.

II. It is a well founded rule of a Court of Equity, and more especially of a Court of Probate, that if an executor or administrator, honestly and in good faith, does without the order of the Court that which the Court on application to it would have ordered to be done, he shall be protected. 2 Ashmead, (Penn.) 211; Hopkins' Ch. R. 28; 2 Hill Ch. R. (So. Ca.) 215; 1 Bailey Ch. R. (So. Ca.) 23.

Now, if the administrator in this case, threatened as he was by Vallejo with the foreclosure of the mortgage of \$25,000, had in May, 1854, made application to the Court for directions, what would have been the result? We will suppose, for the present, that the Court possessed full power in this matter: The administrator would have stated in his petition the fact that the mortgage was neither given by the decedent nor assumed by him, but was one given by the grantors of the decedent; that the property owned by the estate was worth \$20,000 (making, therefore, the value of the whole ranch to be \$100,000, since the estate only owned the one-fifth); that the administrator had sufficient funds in hand; that the property had depreciated in value somewhat, but that such depreciation was according to the opinion of every one only temporary; that he could arrange the matter with the mortgagee by paying \$2,500 cash, and obtain time for paying the balance, \$2,500 more, and thus release the estate, and that the heirs to the estate were the widow and two children; and he would have asked instructions from the Court as to the course he should pursue.

Would the Court, on such a state of facts, have ordered the administrator to let the foreclosure go on? and that he should only take the

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proportion of the residue remaining after the mortgage was paid, with all the Court costs and expenses of sale?

In this view of the case, the Court would certainly have ordered the administrator to do what he did do. He had, in May, 1854, funds in hand.

In the administration of an estate — in all those various matters which must depend on the judgment of the executor or administrator, and which are not regulated and prescribed by legislative enactments — the rule of guidance is, that no more ought to be expected than would be performed by any prudent man in the care and management of his own property. *Dillebaugh's Est.*, 4 Watts, 177; *Jones' Appeal*, 8 Watts & Sergt. 148; *Meeher v. Vanderveer*, 3 Green, 392.

In *Welsh v. Perkins*, 8 Hammond, 52, taxes were due on an estate in the hands of an administrator. He had no money of the estate to pay them with, and in order to prevent a sale, he borrowed of a friend the amount required, agreeing that he would at a future day apply to the Court for an order of sale, and would sell certain specified property to raise the money so borrowed. He acted in perfect good faith. He obtained the order, and sold a certain piece of land. It so happened, that after sale the land so sold rose rapidly in value, whereas the other lands not sold remained stationary. It was sought by the heirs to make him responsible for the loss. The Court held the estate liable, and allowed the amount to administrator.

In *Williams on Executors*, 1280, it is said: "If an executor surrenders, or otherwise fails to preserve the residue of a term of years, where the land is of more value than the rent, it is a *devastavit*, for which he is responsible."

So, also, on page 1281, it is said, that though, generally speaking, an executor compounding or releasing a debt, must answer for the same; yet if it appears to have been for the benefit of the estate, it is an excuse.

Again, on page 1287: "Where an executor puts out the money of his testator, though without the indemnity of a decree, upon real security, which there was no reason then to suspect, but afterwards, such security prove bad, the executor is not responsible for the loss." See *Estate of Bosie*, 2. Ashmead, (Pa.) 437.

In the matter of the Estate of B. Knight.

F. A. Fabens for Respondent.

1st. Had the administrator any right or authority to make these payments to Vallejo?

The administrator has only such powers as are given him by statute, by the Act of May 1st, 1851, regulating the settlement of the estates of deceased persons, and those powers are a limitation of the powers given by the common law.

Thus he can compound with a debtor only with the approbation of the Probate Judge. Sec. 201 of Act of 1851.

He cannot enter into an agreement in writing to refer a doubtful claim, except to some disinterested person to be appointed by the Probate Judge. Sec. 142 of Act of 1851.

Neither can he sell personal property except by order of the Probate Court. Sec. 148 of Act of 1851.

The duty of an administrator, then, is plainly defined. He has no discretion to act generally for the good of the estate—to do that which he believes in good faith will be advantageous to it. But he must act according to the law, and the authority given him by the law. If he assumes to exceed his authority in a case where he thinks it will be beneficial to the estate, he does it at his own risk. The law does not require him to do it, and, if loss occurs, does not protect him.

The administrator shall take into his possession both the real and personal estate of the deceased. Secs. 114 and 194 of Act of 1851.

“This, however, is only that he may receive the rents and profits until the administration is concluded; the law does not make the real estate descend to him as in the case of personalty. By the common law, the real estate is the heir’s, the personal estate the administrator’s; and this rule is not altered with us, except so far as regards the temporary custody of the realty. *Beckett v. Selover*, 7 Cal. 215.

The administrator shall keep in good tenable repair all houses, buildings and fences thereon, which are under his control. Sec. 114 of Act of 1851.

What payments is an administrator authorized to make? See secs. 242, 239.

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Sec. 243 provides, that the Court shall make an order for the payment of the debts, as the circumstances of the estate shall require.

And by sec. 219 the administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as the law provides.

So far from this payment being a necessary expense in the care, management and settlement of the estate, it seems rather to have been a speculative expense. If the ranch, instead of further decreasing, had improved in value, it would have been beneficial; if it continued depreciating, it would be disastrous. The administrator, no doubt, thought that the property would improve, and he was willing to run the risk. It did in fact depreciate, and he must bear the loss. It was not, then, a necessary expense, etc.; for if it had not been incurred the estate would have been better off by some thousands of dollars.

But it is argued, that the word "care" used in sec. 219, is broad enough to cover this payment of a mortgage upon real estate. The necessary expenses in the care of the estate would doubtless include the expenses of keeping houses, buildings, etc., in tenantable repair, which the administrator is especially enjoined to do; but certainly it would not embrace the payment of a mortgage upon real estate which the administrator is nowhere authorized to make.

It is said, however, that these payments were made in good faith, and were at the time made with the object of benefiting the estate. But it is not enough to act in good faith merely. In *Rossiter v. Cosuit*, 15 New Hamp. 41, the Court says: "We cannot adopt the principle suggested in the argument for the appellee, that the administrator is to be allowed the amount he has paid in the redemption of the mortgage to the Wardens of Union Church, if he acted in good faith merely." And again: "But notwithstanding that he acted in good faith, if what he did would probably operate to the prejudice of the creditors, and will in fact so operate if he is allowed the amount paid, we must not disregard their interests because of his good intentions."

In *Alsop v. Mather*, 8 Conn. 586, the general proposition is stated thus: "An administrator is an agent who is created, and whose powers and duty are prescribed by law. The extent of his liability is defined by the condition of his bond."

In the matter of the Estate of E. Knight.

There are several cases in Louisiana not decided upon any enactment of the Code, which illustrate the general principles declaratory of the limited powers of an administrator. *Russell v. Cash*, 2 La. 187, republished in 1 Louisiana Reports, 317; *Gillett v. Ruchall*, 9 Robinson, 279.

An administrator cannot, in any transaction in which he pretends to act as such, create any liability on the estate, or change the nature of its obligations, or increase its responsibility with regard to its outstanding debts, and if he does so, he will be personally bound. *Bank of Louisiana v. Dejean*, 12 Robinson, 19; and cases commented upon by the Court in that case; see also to this same point, *Whightman v. Townroe*, 1 Maule & Selwyn, 415; *Alsop v. Mather*, 8 Conn. 587; *Wyse v. Smith et al.*, 4 Gill & John.

So too, when the widow of the deceased testator entered into an agreement with the executors, by which she relinquished her dower, and they agreed, as executors, to pay her in consideration thereof a certain sum therein specified. The Court held that the estate was not liable on the contract of the executors, but that the contract only bound them personally. *Callis v. Tolson's Exors.*, 6 Gill & Johnson, 91.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This is unquestionably a hard case on the administrator, for he seems to have acted in good faith. But we cannot relax or set aside the rules of law to suit the exigencies of particular cases, or relieve individual instances of hardship.

The statutes of this State do not allow an administrator to pay even the debts due by an intestate except in a particular way. Certainly they do not allow him to pay money not due by an intestate, upon an idea that the payment might be beneficial to the estate. He is to take care of, manage and preserve the estate committed to him; but this does not mean that he is, at discretion, to pay off all incumbrances resting on the property, upon the notion that the property may increase in value, and thereby a speculation may be made for the estate. If this were so, an administrator might consume all the assets

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of the estate in clearing the title to a portion of the property, and then the property might turn out to be valueless or worth but little. If a case should arise in which a great sacrifice would ensue unless money were paid to discharge an incumbrance, it is not impossible that a Court of Chancery might order the expenditure of the money needed to remove such incumbrance. The rule of equity is, that a trustee has a right, in questions of responsibility and difficulty, to seek the direction of a Court of Chancery, touching his conduct in the trust, and that the decree of the Court is a protection to him. But if he undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure. It would be a most dangerous precedent to hold that an administrator may speculate with the funds of the estate, or pay charges not allowed by law, though solely with a view of benefiting the estate, and then throw the loss upon the estate, and assign his good intentions as a defense to the injurious consequences of his acts.

The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; he cannot advance money to remove incumbrances, unless his intestate was bound to pay the money. If he takes the responsibility of improving the estate, or bettering the title in this way, it must be at his own risk. The loss cannot be visited upon the heirs, who gave him no authority to cause it. Nor can he ask legal protection, when he has himself, though with the best motives, gone beyond the provisions of the law.

The decree of the Probate Court is affirmed.

WAGENBLAST v. WASHBURN.

A Court of Equity will relieve against mistake, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake. Where the mistake appears upon the face of the instrument itself, Courts will correct the mistake without evidence *affande*.

Wagenblast v. Washburn.

APPEAL from the Sixth District, County of Sacramento.

This was an action of ejectment for a lot of ground in the City of Sacramento. The cause was tried in the Court below without a jury. The defendant had judgment, and the plaintiff appealed to this Court. The facts sufficiently appear in the opinion of the Court.

Winans for Appellant.

A Court of Chancery, though it has authority to correct mistakes, is very reluctant in exerting it, and will only do so where the evidence is perfectly clear. And even Chancery will grant no relief in such cases as against subsequent *bona fide* purchasers for valuable consideration without notice. Story's Eq. Juris., vol. 1, sections 151, 139 and 165, with cases cited under Note 1 to said section 165 and sections 435 and 436.

"In all cases of mistake in written instruments, Courts of Equity will interfere only as between the original parties, etc., or purchasers from them with notice of the facts. As against *bona fide* purchasers for a valuable consideration without notice, Courts of Equity will grant no relief, because they have at least an equal equity to the protection of the Court." *Warwick v. Warwick*, 3 Atk. 290 and 293; *Wall v. Arrington*, 13 Georgia, 89; *Woodworth v. Guzman*, 1 Cal. 203.

In the case last cited, the right to correct a mistake in a mortgage is admitted, as against a mortgagor, but not against a person claiming under him, unless the latter has actual notice of the existence of the prior lien. Again, even if Chauviteau had notice of the mistake, which is not admitted, still that does not defeat plaintiff's right to recover. A notice to a prior purchaser, grantor or assignor, even in a Court of Equity, does not affect the rights of a subsequent purchaser, grantee or assignee in good faith, for a valuable consideration and without notice. 1 Story's Eq., sections 409 and 401; Sugden on Vendors, 1037, section 20, vol. 2 of 7th Am. Ed., p. 533; *Curtiss v. Mundy*, 3 Met. 407; *Argendright v. Campbell*, 3 Hen. and Munf. 144.

"It is not sufficient to prove facts that would reasonably put the subsequent grantee on inquiry." *Pomeroy v. Stevens*, 11 Met. 244; *Spofford v. Weston*, 29 Maine, 140; and see Sugden on Vendors,

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1040 and 1041; *Fort v. Birch*, 6 Barbour, 60; *Tuthill v. Jackson*, 6 Wend. 226; *Jackson v. Van Valkenberg*, 8 Cowen, 260; *Jackson v. Given*, 8 Johns. 137; *Mundy v. Vawter*, 3 Grattan, 518; *Doe v. Reed*, 4 Scannell, 117.

Clark & Gass for Respondents.

In this case we hold that the mistake is so palpable, and the intention of the parties so clear, from the face of the deed itself, that the word "west" will be at once rejected, and should it be necessary, the word "east" will be substituted for it.

In the language of the District Judge who tried the case, "The error is one patent upon the face of the deed, and could mislead nobody."

Let us read the description, and see what information we derive from it. The description in respondent's mortgage is as follows:

"The following described real estate, situate, lying and being in the City of Sacramento, and described on the map of said city as a part of lot number one, (1) in the square between K and L, Third and Fourth streets, bounded as follows: commencing at a point sixty feet west of the corner of K and Third streets, thence east on K street twenty (20) feet, thence southerly ninety (90) feet, thence westerly twenty (20) feet, thence northerly ninety (90) feet, to the place of beginning."

To locate this lot in the proper place, you have only to reject, or do violence to one of the calls of respondent's mortgage. But suppose you locate it as appellant's counsel would have you to do, in the middle of Third street, let us see how much of the description you would reject.

1st. You would reject that portion of the description which locates it in the square by K and L, Third and Fourth streets; for if in the middle of the street, it cannot be in the square formed by the intersections of four streets.

2nd. You reject that portion of the description which describes it as part of lot one; for the street cannot be any portion of the square formed by streets.

3rd. You cannot bound it twenty feet on K street, unless you arbi-

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trarily say, that where K and Third streets intersect each other, K street absorbs that portion of Third.

4th. To locate it as appellant demands, you commence at the corner of K and Third, run along the line of K street, (having arbitrarily determined that it is K street instead of Third) west sixty feet, for your initial point. Your next call is east twenty feet, which brings you back twenty feet on the same line you have already run. If this had been the location intended, the draftsman would have said, "commencing forty feet west of the corner of K and Third streets, thence west twenty feet," etc. Substitute east for west, and the description is natural and proper, and does not require you, in making the survey, to run over the same line twice, commencing sixty feet east of the corner of K and Third streets, thence east twenty feet, etc.

Counsel for appellant denies that where "west" is used when "east" is intended, that we can substitute the one word for the other.

It is perhaps not necessary for us to contend for this power of substitution, in this case; for without using either word, east or west, the description in this mortgage is sufficient for the correct location of this lot.

If we leave out the word "west," the description will then be, "Part of lot one in the square, etc., commencing sixty feet from the corner of K and Third streets, thence east along the line of K street twenty feet, thence southerly," etc. In this description the surveyor is directed to commence sixty feet from the corner of K and Third streets, without being told whether it is sixty feet north, south, east or west, and yet he can have no difficulty in ascertaining his starting point.

If he commences sixty feet west of the corner, he will not be upon lot one, nor in the square between K and L, Third and Fourth streets; nor will twenty feet east from that point, which is the next call, bring him either to lot one, or to the square between the streets named.

TERRY, C. J., delivered the opinion of the Court—Baldwin, J. concurring.

This is an action of ejectment for a lot in Sacramento city. The plaintiff and defendant both deraign title through meane conveyances

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from one Hein; the defendant's conveyance being prior in point of date. In this conveyance the premises are described as a lot in Sacramento City, "described on the map of said city as a part of lot No. 1, in the square between K and L, and Third and Fourth streets, bounded as follows: Commencing at a point sixty feet west of the corner of K and Third streets, thence east on K street twenty feet," etc.

By reference to the map, it appears that the lot in question lies wholly east of the corner of K and Third streets, and that the description given in the deed would locate the premises in Third street.

The rule is, that effect must be given to the intention of the parties, when it can be gathered from the instrument. Here it appears that the parties intended to convey a portion of lot one. This lot extends eighty feet east from the corner of K and Third streets; excluding the word west, which is evidently a mistake, the description is perfect to all that portion of the lot which lies between the point of beginning and the adjoining lot.

A Court of Equity will relieve against mistake as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show if it be denied in the answer. (2 John. Ch. 585.) Here the mistake appears upon the face of the paper itself, and does not require to be shown by parol. The case comes fully within the authority of *Jackson v. Marsh*, (6 Cowen, 281) which is cited by appellant.

Judgment is affirmed.

KNOWLES et al. v. INCHES et al.

Transcripts on appeal to this Court, should not contain irrelevant or unnecessary matter. Instead of copying into a statement for a new trial or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the Practice Act requires.

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A bill to restrain vexatious litigation upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits, in which all the claimants to the title were parties.

Although some of the parties may be mere accommodation grantees, and fictitious depositories of title, still they have a right to be heard at law in their own defense, before Courts of Chancery can pronounce definitely on their claims.

The remedy, by bill of peace, is provided in instances of this sort for cases of vexatious litigation, after the real merits of the controversy have been settled at law.

A judgment suspended by appeal, cannot be considered as conclusive of the fact of title, even without reference to the manner in which it was obtained.

APPEAL from the Fourth District, County of San Francisco.

This was a bill in equity to restrain the defendants from prosecuting certain suits, depending in the Courts of San Francisco, and from leasing and conveying certain real estate situated in said city.

The bill charges that there has been a long course of vexatious litigation respecting certain real estate, and that the title has been determined in favor of the plaintiffs in said bill, and that several actions are still prosecuted and threatened to harass and annoy plaintiffs.

Defendants had judgment in the Court below, and plaintiff appealed to this Court.

The other facts necessary to understand the points decided, appear in the opinion of the Court.

H. S. Love for Appellants.

A. P. Wilson for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

We must reprehend the practice, which is too common, of stuffing a transcript with irrelevant and unnecessary matter. The present case affords a remarkable illustration. The transcript contains some two hundred and thirty-three pages, when everything essential to a review of the case might easily have been given in fifty. Besides the delays, unnecessary expense and labor thus created, the points are hid

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in this mass of superfluous matter, and it frequently becomes more difficult to find out what they are, than to decide them when found. The Practice Act, so far from sanctioning any such course of proceeding, by implication, rebukes it. Instead of copying into a statement for a new trial or on an appeal, deeds and transcript of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose. There is no sense in copying a judgment, execution, and the like, in cases where no question arises as to the form, or the particular words of them; but a short description of the paper, giving the sums, date, Court, etc., is sufficient. If proper attention were given to the making up of statements, we are convinced that the transcripts in this Court might, on an average, be reduced to less than one-half the present size. We might exercise our discretionary power in the imposition of costs in this case, probably with some effect, but for the difficulty of ascertaining by whose fault the insertion of this unnecessary matter is caused. In this case the appellants' counsel, in his brief, apologizes for the length of the transcript, and refers the cause of it to the other side's insisting on the insertion of all this useless stuff. On this suggestion, of course, we cannot act.

This case is a bill in equity to restrain the defendants from prosecuting certain suits, depending in the Courts of San Francisco, and from leasing and conveying certain real estate herein situate. The ground upon which the bill proceeds is, that there has been a long course of vexatious litigation, and that the right has been determined in favor of the appellants; that sundry actions are still prosecuted and threatened, to harass and vex the appellants.

The case was referred to a referee, who, in his report, gives the history of the litigation, which, for variety and extent, is unexampled, considering the small value involved. This history, indeed, might afford an illustrative appendix to Scott's account of the celebrated suit of Peter Peebles *v.* Plainstaines, or Dickens' report of the case of Jarndyce *v.* Jarndyce. Indeed, it would appear that the only use to which the parties designed to put this lot was to make it a foundation of a lawsuit, which they have erected upon it; an edifice divided, from cellar to garret, into all manner of secret chambers, involved passages and dark entries. The real parties to the controversy seem to have

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been too few in number to keep up the strife, and hence, both sides have called in a relay of fresh partizans to figure in the fight, having impressed them by means of sham deeds and fraudulent conveyances. Perjury is charged, with no lack of nervous expressions, upon the respective sides, and the lower arts of forensic warfare, such as snap judgments and partial statements of facts, as we are informed by counsel, give character and variety to the proceedings. Ten solid pages of transcript paper, closely written, are taken up by the able gentleman who acted as referee, in giving a mere analysis of the leading facts of these fierce forensic conflicts; the whole narrative of which, unabridged, exceeds, by a few pages, Sir Walter Scott's account of Napoleon's first campaign in Italy. Fearing, probably, that the litigation might, in some way, be brought to an untimely close in the lifetime of the litigants, the respondents are accused, with some reason, of adopting the economical plan of dividing out the subject into small parcels, and suing for this lot by *inches*.

We cannot take time to review this protracted controversy, and to follow its mazes through all their ramifications; nor is it necessary, for a simple point is conclusive. We regret that we have no power to put a stop to this comprehensive and embarrassing litigation, and that we must turn a deaf ear to the pathetic appeal of the appellants' counsel, not "to suffer his clients to be lawed to death;" but, though "it is the interest of the Republic that there should be an end of litigation," and not less the interest of these parties, yet the rules of law forbid our putting an end to it in this way.

It seems that *the title* of the lot was tried only in the case of Knowles v. Calderwood and Chittlebury. In that case there was judgment for Knowles; but Calderwood appealed from the judgment, and the appeal is, or was, at the time of the referee's report, pending in this Court. It is charged that, in that case, Forrest, who had a mortgage on the premises given by Knowles, was one of the principal witnesses for Knowles; that he swore, on his *voir dire*, that he was not interested, and that the verdict was mainly, or at least in part, gained on his testimony. The referee finds — and there certainly seems to be *some* evidence to support the finding — that the case was not satisfactorily and fairly tried. This judgment, suspended by appeal, cannot be consid-

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ered as conclusive of the fact of title, even without reference to the manner in which it was obtained.

Besides, there was no trial on the merits in any action to which Inches, who claims to be interested through Calderwood, or Van Valkenburg, who is lessee of Calderwood, or holds under his title, or to which action Sanborn and Forrest, who were of the opposite faction, were parties. It is true that these parties, as the referee finds, are, except Van Valkenburg, mere *accommodation* grantees, and fictitious depositories of title; but they have a right to be heard at law in their own defense, before the Courts can pronounce definitely on their claims, however false they may appear in a controversy *inter alias*.

Chancery will not interfere in cases like this, until after a trial at law adjudicating the title; and this means a trial in an action in which all the claimants to the title are parties. Otherwise, it would follow, that Chancery might assume jurisdiction, in the first instance, of all actions of ejectment. The remedy, by bill of peace, is provided in instances of this sort, for cases of vexatious litigation, after the real merits of the controversy have been settled at law.

If the appellants are in possession, it is easy to frame a bill to quiet title upon the ground of superior right; but this bill is not framed for that purpose.

The judgment of the Court below is affirmed.

SMITH v. SMITH *et al.*

The purchase of land by the husband, after marriage, with his separate funds acquired by him before marriage, and the taking of a conveyance therefor in the name of his minor children by a former wife, is not a fraud upon the rights of his wife.

The law of this State in relation to the rights of husband and wife, as to the common property, is similar to the law of Louisiana and Texas; and in those States it is held, by their highest tribunals, that all property acquired, by either spouse, during the existence of the community, is *presumed* to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate.

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Where a brick building was erected on such lots during the existence of the community, the presumption that it was but the form in which the common property was invested, is too cogent to be overcome by loose and unsatisfactory testimony.

The law, in vesting in the husband the absolute power of disposition of the common property as of his separate estate, designed to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife.

The law will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife.

A homestead right cannot be asserted merely to a building, independent of the land upon which the building is erected. In the present case, the building is to be regarded only as the form in which the common property was invested, upon the pretense of the husband of having a homestead, but for the real purpose of defeating any claim the wife might have thereto. The beneficent purposes of the statute could not thus be frustrated, and the right of the wife to one-half, upon the dissolution of the marriage, attached.

Where the husband deliberately places a brick building upon the property of his children by a former marriage, after his second marriage, he cannot have any claim upon it or its proceeds. In such case, its character as common property is declared only for the protection of the interest of the wife.

APPEAL from the Sixth District, County of Sacramento.

This was an action brought by the plaintiff, Augusta J. Smith, against the defendant, Frederick C. Smith, for a divorce from the bonds of matrimony between the said parties, and a division of the common property.

The plaintiff asked for the dissolution of the marriage contract on the ground of the commission of adultery by the defendant, after his marriage with her. This charge was denied by the answer. The case was tried in the Court below without a jury, and a decree of divorce granted. The question of the separate and common property of the parties was referred to P. L. Edwards, a referee appointed by the Court, to take testimony, find the facts, and report a judgment to the Court.

The parties were married on the fourth day of May, 1852.

In respect to the property of the parties, the complaint charges:

1st. That prior to and at the time of her marriage with defendant, Frederick C. Smith, she was the owner and in possession of lots numbers two and five in the square between M and N and Eighth and Ninth streets, in the City of Sacramento. That these lots were her separate property.

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2nd. That defendant, Frederick C., on the — day of June, 1853, sold lot number two, with her consent, and received therefore, to his own use, \$1,050.

3rd. That defendant, Frederick C., in 1854 used a portion of this money, together with certain other moneys, the common property of the parties, in the purchase of lots numbers six and seven, adjoining the lots of plaintiff and in the same square. That this last purchase was intended for his own benefit, but the conveyance was taken in the name of the defendants, Alfonzo B. and George V. Smith, both minor children of the defendant Frederick C. by a former marriage.

4th. That afterwards, in the month of July, 1854, the defendant, Frederick C., with the balance of the purchase money of lot number two, and with other moneys acquired by him since their marriage — which is charged to be common property — erected upon said lot number six a brick building at a cost of \$4,500, which building is claimed as the common property of plaintiff and Frederick C.

5th. The minor defendants, Alfonzo B. and George V., possessed no means, either in their own name or that of others, and the conveyance to them was, and is, a fraud upon the plaintiff's rights.

6th. That after the erection of said brick building, the plaintiff and defendant Frederick C. occupied said building as a homestead, until about the 18th of November, 1856, when the said Frederick C. fraudulently induced plaintiff to vacate same, and that he is now trying to dispose of the same for the purpose of defrauding her.

7th. Plaintiff prays for a dissolution of the marriage contract, etc., and that lot number five, in the square between M and N and Eighth and Ninth streets, may be decreed to be the separate property of herself, and that lots numbers six and seven, in the same square, the common property and homestead of plaintiff and defendant, Frederick C. — that the same be charged, first, with the payment to her of the sum of \$1,050, it being the amount of the purchase money of lot number two in the square aforesaid, and that the Court make such order for the division of the common property as the nature of the case may require, etc.

Defendant, Frederick C., in his answer denies:

1st. That plaintiff was the owner of lots numbers two and five.

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2nd. That she possessed any property at the time of their marriage.

3rd. Admits that he and his partner did enter upon and improve lot number two, and that they subsequently sold the same for ten or eleven hundred dollars. That such entry was not under any right of plaintiff, nor did they pretend to sell any claim of hers — the deed given by them was a quitclaim. .

4th. Defendant alleges, that at the time of their marriage he was worth \$20,000.

5th. Five months after marriage, defendant did purchase lots numbers six and seven, and that the purchase was a gift to his two sons, and was not more than a fair proportion of their rights in the property then possessed by him. Denies that any of plaintiff's money was used in such purchase; and avers that the money was his separate property, etc.

6th. Defendant built the dwelling house with his own funds, and was worth at the time, over and above the two lots, from fifteen to twenty thousand dollars. He gave for the lots eight hundred dollars.

Both the complaint and answer were sworn to.

The referee made his report, from which the following facts are taken:

Parties intermarried about the fourth of May, 1852. At the time of the marriage, Frederick C. owned property in this State to the value of about \$16,000. That after the marriage, on the eighteenth of October, 1854, the defendant, Frederick C., consummated a purchase, for which he had previously been negotiating, for the lots numbers six and seven, and took a deed therefor to the defendants, Alfonzo B. and George V. Smith, children of the said Frederick C. by a former marriage, and who were at the time of the respective ages of eleven and thirteen years. At the time of making the purchase, defendant Frederick C. was worth between fifteen and sixteen thousand dollars, and that the conveyance was made to the children by way of advancement from the father. Afterwards, and while yet in affluent circumstances, he erected a brick house thereon, at a cost of \$4,000, and the house and lots were worth \$4,800, and the same was not an unreasonable advancement to the children. From December, 1854, to the eighteenth of November, 1856, the premises were occupied as a homestead by plaintiff and defendant Frederick C. In the year 1855,

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Frederick C. brought his two children from some of the Atlantic States, and they resided with him until the eighteenth of November, 1856, when all parties left the house. The house was erected indifferently with the moneys of the said Frederick C. before the marriage, and those earned by him in the course of his business during the progress of the work, although he had enough of the former to complete the building. At the time of the marriage, the plaintiff did not own exceeding one hundred and fifty dollars, "and I do not believe she had that amount."

She claimed divers lots by virtue of purchase thereof, for taxes assessed thereon, among which were lots numbers two and five, in the block between M and N and Eighth and Ninth streets, in Sacramento city. That after the purchase of these lots, she caused a ditch to be dug on one side of one of these lots, but they were wholly unenclosed on all other sides. After the marriage, the defendant, Frederick C., under color of plaintiff's claim to these lots, took possession, and jointly with one Barclay enclosed the same, and erected some houses thereon at a cost of about \$1,000. That afterwards, Frederick C. and Barclay sold the improvements for about \$950, Smith at the same time selling and quitclaiming the possessory title to said lots. The referee further finds, that both parties are now poor, and recommends that a decree be entered denying the claims of plaintiff to lots numbers six and seven, in block M and N and Eighth and Ninth streets, and that the same be confirmed to the defendants Alfonzo B. and George V. Smith.

A decree was entered accordingly. Plaintiff moved the Court below for a new trial, which was denied, and she appealed to this Court from that portion of the decree disposing of the property.

Winans for Appellant.

1st. The voluntary settlement of defendant, F. C. Smith, on his children by a former marriage, was in fraud of the rights of the plaintiff, his wife, and therefore void. *Lightfoot v. Colgin*, 5 Munford, 51 *et seq.*

The rights of husband and wife were very similar at common law, and constituted an interest on the part of each against which a fraud

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might be committed by the other. Thus, if a *feme sole*, in contemplation of marriage, made a voluntary settlement of her estate upon another person than her intended husband, the settlement was void as against him, because in fraud of the rights he acquired by the subsequent marriage.

So, if the husband, by voluntary settlement or otherwise, alienate his estate after the wife's right of dower had attached, such right remained notwithstanding such alienation, and the property continued charged therewith. *Black v. Jones*, 1st A. K. Marshall, 312; 2 Blackstone Com. 129, 130, 132; *Combs v. Young*, 4 Yerger, 224, '5, '6; *Hughes v. Shaw*, Martin & Yerger, 329.

2d. In the present case, the conveyance to the infant defendants was not, strictly speaking, a voluntary settlement, but only a purchase in the name of the children.

In *Bateman v. Bateman*, 2d Vernon, 346, a declaration of trust, even by the child himself, was not suffered to prevail against the widow's claim of dower.

Again: a purchase in the name of a child, although presumed *prima facie* to have been intended for his benefit, will not be so considered, when there are circumstances to rebut such presumption; as, when there are other children who would go unprovided for, or be only scantily provided for. *Pole v. Pole*, 1st Vesey, 176.

3rd. The settlement on the infant defendants was fraudulent in fact, as shown by the evidence set forth in the statement.

4th. The conveyance to the children was fraudulent in law, as well as in fact.

Because it was in derogation of the rights of the wife in the common property, as established by the Act of April 17th, 1850, defining the rights of husband and wife. See Wood's Digest, 487.

True, by sec. 9th of that Act, it is provided that the husband shall have the like absolute power of disposition of the common property as of his separate estate; but this section was designed to facilitate the *bona fide* alienation of the property, and to prevent it from being hampered in the possession of *bona fide* purchasers, by equities or legal claims on the part of the wife, and did not refer to, nor embrace, voluntary settlements of the common property made to third persons for

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the express purpose of defrauding the wife out of her interest, or even to voluntary settlements made without such intent, but in derogation of the wife's interest.

In the matter of Buchanan's Estate, (8th Cal. 507) it was held, that the common property could not be disposed of by the husband by will. And the same doctrine is held in *Beard v. Knox*, 5 Cal. 252.

In *Petty v. Petty*, (4 B. Monroe, 217) it is held, that a man advanced in life, having children by a former wife, contracting a marriage with a woman in moderate circumstances, who two days before the marriage conveyed his property without the knowledge of his wife, cannot thereby deprive his wife of her right of dower in such lands.

In *Swain v. Perine*, (5 Johns. Chanc. 488) it is also held, that a deed, given by a husband just before marriage, to his daughter, without any consideration and kept a secret until after the marriage, is fraudulent, as against his wife's claim of dower. But the doctrine for which we are contending in this cause, is still more strongly sustained in *Questet v. Questet*, (Wright's Ohio Rep. 492) where it was held, that a conveyance made without consideration to a son by a former marriage, to deprive the present wife of her subsistence, is void.

F. C. Smith not only used this property as the homestead, but in all his conversations at various times so denominated it; and that, by every act in his power, as well by declaration as by residence, and otherwise, he notoriously set it apart as a homestead, and invested it with the legal attributes thereof. See *Cook v. McChristian*, 4 Cal. 23; *Taylor v. Hargous*, 4 Cal. 268, *et passim*.

John Heard for Respondent.

1st. The lots in question were purchased in good faith by F. C. Smith, for the defendants George and Alfonzo Smith, his children by a former marriage, with his own separate estate.

The house was erected by F. C. Smith with his own money, and when he was in affluence, and was not an unreasonable advancement to the defendants George and Alfonzo.

2nd. The purchase being made by F. C. Smith in the name of his two sons, who were not before provided for, the presumption of law is, that the purchase was intended as an advancement, and rebuts the

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presumption of a resulting trust to F. C. Smith. See 2nd Story's Equity Jurisprudence, sec. 1202, *et seq.*

The charge of fraud in fact made by the plaintiff in this case, is without foundation. The evidence and the finding of the referee both contradict it, and there is nothing to support it.

It is as difficult to see any equity or justice in the plaintiff's case, as to find any law to support her.

In 1852 she was married to the defendant F. C. Smith, who was then wealthy; a few months after the marriage, he made the advance to his two sons, then wholly unprovided for. When the advance was made, the witnesses and the referee all say it was not disproportionable to the means of her husband, and that he still retained a large fortune.

The plaintiff brought nothing to the marriage, and certainly lost nothing that she had any right to by this act of paternal duty of her husband. Wood's Digest, p. 487, art. 2605, *et seq.*

FIELD, J., delivered the opinion of the Court—TERRY, C. J., and BALDWIN, J., concurring.

It is clear that the two lots in question were purchased by the husband with funds owned by him previous to his marriage with the plaintiff. This he expressly states in his examination, and there is nothing disclosed by the record which contradicts his testimony. In this separate property of his, the plaintiff possessed no interest which the law could protect so as to restrain his power of absolute disposition, whether by sale or gift. The purchase of the lots and taking the conveyance in the name of his children by a previous marriage, was not in fraud of any rights of the plaintiff. She had no claim upon the funds thus applied. They were the husband's previous to the marriage, and no interest passed to the wife by that event. The gift to the children was an advancement for their benefit, and was not forbidden by the letter or policy of the law.

But as to the building upon the lots, the case is different. The building was erected long after their purchase, and with funds which constitute common property. It is true, the evidence of the husband tends to show that a portion of the funds thus used were his separate property, but its general effect, when considered in connection with

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his repeated declarations to different parties, is insufficient to overcome the presumption arising from the fact of the construction being made during the existence of the community.

The law of this State in relation to the rights of husband and wife, as to the common property, is similar to the law of Louisiana and Texas; and in those States it is held, by their highest tribunals, that all property acquired, by either spouse, during the existence of the community, is *presumed* to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate. *Lott v. Keach*, 5 Texas, 394; *Houston v. Curl*, 8 Texas, 242; *Gilliard v. Chesney*, 13 Texas, 337; *Chapman v. Allen*, 15 Texas, 278; *Clai-borne v. Tanner*, 18 Texas, 69; *Ford v. Ford*, 1 Louisiana, 207; *Dominquez v. Lee*, 17 Louisiana, 290; *Smalley v. Lawrence*, 9 Rob. 214; *Fisher v. Gordy*, 2 La. Ann. 763; *Webb v. Peck*, 7 La Ann. 92.

In a case decided at the present term, (*Meyer v. Kinzer and wife*) we have had occasion to consider whether the possession of property by either spouse during the existence of the community, acquired by purchase, created a presumption that the property was common; and we arrived at a conclusion similar to that of the Louisiana and Texas cases, that the presumption of the law is, that all property belongs to the community, which can be repelled only by clear and decisive proof that it was either owned before marriage, or subsequently acquired in one of the particular ways designated in the statute; that is, by gift, bequest, devise or descent, or was taken in exchange for, or in the investment, or as the price of such property, so originally owned or acquired; and that the proof rests upon the party asserting the separate right.

In the present case, the building was erected during the existence of the community, and the presumption that it was but the form in which the common property was invested, is too cogent to be overcome by the loose and unsatisfactory evidence contained in the record. If the separate property of the husband did, in fact, go into the building, it was essential to the preservation of its separate character, that it should have been clearly and indisputably traced by him.

The law, in vesting in the husband the absolute power of disposition

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of the common property as of his separate estate, designed to facilitate its *bona fide* alienation, and to prevent clogs upon its transfer by claims of the wife; and we are not prepared to say that, under the comprehensive language of the statute, a voluntary settlement, or a gift of a portion of the common property, not being unreasonable with reference to the entire amount, the claims against it and the situation of the parties, would be invalid. But we think it clear, that the law, notwithstanding its broad terms, will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claim of the wife. The different declarations of the husband, respecting the object of the building, were conflicting; at one time it was to be used as a homestead, and at another it was placed on the land of his children to deprive the wife of any claim thereto. If the building can be regarded as a homestead of the parties, she has an interest in it which should have been protected; but we do not see how a homestead right can be asserted merely to a building, independent of the land upon which the building is erected. The building is to be regarded only as the form in which common property was invested upon the pretense of the husband of having a homestead, but for the real purpose of defeating any claim the wife might have thereto. The beneficent purposes of the statute could not thus be frustrated, and the right of the wife to one-half, upon the dissolution of the marriage, attached.

In *Beard v. Knox*, (5 Cal. 252), this Court held that the common property could not be disposed of by the husband by will, so as to defeat the rights of the surviving wife; and the same doctrine is maintained in the matter of *Ruchanan's Estate*, (3 Cal. 507). In the first case, the Court said: "Our statute has done away with the common law right of dower, and substituted in its place a half interest in the common property. This liberal provision was intended for the benefit of the wife, and the intention of so humane and beneficent a law should not be defeated, by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband."

Voluntary conveyances, given on the eve of marriage, for the purpose of depriving the intended wife of her right of dower, where that

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common law right exists, are fraudulent as against her claim. This was so adjudged in *Swaine v. Perrine*, (5 John. Ch. 482). And upon the same principle, a voluntary disposition by the husband of the common property, or a portion thereof, for the like purpose of depriving the wife of her interest in the same, must be held ineffectual against the assertion of her claim.

It follows, therefore, that the plaintiff, upon the dissolution of the community, was entitled to one-half of the building erected out of the funds of the common property; and, as the title of the land is vested in the children, the separate value of the house and land should be first determined, and a sale then decreed of both, with directions to pay to her one-half of such proportionate part of the proceeds as the value of the house bears to the entire property, the balance and the proceeds of the land being placed in the hands of guardians of the children, and invested, under the direction of the Court, for their benefit. The husband having deliberately placed the building upon the property of his children, cannot himself have any claim upon it or its proceeds. Its character as common property is declared only for the protection of the interest of the wife.

Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

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In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up and converting the gold-bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him.

The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the Sheriff, who had the execution, in going on the ground and digging up the soil, and taking the gold it contained.

In such case, no ouster is necessary to maintain an action of trespass; any unlawful entry is sufficient. An officer, when he puts a Receiver in possession of the property of another, against whom he has no process, or asserts through himself or another an unlawful dominion over such property, is a trespasser.

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In such action, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage.

APPEAL from the Fourteenth District, County of Sierra.

The facts, as disclosed by the opinion of the Court, are as follows: This was an action of trespass, in which the plaintiff complains that in April, 1857, he owned and possessed a third part of a tract of mining ground, and that defendants broke into and trespassed upon it, and dug up and converted the dirt and gold-bearing earth to the value of \$2,000.

The defendants answered, denying that the claim was the property of the plaintiff, or that they committed any trespass on *the property* of the plaintiff, and generally denying all the allegations of the complaint. And further say that "George Davis, one of the defendants herein, is Deputy Sheriff in and for the County of Sierra; that by authority of his said office, and by virtue of an attachment issued from the District Court of the Fourteenth Judicial District in and for Sierra county, in an action before said Court, in which J. W. Bradley was plaintiff, and F. M. Rowe defendant, he levied upon or attached the said F. M. Rowe's interest in the mining claim described in plaintiff's complaint in this action; that thereupon the plaintiff in this case claimed the property as his own, and the said Sheriff, in conformity with the statutes in such cases made and provided, proceeded to try and determine the rights of property; that the jury called to determine said matter decided in favor of said plaintiff, J. W. Bradley, as will more fully appear by reference to the proceedings then and there had, which defendants pray may be made a part hereof.

"And that, afterwards, by virtue of a judgment and execution issued from said Court, and to him directed, and by virtue of said decision of said jury, and of the statutes in such cases made and provided, satisfied the claim of said J. W. Bradley out of the said F. M. Rowe's interest as aforesaid, as the proceedings in said case on record will more fully show; which record, return and proceedings, defendants introduce and make a part of this answer." The answer was sworn to by Davis. Afterwards, defendants amended their answer to this effect:

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"That they have been informed that plaintiff claims to have purchased the mining claim mentioned in his complaint from one James Finney; but defendants aver that, if such conveyance was made, it was in fraud of the rights of defendant, J. W. Bradley, and made for the purpose of delaying and hindering him from collecting a debt due from F. M. Rowe to him, which debt was the same sued for in the case of J. W. Bradley v. F. M. Rowe in this Court, the record of which suit is made a part hereof; and that said purchase was made by F. M. Rowe, defendant in the last mentioned suit, and the money therefor furnished by him, and the name of A. C. Rowe used in said conveyance from Finney to deceive and defraud said defendant, J. W. Bradley." This was sworn to by Bradley.

One Finney, the vendor of the claim to Rowe, to whom was due a part of the purchase money, was examined as a witness. It is assigned as error, that he was admitted to testify when he was incompetent. The question before the jury was not as to the original title as it stood before the witness sold, but as to whether the claim belonged to plaintiff, F. M. Rowe, as whose property it was levied on by the officer.

The cause was tried by a jury, and a verdict had for plaintiff for \$2,000, on which verdict there was judgment, from which the defendants appealed to this Court.

H. B. Crossette & R. H. Taylor for Appellants.

Appellants insist that there are but two acts that can be charged as wrongs, and that these were committed by the Sheriff of Sierra county in the discharge of his duty; neither of which constitute a trespass, as charged in respondent's complaint.

These acts are — *First.* In attaching the right, title and interest of F. M. Rowe, in and to the said mining claims; and,

Second. In receiving the gold dust or coin from Peter Lyre, co-tenant, in satisfaction of Bradley's judgment.

1st. In regard to the first act, it is not denied that George Davis was a regularly appointed and qualified officer, acting under a precept duly issued from a Court of competent jurisdiction; that he found F. M. Rowe in possession of this mining interest; that he legally served him as commanded; that at this time he knew nothing of the pretan-

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sions of A. C. Rowe, or any other person, other than F. M. Rowe, to the ownership of the mining interest. And we say that it was not his duty, nor had he, as a ministerial officer, the right to investigate the title to this interest; that the finding F. M. Rowe in possession was a sufficient justification as to him.

2d. In regard to the second act. He (the Sheriff) received a certain amount of gold dust, or coin, the profits of this interest, from the hands of Peter Lyre, a co-tenant in these claims. This dust or coin, separated from the claim, formed a distinct species of property, and I can no more conceive of an officer rendering himself liable to an action of trespass on a mining claim, by receiving the dust or coin after its separation therefrom, than I can conceive an action of trespass would lie for an injury done to meadow land, for taking the grass, which grew upon it, but which has since been separated and become an independent species of property.

If there was any wrong committed in relation to this matter, it was committed by Peter Lyre; and if A. C. Rowe was the real owner of this claim, then the action of trespass would not lie against him; for the appropriation of the entire profits by one tenant in common, will not justify an action of trespass by his co-tenant; nothing short of an actual ouster will justify this action.

3d. In regard to the admission of F. M. Rowe's testimony, we say it was error, for the reason that fraud was directly charged against him; that this was the main issue in the case; that this was permitting him to come in and purge himself of the charge. It is true, that his interest, in dollars and cents, could not have been clearly ascertained, but we understand, as a well-settled principle, that it is not the province of Courts to weigh the amount of temptation which witnesses can endure, but to see that they have no temptation at all.

4th. In regard to excessive damages, the testimony shows (and that not clearly) that but \$1,745 was taken out, but the testimony does not show how much of this was paid for expenses, which in all cases are deducted; but in any event there is an excess of two hundred and fifty-five dollars. That this excess was given under the influence of passion or prejudice, there is no doubt.

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Vanclef & Stewart for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

One Finney, the vendor of the claim to Rowe, was examined as a witness. It is assigned as error, that he was admitted to testify when he was incompetent. The question before the jury was not as to the original title as it stood before the witness sold, but as to whether the claim belonged to plaintiff, F. M. Rowe, as whose property it was levied on by the officer.

It is true that the witness had not been paid all the purchase money; but this made no difference. This was not an action to try the title; and if it were, in this state of the question before the jury, the vendor, for all that appeared, was a competent witness.

Another assignment of error is, that no trespass was committed, because the officer found F. M. Rowe, the debtor in attachment and judgment, in possession, and therefore had a right to seize the property. But the very question of fact was, who was in possession? and the possession of real estate usually follows the ownership. The mere fact that F. M. Rowe was on A. C. Rowe's ground, is no justification to the officer to go there and dig up the soil, or take the earth or gold taken from the land.

The next error assigned is, that no ouster was made, but merely the rights, title and interest of the judgment debtor attached; but no ouster in this sense is necessary to maintain an action of trespass; any unlawful entry is enough. And the officer, when he put a Receiver in possession of plaintiff's property, or asserted through himself or another an unlawful dominion over another's property, is a trespasser. There is no difference between the officer going, without right, upon the plaintiff's land, and getting Lyre to seize or take the plaintiff's gold or earth, and doing it himself.

In both cases, such an act is a trespass and conversion; and all concerned, aiding and abetting, are original trespassers. It is not the case of a co-tenant paying over money or gold dust to the Sheriff, but

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the Sheriff getting the co-tenant to aid him in seizing and taking property of the plaintiff.

The next objection is, that the damages were excessive. There was some evidence tending to show that in a few weeks the amount coming to the plaintiff's share was \$1,745. The jury might infer that some additional amount was taken out the balance of the time. Besides, there is no specific denial of the amount of damages laid in the complaint, though there is of the alleged causes of damage.

It may well be doubted, indeed, if the answer put in issue any fact except the fact of ownership, and of the levy, etc., as the property of F. M. Rowe.

Some technical exceptions are taken, but they were not made below, and we cannot consider them for the first time here.

The judgment is affirmed.

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Where a deed is offered in evidence, which purports on its face to be a deed of bargain and sale for an alleged consideration, executed and acknowledged by the defendant, and on the same day recorded, it is some evidence to go to the jury of the delivery of such deed.

It is scarcely to be presumed that one man will execute to another a deed without the assent of that other.

In such case, it is for the jury to say whether the grantee had knowledge of the execution of the deed, or had given his assent thereto.

The grantor, by the execution and acknowledgment of the deed, admits the delivery.

Where A sold a lot of land to B, and delivered possession, and, in a written contract respecting the same, it was stipulated, among other things, that in the event that B should be dispossessed by legal judgment at any time within three years, A should pay back to B \$2,000; and should suit be brought against B for the lot, then B should notify A of it, in order to enable him to assist in the defense of the title; *Held*, that the giving of the notice by B to A of the institution of suit against B for the lot, was indispensable to enable B to recover of A on such contract.

Nor does it matter of what value this notice was to A, or whether it was of any value. In a Court of law, effect is to be given to the bargain according to its terms, and Courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. A bound himself only in a given way, and can be held only by the bargain he made, at least in the form of this action.

In a suit on such contract, B should aver that he had been evicted after notice to A. The payment of the money is dependent upon this fact.

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APPEAL from the Twelfth District, County of San Francisco.

The facts of the case sufficiently appear in the opinion of the Court.

Shafter, Park & Heydenfeldt for Appellant.

I. The Court was requested to charge that, "assuming the facts which the evidence tended to prove, there was no delivery of the deed executed by the plaintiff to Samuel Bensley, the grantee."

This instruction was refused. The Court very properly told the jury that a grantor could not force a deed upon the grantee; that assent of the grantee was essential; and left it to the jury to find whether there had in fact been such assent, or not.

a. The plaintiff was entitled to the instruction requested; for there was no conflict in the evidence on the question of "assent," and the facts that it intended to prove showed that there had been no assent as a matter of law.

1. As there was no conflict in the testimony, the plaintiff could claim a judicial declaration as to the effect of the facts should the jury find them. *Whitney v. Synde*, 16 Vt. 580, 586; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; *Pleasant v. Pendleton*, 6 Rand. 473; 2 U. S. D., p. 169, sec. 270; *Swartwilder v. U. S. Bank*, 1 J. J. Marsh. 36.

2. The declaration or charge requested was correct; for if the facts which the evidence tended to prove, really existed, they precluded all idea of privity on the part of the grantee with the deed. 2 Hilliard's Ab. 283. Nor can the effect of this refusal be evaded on the ground of the charge actually given; for that was clearly erroneous, inasmuch as it put the question of assent as an open question of fact to the jury, when there was no evidence tending to prove such assent. *Birney v. Boardman*, 3 Vt. 236.

II. The Court told the jury that by the terms of the contract it was necessary for the plaintiff to prove that he had given reasonable notice to Atwill that Lick had sued in ejectment for the land.

This was telling the jury in effect, that the giving of such reasonable notice was a condition precedent to the right of recovery.

This was erroneous; for the giving of the notice was not a condition precedent, but an independent covenant merely.

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a. The inclination of the law is against conditions precedent; for a failure results in forfeiture, whereas a breach of covenant results in compensation merely.

b. The contract, in speaking of the liability of Atwill to refund the money, first adopts the language of conditions, as follows: "Provided" that Bensley shall vigilantly defend.

Such defense was very likely a condition precedent. But immediately thereafter the language is changed; and, in that part which relates to the notice it is said, "It is further agreed."

c. The context has to do with the question of construction, and it can hardly be contended that the payment of taxes, assessments, etc., that are grouped under the "agreement" to give the notice, are conditions precedent. *Noscitur à Locies.*

d. Again: the giving of the notice does not constitute the entire consideration of Atwill's undertaking to refund, nor any considerable part of it; therefore, on established principles, the giving of the notice should not be construed as a condition precedent.

1. It does not in fact constitute the whole consideration of Atwill's undertaking. The bulk of the consideration consists in the payment of the \$6,000, and in Bensley's engagement to defend efficiently against any suit that might be brought for the possession; and if such defense should be made in fact by Bensley, it would be a matter of no practical moment whether Atwill had notice of the pendency of the action, or not.

2. Assuming, then, that the fact is with us, that is — that the giving of the notice does not constitute the whole of the consideration of Atwill's undertaking — the contract is subjected to the rule of construction for which we contend. *Boone v. Eyre*, 1 H. Black. 273, note; *Stavers v. Curling*, 32 C. L. 153; *Muldrow v. McClelland*, 1 Littell, 1; *Tomkins v. Elliott*, 5 Wend. 496; 2 Smith's Leading Cases, 25; 2 Par. Contracts, 37.

Though in form the covenants may be dependent, yet to prevent injustice, they may be treated as independent. 2 Smith's L. C. 24.

George F. & W. H. Sharp for Respondent.

I. The Court charged the jury that the deed from appellant to his

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brother, S. S. Bensley, "was not operative to pass the title, and that the lot in question had not been transferred;" which charge was more favorable to appellant than the law warrants.

The acts done by appellant, and by Brooks, with his authority, were a transfer in the sense of this clause of the agreement, and in violation of it.

In truth, the Court should have given the fifth request asked by respondent; as no dissent of S. S. Bensley was shown, it being for his benefit, it is presumed that he accepted the deed. The Lady Superior v. McNamara, 3 Barb. Chy. Rep. 378; Thompkins v. Wheeler, 16 Peters' Rep. 106, 119; Ingram v. Porter, 4 McCord Rep. 198.

After the deed was left for record with the County Recorder, he held it for S. S. Bensley, who alone was entitled to receive it. At least, the Recorder would have been justified in refusing to deliver it to appellant.

II. It was incumbent upon appellant to give notice of the suit of Lick against Bensley *et al.* to respondent, so that he might assist in the defense. The notice did not meet the requirements of the contract either in substance or time.

The respondent conveyed to appellant the lot by quitclaim, with full knowledge of the exact claim of Atwill to the lot. Hence the doctrine of *caveat emptor* applies. Gouverneur v. Elmendorff, 5 J. Ch. Rep. 84.

The return of the purchase money depended — 1st. Upon appellant being dispossessed by legal and final process within three years. No return, if dispossessed after that time; so that the agreement was in fact to insure a three years' possession.

2d. That appellant would "faithfully, diligently and watchfully resist and defend any claim or infringement that might be made upon said premises, either by law or against law; and also, that appellant notified respondent of any claim made, so as to enable respondent to assist in defense of the title."

3d. That appellant would not transfer the lot without the written consent of respondent.

The clause of the agreement requiring appellant to defend and resist "any claim," is introduced by apt words to make the defense of the

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claim a condition precedent. No particular words are required to make a condition precedent. It is to be gathered from the meaning of the parties, and it is apparent that the clause of the agreement in regard to notice is to be read with the clause as to the defense of any claim, and is wholly independent of any other. Atwill contracted expressly to have the right to furnish his aid, which might have been controlling in that suit, if allowed to use it effectively.

The Court below did not put the question to the jury as a condition precedent, nor did the jury find a verdict upon that ground. The Court simply made the giving of notice and the defense dependent.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., concurring.

Action upon contract, dated twentieth July, 1853, Atwill conveyed to Bensley a lot in San Francisco for the sum of \$6,000. A part was paid down, and Bensley's note taken for the balance, payable in three years after date. Atwill agreed to pay back the \$2,000, and deliver up the note to be canceled in the event that Bensley should be dispossessed by legal judgment at any time during three ensuing the date of the contract, provided that Bensley should vigilantly defend any suit that might be brought against him during the period of three years for the possession of the lot. Bensley agreed to pay the taxes on the lot; that he would not encumber it; that he would defray all law expenses; and that should a suit be brought against him, he would duly notify Atwill thereof, and that he would not convey the lot without the written consent of Atwill.

Issues of fact having been joined on the complaint and answer, it was specially referred to the jury to find upon the following questions:

1. Did Bensley vigilantly defend the action brought against him by one Lick, who sued, within the three years, for the recovery of the lot?
2. Did he give reasonable notice to Atwill of the pending of the suit?
3. Did Bensley convey the lot to his brother, Samuel Bensley, during the three years?
4. Was the plaintiff judicially dispossessed on the twentieth July, 1856?

The first question being, in effect, as it was treated, a question of

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law, and passed upon in his (appellant's) favor, it is not necessary to notice it further.

On the second and third issues there was evidence, and instructions were given and refused by the Court, which are the subjects of review by us.

The first error assigned in this connection is the refusal of the Court to charge, at the instance of the plaintiff, "that assuming the facts which the evidence tendered to prove, there was no delivery of the deed executed by the plaintiffs to Samuel Bensley, the grantee."

It is argued by the appellant that there was no conflict of proof on this point, and therefore the Court should have given this charge as the legal result of the facts. This deed purports to be a deed of bargain and sale on an alleged consideration, executed and acknowledged by the defendant, and on the same day recorded. This certainly is some evidence that the deed was perfected, and that it was intended to vest the title in the grantee. He might, if ignorant of its execution at the time, have, at any time, assented to it. It is scarcely to be presumed that one man will execute to another a deed without the assent of that other. Mr. Brooks, the witness, does not say that the grantor had no knowledge of the execution of this deed. We think the facts should have gone to the jury, for them to say whether the grantee had this knowledge, or had given, directly or otherwise, his assent; and that the Court did not err, on the facts stated by the witness, in refusing to rule that the deed was never delivered. Perhaps it would be too much, in any case where the testimony of a witness contradicts the written acknowledgment of a party introducing him, (as in this case, that a deed was delivered) and also the fair presumption from the nature of the transaction, for the Court to assume that the testimony of the witness is the fact, and to give effect to it as a legal conclusion. In this case the plaintiff admitted, by the execution of the deed and his acknowledgment of it for record, that he delivered it. The mere fact that the plaintiff was absent from the State, and that the deed was made at the instance of the grantor, or of the witness, is not conclusive evidence of its non-delivery.

The next error assigned is the instruction of the Court that it was

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the duty of the plaintiff, by the terms of the contract, to prove that he had given reasonable notice to Atwill that Lick had sued in ejectment for the land. This instruction depends upon the terms of the contract, which is in these words:

"State of California, City of San Francisco, ss. — Agreement entered into twentieth day of July, eighteen hundred and fifty-three, between Joseph F. Atwill, of said city and State, party of the first part, and John Bensley, also of San Francisco, party of the second part, witnesseth:

"Whereas, the said Joseph F. Atwill has sold to the party of the second part city lot number (1478) fourteen hundred and seventy-eight, as will appear by deed executed this day, for the sum of \$6,000, in which deed the payment of the whole purchase money is acknowledged; and whereas, furthermore, the party of the second part has executed a mortgage on the premises to secure the payment of four thousand dollars, being a balance of purchase money, and has also given his note for the same, payable three years from date, within fifteen per cent. interest from date per annum until paid, as will more fully appear by said mortgage and note executed this day; and whereas, the said Atwill is willing to give the party of the second part a fair title; now, it is fully agreed between said parties, as follows: That if the party of the second part shall, by legal and final process, be dispossessed from the above conveyed premises, in consequence of the establishment of successful claim of ownership of said lot by any other party in a suit at law, any time within three years from this date, then the said Atwill will return the \$2,000 cash he has received this day, and also the note of \$4,000, and discharge the party of the second part forever; and said Atwill be also discharged upon such payment from all liability to the party of the second part.

"Provided, nevertheless, and it is distinctly agreed upon by the party of the second part, in consideration of the above, that the said party of the second part retain possession of the said lot number 1478, and not suffer the same to be lost without faithfully, diligently and watchfully resisting and defending any claim or infringement made upon said premises, be it either by law or against law, whereby the

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ownership of said lot may come in question. That the said party of the second part defray all such law expenses incurred by defending title and possession of said property; and, should such suit result in being dispossessed of said lot, he shall have no recourse for the same upon the party of the first part, nor if the title be sustained in favor of the party of the second part.

"And it is further agreed, and distinctly understood, that the said party of the second part will pay all taxes and assessments and improvements on the same, and keep said property free of any incumbrance which may otherwise be created by the party of the second part, and also that said party of the second part will duly notify the party of the first part, or his agents or assigns or administrators or executors, of any claim which may by law be made against said premises, so as to enable the party of the second part to assist in the defense of the title. And it is also fully understood that the delivery of the said premises shall be equal to the interest of the said moneys paid by the party of the second part, and that the said Atwill is not to refund any taxes, assessments, improvements, lawyers' fees, or Court costs whatever, in the event of the loss of said property by process of law or otherwise.

"And it is furthermore understood between the parties, that all that part wherein said Atwill agrees to refund any or all of the purchase money, be void if the said party of the second part transfer the premises (lot No. 1,478) without the written consent of said Atwill previously obtained, or the payment of the said four thousand dollars.

"Witness our hands and seals this 20th July, 1858.

"JOHN BENSLEY, [SEAL.]

"JOSEPH F. ATWILL, [SEAL.]

"In presence of { O. WILLIAMS,
A. B. PERKINS."

Two things appear very prominently in this agreement:

First. That the grantor was only to be responsible after eviction upon or by final process, and that grantee should hold possession until then; and,

Second. That the grantor should have reasonable notice of the

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adverse claim. If this sale of the lot had been by deed, with general warranty, in the usual form, and the grantee had been dispossessed by paramount title, he could not recover (unless he showed notice to his warrantor to defend) upon the production of the record of eviction. He must show, in addition to the record of eviction, that he was unable to resist the title upon which he was sued. Here, however, the grantor makes a special covenant for himself. He does not agree generally to defend the title. Indeed, he does not agree to defend the title at all. He merely agrees to guarantee the possession for a stipulated period. He covenants to repay the purchase money only under particular circumstances, and in a given event. There can be no doubt, if the eviction occurred after the three years, that the grantor would not have been liable at all. The main thing seems to have been, not an eviction, but an eviction of a particular sort, or rather arising in a particular way. The whole agreement seems to have been drawn in a spirit of jealous, almost of suspicious, caution in this respect. Courts do not make contracts for men. They are supposed to be able to make contracts for themselves; and we do not see, if a man chooses to bind himself to pay money on a particular event, why he may not, also, as well give character to that event, and mark and describe it, and hold himself only bound by or after the event so defined; or, in other words, why, if he were only bound, upon eviction of his grantee, to pay money, he may not, by express agreement, limit the obligation to an eviction after reasonable notice to him. If the collocation of the words of this agreement were different, there would be no doubt; that is, if the grantor had said: "I hereby agree, upon grantee's judicial eviction from the lot sold him — that eviction having been obtained after reasonable notice to me of the pending of the suit, etc. — to pay, etc.," no pleader would sue upon such an instrument without averring the performance of the condition. Why should the agreement be differently construed because the words limiting and characterizing the obligation are introduced after the word "provided" in the article quoted? The sense was the same; indeed, we presume the draftsman supposed he had made this sense more emphatic by this form of statement. We have noticed the criticism that the matter relied on by the respondent is introduced in the next paragraph after the word "provided;" and

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the inference that, therefore, this was an independent agreement. We think this is a mistake, and that the proviso was intended to embrace the whole succeeding portion of the agreement to the last clause.

Whether agreements are independent or dependent is sometimes difficult to determine. But in cases where one man agrees, in consideration of a future event or act, to do or not to do a thing, the happening of the event is usually a condition precedent to the enforcement of the obligation. The very and only cause whereby the liability of the defendant was to accrue was this eviction; it was to constitute the sole or main ground of the grantee's recovery and claim for compensation. Unless and until evicted, there was no pretext of claim upon the defendant to pay or repay money. The covenant was for a certain sort of eviction, or an eviction had under particular circumstances. The eviction, thus described, was the condition on which the whole liability was founded. It was, therefore, indispensable for the plaintiff to show, in order to maintain his action, that this eviction had happened, a necessary element of which was this reasonable notice, as we have before intimated.

Nor does it matter of what value this notice was to the defendant, or whether it was of any value. In a Court of law, effect is to be given to the bargain according to its terms, and Courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. The defendant bound himself only in a given way, and can be held only by the bargain he made, at least in the form of this action. The instructions of the Court were unobjectionable, or, if any fault is to be found with them, the appellant cannot complain.

The evidence was conflicting, and it was for the jury to pass upon it. The Court below saw no reason to interfere with the verdict, and for reasons which have often been given, we cannot, in such cases as this, review its action.

The judgment is affirmed.

On a re-hearing of this case, the Court, by BALDWIN, J., and TERRY, C. J., concurring, delivered the following opinion:

We have re-considered this case at the earnest instance of the appellant. We remain, after examining his argument, of the same opinion

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as before. The decision we have made must, of course, be regarded in connection with, and limited by, the precise facts of that case. The language of the agreement is very guarded. The evident intent of Atwill, in guaranteeing against an eviction within the period limited, was to guard against a collusive judgment. He agreed to pay back the purchase money on a carefully defined condition, viz.: On a *judicial eviction within the time*, and obtained after notice to him. If "common sense" is applied to the language he used, it amounts to this: "I will repay you \$2,000 on your being evicted by judgment after notice to me." Does this mean that he will pay it without *any* eviction, on a mere showing of a paramount title? Does it mean, any more, *any* kind of judicial eviction—with or without notice? These questions answer themselves. What Atwill warranted was not the title; it was the possession; and he did not unconditionally warrant the possession, but only on a condition which he expressed. How, then, can he be held, except on his own terms, for a violation of his own contract made and qualified *in his own way*? Is it not plain, that a party suing for a breach of this covenant, must aver that the warrantee had been evicted after notice to warrantor, and warrantor had failed to pay the sum stipulated? The payment of the money is absolutely dependent upon these facts.

The petition is denied.

KNEELAND v. WILSON *et al.*

In an action to recover the value of certain buildings standing on certain lots proof that one C, through whom plaintiff claimed, on the day of his entry, applied to one of the defendants for his consent to the erection of the buildings, is sufficient evidence to authorise the jury to infer knowledge on the part of C, of defendants' title at the time of such entry.

APPEAL from the Sixth District, County of Sacramento.

This was an action brought by the plaintiff to recover damages for

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the unlawful conversion of certain buildings (wooden) erected upon certain lots of land situate in the town of Folsom, which buildings were claimed as personal property by plaintiffs, inasmuch as they were constructed on posts or blocks placed upon the surface of the ground.

The facts shown by the record are as follows: In the early part of the year 1856, one F. P. Watson was in possession of the lots of ground on which said buildings were subsequently erected. While in possession, Watson leased said lots to one W. L. Chrysap, and delivered to him possession thereof. Soon after taking possession, Chrysap erected the buildings in controversy. On the day of Chrysap's entry, he applied to one of the present defendants for permission to erect the buildings, which was refused. In the month of July, 1856, the buildings were sold under a foreclosure of certain mechanics' liens, and one B. Tallman became the purchaser; to whom possession was delivered under said sale, and by him retained until the fifteenth September, 1856. Prior to that time, a judgment was recovered in the District Court of the Sixth Judicial District by plaintiff and Henry B. Waddilove against said Tallman, upon which execution was issued; and under said execution a sale of the said buildings was made by the Sheriff of Sacramento county, and they were bought by said Kneeland and Waddilove, who took possession; Waddilove subsequently conveyed his interest to plaintiff. Defendants, in March, 1856, commenced an action of ejectment for said lots against Chrysap and others, and subsequently obtained judgment, and were placed in possession by a writ of restitution, whereupon plaintiff brought this action.

On the trial, the jury returned into Court and asked instructions to the following question: "What would be the law if the jury believed that Chrysap entered with knowledge of defendant's title?"

The Court refused to instruct them on this point, upon the ground that there was no evidence to that effect. The jury again retired, and subsequently returned a verdict for plaintiff, upon which judgment was entered. Defendants appealed to this Court.

H. T. Booram for Appellants.

Winans for Respondent.

Martin v. Travers.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

In this case, after the jury had retired they returned into Court and desired to be instructed: "What would be the law if the jury believe that Chrysop entered with knowledge of defendants' title." The Court, in reply, said that there was no evidence to that effect, and therefore refused to instruct on the point.

This was error. It is shown by two witnesses, that on the very day of Chrysop's entry he knew of defendants' claim to the lots, and that he applied to one of defendants for his consent to the erection of the building, which was refused. Surely, this was sufficient evidence to authorize the jury to infer that this knowledge existed at the time of the entry.

Judgment reversed, and cause remanded.

MARTIN v. TRAVERS.

Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise this Court cannot review it.

APPEAL from the Twelfth District, County of San Francisco.

This was an action brought to recover back money deposited by the plaintiff with the defendant, as an indemnity for liability on a bail bond for the appearance of the plaintiff.

The complaint alleged, that in March, 1856, the defendant received from the plaintiff five hundred dollars, which the defendant was to return when he should be released from his liability on certain recognizances, which he had entered into for the appearance of the plaintiff and one Saddeaux, in the Court of Sessions. That the defendant had been released and fully discharged from said recognizances, but that he refused to repay the money.

The material portions of the defendant's answer are as follows:

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"Denies each and every allegation, except as hereinafter admitted.

"Defendant denies that he had or received of or from the plaintiff the sum of five hundred dollars, or any other sum, as alleged in the complaint; or that he is indebted in any amount to the plaintiff. And the defendant avers that said sum was paid by plaintiff to his counsel, in consideration of his professional services, in the prosecutions in the complaint stated.

"The defendant admits that he executed the receipt," (recited in the complaint) "and at the same time alleges that he executed said receipt and became bail as therein stated, in consideration and upon an understanding with said plaintiff, that said plaintiff would deliver to, and deposit with the defendant personally, the said sum of five hundred dollars therein mentioned, by way of indemnity; but the defendant positively avers that said plaintiff did not so deposit said sum of five hundred dollars, or any other sum, with this defendant, as in said receipt stated. And so defendant alleges that said receipt is without consideration, and not binding upon defendant in any manner."

The case was referred to a referee for trial, who made his report to the Court, and found, amongst other things, the following facts, which are the ground of exception in this Court.

"*Sixth.* That the defendant, at various times between the eighth day of March, 1856, and the — day of November, 1856, by direction and order of the plaintiff, paid the five hundred dollars to one Col. George F. James, the counsel of the plaintiff, to whom plaintiff was indebted in that amount."

On the trial of the case before the referee, James was sworn, and testified on the behalf of the defendant; and to the following questions put by defendant's counsel, after handing the witness a receipt: "Did the defendant receive the money mentioned in that receipt?" the plaintiff objected, but assigned no grounds for such objection. The referee overruled the objection, and the witness testified.

Defendant had judgment. Plaintiff moved the Court for a new trial, which was denied, and he appealed to this Court.

Delos Lake for Appellant.

C. M. Brosman for Respondent.

Morgenthau v. Harris.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

The plaintiff objected to the admission of the evidence upon which the referee based his sixth finding, but upon what ground the record does not disclose. The objection fails to specify the point upon which it rests, and did not merit consideration for its generality. *Kiler v. Kimball*, 10 Cal. 267.

To have entitled it to notice, the party should have laid, as the authorities say, his finger on the point at the time. *Practice Act* sec. 189; *Frier v. Jackson*, 8 John. 496; *Jackson v. Caldwell*, 1 Cow. 622; *Whitesides v. Jackson*, 1 Wend. 418; *Watara v. Gilbert*, 2 Cushing, 27; *Covillaud v. Tanner*, 7 Cal. 38.

Judgment affirmed.

MORGENTHAU v. HARRIS *et al.*

An assignment of property to a creditor, to be sold at public auction, and the proceeds to be applied, *First*, in payment of the claim of such creditor; and, *Second*, the residue to be distributed *pro rata* among the creditors of such debtor, is not in contravention of the statute, which prohibits assignments by insolvent debtors for the benefit of creditors.

If such creditor were insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact. The insolvency could not be presumed from the language of the assignment.

APPEAL from the County Court of the City and County of San Francisco.

This was an action of assumpsit, originally commenced in a Justice's Court.

The facts are as follows:

On the fourth of May, 1857, the defendant, Harris, being indebted to Tandler & Co., executed to them a certain instrument, which, after giving a schedule of goods, reads as follows:

"The above mentioned goods, amounting to \$1,912.96, I have

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delivered into the possession of Messrs. Tandler & Co., to be sold at public auction, and the proceeds thereof to be applied in payment of their claim against me, and any surplus over the amount of their claim to be disturbed *pro rata* to my other creditors.

"In witness whereof I have hereunto put my hand and seal.

"San Francisco, May 4th, 1857.

"M. HARRIS, { SEAL }

"Witness, S. V. E. STRAUSS."

The goods were delivered to Tandler & Co. under this instrument, who sold them at public auction, and, on the eleventh of May, 1857, after deducting the amount due them, paid over to Harris two hundred and fifty-five dollars and sixty-seven cents, the balance of the proceeds of the sales. An hour or two after the payment of the money to Harris, an order was served upon Tandler & Co. to attend and undergo an examination before a Justice of the Peace, upon proceedings supplementary to execution, concerning property, money, etc., in their hands, belonging or owing to Harris. This order was issued in the present case, which was then pending before said Justice. The Justice ordered Tandler & Co. to pay to plaintiff, Morgenthau, the sum of two hundred and six dollars and fifteen cents, the amount of the judgment against Harris. The case was taken to the County Court, but how it got there the record does not disclose. The cause was tried in the County Court without a jury, and judgment rendered for Tandler & Co., reversing the order of the Justice. Plaintiff Morgenthau appealed to this Court.

Sidney V. Smith, for Appellant.

I. The transfer made by Harris to Tandler & Co., dated May 4th, 1857, was an assignment for the benefit of creditors, and therefore void, as being contrary to the provisions of the Insolvent Law of 1852. *Cheever v. Hays*, 3 Cal. 471; *Groechen v. Page*, 6 Cal. 138.

II. As Tandler & Co. obtained their money under and by virtue of a fraudulent transaction, they cannot retain it as against any creditors who may attack such transaction. They are in such case merely holding the money so received as trustees for the debtors, and liable to attachment at their hands. *Van Nest v. Toe*, 1 Sand. Ch. R. 4.

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Crockett, Baldwin & Crittenden, for Respondents.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The assignment by Harris to Tandler & Co., was made to secure his indebtedness to them, and there is no pretense that it was fraudulent in fact. Nor was it in contravention of the statute, which prohibits assignments by insolvent debtors for the benefit of creditors. Harris was not insolvent at the time of its execution; at least there is no evidence in the record that he was. If such were the fact, it should have been affirmatively shown by the appellant who contested the validity of the assignment. His insolvency could not be presumed from the language of the instrument, and the surplus remaining of the proceeds of the goods, after the payment of his debt to Tandler & Co., exceeded the claim of the appellant, who, so far as appears, was his only remaining creditor.

Judgment affirmed.

MEYER v. KINZER AND WIFE.

Under our statute, all property acquired after marriage, by either husband or wife, except such as is acquired by gift, bequest, devise or descent, is common property.

The presumption, therefore, which attends the possession of property by either spouse, during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of the property so originally owned or acquired. The burthen of such proof is with the claimant of the separate estate.

Where the purchase of property was made with the separate funds of either, that fact must be affirmatively established by clear and decisive proof. In the absence of such proof, the presumption is absolute and conclusive, and it makes no difference whether the conveyance is taken in the name of one or the other, or in the names of both.

The fact of purchase excludes the supposition of acquisition by gift, bequest, devise or descent.

Meyer v. Kinzer and Wife.

APPEAL from the Twelfth District, County of San Francisco.

This was an action brought by the plaintiff against the defendants, Kinzer and wife, to extinguish a claim of title by the defendants to certain real estate in the city of San Francisco.

Kinzer, the husband, in his answer disclaimed all pretensions to title in himself. Rebecca, the wife, sets up title by a mortgage upon the premises, and asked that the same may be foreclosed for the benefit of her separate estate.

The facts are as follows:

On the sixth of December, 1851, the defendant, George W. Kinzer, who was then, and still is, the husband of the defendant Rebecca, purchased certain real estate in the city of San Francisco, and took the conveyance in his own name. On the first of October, 1853, Kinzer and wife sold the premises to James H. Gager, both joining in the deed, and on the same day, Gager executed and delivered to Kinzer and wife, a note and mortgage on the premises, to secure \$14,000 of the purchase money. On the eighth day of April, 1854, George W. Kinzer, for a valuable consideration, assigned and transferred the note and mortgage to Adolphus H. Lemmen—the wife did not join in this assignment. On the twenty-fifth of September, 1855, Gager, the mortgagor, paid to Lemmen the amount of the mortgage, and took a discharge. On the sixteenth of July, 1856, Gager sold and conveyed the property to plaintiff. The defendant Rebecca sets up a claim to one-half of the mortgage debt, as her separate property.

The cause was tried in the Court below without a jury. Plaintiff had judgment, and the defendant Rebecca appealed to this Court.

J. B. Hart for Appellant.

The position taken by the appellant is, that the contract and agreement between her and her husband, by which one-half of the mortgage was placed in her name and so recorded, gave to her the title to a moiety of the mortgage, and placed it beyond the control and disposition of her husband.

Before the sale and conveyance to Gager, the property was common property, one-half of which was in equity hers, the other her hus-

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band's, — while in his name was subject to his disposition, and liable for the payment of his debts, but after the sale to Gager, and execution and record of the mortgage, nothing beyond a moiety of the mortgage was his, and under his control — the other was her property, and none but a creditor before the sale and mortgage could reach it.

The second section of the Act regulating the rights of husband and wife, (Cod. Statutes, p. 812) does not prohibit the wife from accepting a gift from the husband, from common or his separate property.

It is clear to my mind, from the seventh section of the Act just alluded to, that the Legislature did not intend to adopt the civil Spanish or French law in regard to gifts or donations between husband and wife, for all those codes prohibit all gifts or donations between them; and upon a fair construction of the Act under consideration, it ought not, it seems to me, to be doubted but a gift from husband to wife, of either common or separate property, was intended by the Act to be allowed, otherwise the Act itself would be an unjust, unfair, and an improper law.

The wife, by the Act, and in all subsequent legislation on the subject, obtained and now has a separate existence and standing from that of her husband in regard to property; the common law no longer governs their right to property, or controls their actions in regard to it, and the only check upon her disposition by her of her property, is that the husband must join in the instrument with her.

The provisions of the third section of the Act, requiring the separate estate of the wife to be inventoried and acknowledged by the wife, and recorded by her, has reference to her separate personal and real estate, in the name and under the control of her husband, and was done to prevent him from having credit upon her property.

But when the title of property is placed in the name of the wife, by and with the consent and direction of the husband, as between her husband and the world, it is hers. Standing in her name, it is notice to all creditors and buyers, that that property is not subject to sale by him, or to the payment of debts thereafter contracted by him.

Johnson & Rose for Respondent.

The plaintiff contends, that the said mortgage, like the property, a

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part of the price of which it was given to secure, was the common property of the Kinzers, husband and wife, and as such, subject to the control and disposition of the husband alone. There would seem to be no difficulty in this, under the statute. Wood's Digest, 487, sec. 2; see also sec. 9, same Act.

A very similar case was decided in Texas, under the nearly identical provisions of the law in that State. *Parker v. Chance*, 11 Texas Rep. 513.

For the law determining marital rights in Texas, see Hartley's Digest, pp. 734-8; see also 2 Bright, Husband and Wife, p. 678; Laws passed by the second Legislature of Texas, vol. 2, part 1, pp. 77-9.

Such, also, has been the interpretation of our own law by the Supreme Court, in the case of *Joyce v. Joyce*, 5 Cal. Rep. 161.

Louisiana, Texas and California, have taken this law of a community of property between husband and wife, from the Spanish law, which previously governed the territory out of which those States were formed. In the cases of *Parker v. Chance*, and *Joyce v. Joyce*, the two younger States have conformed to the law as interpreted in Louisiana, and in the Spanish commentators. *Smalley v. Lawrence*, 9 Rob. La. Rep. 214; *Febrero Mejicano*, Lib. 1, Tit. 2, cap. 10, sec. 1, 6.

In the case of *Smalley v. Lawrence*, the Supreme Court of Louisiana holds this language: "The land was purchased during the existence of the community, and although the receipts or certificates are in the name of the wife, still the property as much belongs to the community as if it stood in the name of the husband, unless she can prove that the purchases were made with her own money, or the property given in payment of a debt owing to her in her own right." 1 Rob. 367; 17 La. 300; *Houston v. Carl*, 8 Texas Rep. 240; *Scott & Solomon v. Mavnard et ux.*, Dallam, 548; *McIntyre v. Chappell*, 4 Texas Rep. 187; *Love and Wife v. Robertson*, 7 Texas Rep. 6.

It is contended on behalf of the appellant, that the case is governed by the common law, and that the facts recited in the stipulation raise the presumption of a gift by the husband to the wife. So it was contended in the cases cited from the 11 Texas and 5 Cal. Reports. In

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the case of *Parker v. Chance*, the following observations fell from the Court respecting this part of the case:

"Had this transaction, embracing the assignment and the re-transfer of the one-half to the wife, taken place under the common law, where the estate of community and the doctrines belonging to it are unknown, the conveyance to the wife would have been presumptive evidence of a gift and advancement by the husband." 2 Vern. 67; 8 Vesey, 199; *Bright, Husband and Wife*, vol. 1, p. 32.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The statute defining the rights of husband and wife, provides in its first section that "all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property; and all property, both real and personal, owned by the husband before marriage, and that acquired by him afterwards, by gift, bequest, devise or descent, shall be his separate property;" and, in the second section, that "all property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property;" and, by the ninth section, the husband is invested with the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate.

These provisions of the statute are borrowed from the Spanish law, and there is hardly any analogy between them and the doctrines of the common law in respect to the rights of property consequent upon marriage. The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution, in case of surviving the other. To the community all acquisitions by either, whether made jointly or separately, belong. No form of transfer or mere intent of parties can overcome this positive rule of law. All property is common property, except that owned previous to marriage or subsequently acquired in a

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particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community; exceptions to the rule must be proved.

The purchase of the premises in question was made by Kinzer in 1851, after his marriage with Rebecca, and the presumption follows, as we have observed, that the property belonged to the community. If the purchase was made with the separate funds of either, that fact should have been affirmatively established by clear and decisive proof. In the absence of such proof the presumption was absolute and conclusive, and it made no difference whether the conveyance was taken in the name of one or the other, or in the names of both. This results, as we have said, from the language of the statute — "All property acquired after marriage by *either*, etc., shall be common property." The fact of purchase excludes the supposition of acquisition by gift, bequest, devise or descent.

The Spanish law, so far as the question involved in the present case is concerned, has been adopted in the States of Texas and Louisiana, and in these States the same presumption is indulged that the property belongs to the community from the fact of purchase, as will be perceived by an examination of the adjudged cases in their Courts. Thus in *Love v. Robertson*, (7 Texas, 11) the Supreme Court of Texas held this language: "The presumption that property purchased during the marriage was community property, would certainly be very cogent, and would require to be repelled by clear and conclusive proof." In *Houston v. Curl*, (8 Texas, 240) the same Court said: "It is the settled doctrine and law, that property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife, in which case it remains the separate property of the party whose money was employed in the acquisition." And again, in *Chapman v. Alden*, (15 Texas, 278) the Court said: "The presumption that property purchased during the marriage is community property is very cogent, and can only be repelled by clear and conclusive proof that it was with the individual money or property of one of the

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parties." Where the property has not been preserved in specie or in kind, but, as in this case, has undergone mutations and changes, it is indispensable to ascertain its separate character that it be clearly and indisputably traced and identified. See also *Lott v. Keach*, 5 Texas, 394; *Hemmingway v. Mathews* 10 Texas, 207; *Parker v. Chance*, 11 Texas, 513; *Wells and Wife v. Cockram*, 13 Texas, 127; *Clairborne v. Tanner*, 13 Texas, 69.

To the same effect are the decisions of the Supreme Court of Louisiana. In *Smalley v. Lawrence*, (9 Rob. 211) the plaintiff claimed to be the owner of several tracts of land, by purchase from the United States, against a cession by her husband of his property to his creditors. The parties were married in 1839, and the land was bid off at a land sale in 1841, and paid for by the husband, who took the receipts in the name of the plaintiff, and the Court said: "The land was purchased during the existence of the community, and although the receipts or certificates are in the name of the wife still the property as much belongs to the community as if it stood in the name of the husband, unless she can prove that the purchases were made with her own money, or the property given in payment of a debt owing to her in her own right. All property acquired by either spouse during the existence of the community, the law presumes to belong to it, and is liable for the community debts. If the wife sets up a separate claim, she must make legal proof of it. *The title being in her name does not raise even a presumption in her favor.*" See also *Ford v. Ford*, 1 La. 201; *Davidson v. Stuart*, 10 La. 146; *Dominguez v. Lee*, 17 La. 295; *Comeau v. Fontenon*, 19 La. 406; *Fisher v. Gordy*, 2 La. Ann. 762; *Provost v. Delahoussaye*, 5 La. Ann. 610; *Brandergast v. Cassidy*, 8 La. Ann. 96; *Webb v. Peet*, 7 La. Ann. 92; *Andrew v. Bradley*, 10 La. Ann. 606; *Forbes v. Forbes*, 11 La. Ann. 326.

This invariable presumption which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of the property so originally owned or acquired. The burden of proof must rest with the

claimant of the separate estate. Any other rule would lead to infinite embarrassment, confusion and fraud. In vain would creditors or purchasers attempt to show that the particular property seized or bought was *not* owned by the claimant before marriage, and was *not* acquired by gift, bequest, devise or descent, or was *not* such property under a new form consequent upon some exchange, sale or investment. In vain would they essay to trace through its various changes the disposition of any separate estate of the wife, so as to exclude any blending of it with the particular property which might be the subject of consideration.

By a statute of Pennsylvania, passed in 1848, the property owned by the wife previous to marriage, and that accruing to her during coverture, by will, descent, deed or conveyance, or otherwise, are secured to her as a separate estate; and in *Gamber v. Gamber*, (6 Harris, 363) the Supreme Court of the State said: "In the case of a purchase by the wife after marriage, the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by the husband. Unless the rigid proof of her title is always required, no one can calculate the amount of injustice which the Act of 1848 will produce," and in *Kearney v. Good*, (9 Harris, 355) the same Court held this language: "If the burden of proving that the money was furnished by the husband is thrown upon the creditors, their hope of justice must always be a forlorn one. Thus administered, the Act of 1848 would be the worst one ever passed, and the most poisonous to the morals of the people. It would hold out constant temptations to families in embarrassed circumstances to commit wrongs of the worst kind, and to uphold them by imposture and falsehood.

"But there is nothing in the Act of 1848 which makes such consequences at all necessary. To bring the property of a married woman under its protection, it is made necessary by the letter, as well as the spirit of the statute, to prove that she *owns* it. She must identify it as property which was hers before marriage, or show how she came by it afterwards. Evidence that she purchased it amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with her own separate funds. In the absence of such proof, the presumption is a violent one that her husband furnished the means of payment."

Meyer v. Kinzer and Wife.

It follows, from the views we have taken and the authorities cited, that no presumption arises, as contended by appellant, of a gift or advancement to the wife, from the fact that the note and mortgage were taken in the name of both. The position of the appellant rests upon the authorities of the common law. By them a conveyance taken in the name of the purchaser, or the joint names of husband and wife, upon a purchase made by the husband alone, would be deemed *prima facie* a gift or advancement to her. (Kingdom v. Bridges, 2 Vern. 67; Glaister v. Hewer, 8 Vesey, 195; Christ's Hospital v. Budgin, 2 Vern. 683.) But even by them, the gift, if the property were personal, would only be effectual in case of her surviving him, and he had not, in his lifetime, disposed of it. Cotes v. Stevens, 1 Y. & C. Eq. 66; George v. Bank of England, 7 Price, 646; Rider v. Kidder, 10 Vesey, 360; Lucas v. Lucas, 1 Atk. 270; Drummer v. Pitcher, 5 Sim. 35; Low v. Carter, 1 Beav. 426.

The common law authorities are entirely inapplicable under our system. The statute prescribes the effect of the acquisition of property by either spouse, and its operation cannot be defeated or evaded by the form of the conveyance, or the intention of the husband, in taking it in the name of his wife. In every form the community character of the property continues. See Parker v. Chance, 11 Texas, 515.

As the case at bar stands, it is clear that the note and mortgage were subject to the disposition of the husband as fully and absolutely as if made to him individually. The note was given for part of the purchase money of the land, and the mortgage was executed as security for the note. This change in the form of the common property could not affect the control of the husband over it. The signature of the wife would have added nothing to the validity of the transfer.

Judgment affirmed.

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PEOPLE v. PLUMMER.

Where the record shows no error which could have operated to the defendant's prejudice the judgment will be affirmed.

APPEAL from the Tenth District, County of Yuba.

The defendant was indicted and convicted of murder in the second degree. The case came to this Court, on appeal, from Nevada county, and at the April Term, 1858, (9 Cal. 298) the judgment of the Court below was reversed, and a new trial ordered. Subsequently, a change of venue was had to Yuba county, where a trial was again had, and the defendant again convicted. The case now comes before this Court, on appeal from the judgment rendered in Yuba county. There are no points of law decided which would justify the publication of the facts. The questions determined are peculiarly applicable to this case; and if the facts were spread out at large, no benefit could result to the profession therefrom.

McConnell & Goodwin for Appellant.

Henry Meredith for Respondent.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., concurring.

After a careful examination of the record in this case, we are not able to discern any error which could have operated to defendant's prejudice.

The question proposed to the witness, Mrs. St. John, to which exception was taken, was not strictly proper, but the answer to it could not possibly have prejudiced the case of defendant.

The evidence of Barker, which was also excepted to, was, in our opinion, properly admitted, as rebutting a presumption sought to be established by the testimony of one of defendant's witnesses.

The instructions asked by defendant were all given, except the seventh, which was erroneous as offered, and the qualification given with it by the Judge was strictly in accordance with the statute.

Judgment affirmed.

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WRIGHT & CO. *et. al.* v. LEVY *et al.*

A non-negotiable *chose in action* created by the immediate parties to it, for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such *chose in action*. The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and he stands in the shoes of the assignor as to all defenses which existed against the judgment between the parties to it.

A judgment is property which may be purchased like any other property. The purchaser is bound to inquire into the defense of the debtor. He has the means to do this; but he could not be held to inquire into *latent* equities existing in the hands of third persons; and hence, as to third persons, he stands unaffected by frauds of which he had no knowledge, express or constructive.

On rehearing: L executed and delivered his promissory note to N, without consideration, and for the purpose of defrauding, hindering and delaying his creditors. N had knowledge of the fraud, and was a participant in it. Subsequently, N sued out an attachment upon the note, and had it levied upon L's property. After this levy, W and others, creditors of L, obtained attachments, and had them levied upon the same property. Pending these attachments, and before judgment, N, for a valuable consideration, assigned the note upon which suit was then pending to J, who knew nothing of the original fraud; *Held*, That J is not protected in his purchase. N, having been superseded by W's attachment, could not, by any act or deed of his, put his assignee in any better position than he occupied himself. N's attachment was void as against W, a creditor of L, and the question is as to the relative equities of J and W, and not as to the equities of third persons.

APPEAL from the Sixth District, County of Sacramento.

This was an action brought in the Court below to set aside a judgment rendered therein in favor of John Jones, assignee of Marcus Newmark, and against Davis Levy, upon the ground of fraud, and for an injunction to restrain the collection of the same, etc.

The bill of exceptions discloses the following facts: Davis Levy executed and delivered a promissory note to Marcus Newmark. The note was given without consideration, and for the purpose of hindering, delaying and defrauding the creditors of Levy. Newmark was cognizant of the fraud, and a participant in it. Subsequently, Newmark sued out an attachment upon this note, and had it levied upon the property of Levy. After the levy of this attachment, the plaintiffs, Wright & Co. and others, creditors of Levy, also sued out attachments,

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and levied them upon the same property. After this second levy, and pending the suit of Newmark, he sold and assigned for a valuable consideration the note executed by Levy, together with the action then pending on it, to the defendant, John Jones. Jones was an innocent purchaser, and knew nothing of the fraudulent intent of the parties to the note. The suit upon the note, together with those of the plaintiffs and creditors of Levy, went to judgment. Thereupon Wright & Co., together with others, creditors of Levy, filed this bill against Levy, Jones and others, setting up the fraud and praying an injunction against the collection of Jones' judgment, and that plaintiffs may be adjudged entitled to the money arising from the sale of the property now in the hands of the Sheriff. The Court below dismissed the bill, and gave judgment for defendant, Jones, from which the plaintiffs appealed to this Court.

Mesick & Swezy for Appellants.

I. The equities of the plaintiffs in the case are superior and prior to those of defendant Jones. Parsons on Contracts, 192-199; Vol. 2, pt. 2, Leading Cases in Equity, p. 237, and authorities there cited; 1 Green Ch. (N. J.) 258; 2 Met. 138; 6 Mass. 244; 7 Monroe, 477; 1 Paige, 131 and 319; 2 John. Chy. 512; 3 Bland Ch. (Md.) 514, 540; 6 Hump. (Tenn.) 93; 25 Vermont, 487; 11 Paige, 469; 6 *Ib.* 109; 3 Hill, 231; 10 Cal. 354; 2 Murphy, (N. C.) 30; 3 Monroe, 71 and 510; Clark v. Elvey, 11 Cal. 161, 12 Pick. 388; 3 Geo. 145; 7 Pick. 547.

1. Superior, because as creditors they have a right in equity to represent their debtor. Theirs are not simply "equities against the assignor." 1 Hopkins, 583 and 584; 29 Maine, 160.

2. Prior, because their attachments were prior to the assignment.

II. The "assignment" of the note to Jones by Newmark made it no more available in the hands of the former than it was in the hands of the latter. Vol. 2, pt. 2, Leading Cases in Equity, 236, and authorities cited; Authorities cited above; 3 Story R. 391; 6 Halstead, 116; 1 Rich. Eq. 49; 18 Eng. Com. Law and Equity, 95; 10 Mod. 450, *affd.* in 1 P. Wms. 496; 18 Ills. 495; 20 Maine, 89; 14 Vermont, 387.

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III. The note in the hands of Newmark was void as to plaintiffs; and all the proceedings thereon took their character from that of the demand upon which they were predicated. 12 Pick. 388; 7 *Ib.* 542; 23 *Ib.* 545; 25 Vt. 491; 2 John. Ch. 512; 7 Cal. 352; 10 *Ib.* 227; Drake on Attachments, secs. 770-793; 6 Paige, 108; 4 Wend. 100; 3 Met. 49.

IV. Under the circumstances Jones is chargeable with notice of the infirmities of the claim assigned to him by Newmark. 3 Story's Rep. 388 and 389; 5 John. Ch. 427; 2 Cowen, 289.

V. Jones is not entitled to be considered a *bona fide* holder of the claim, having taken it burthened with a lawsuit for its collection.

Moore & Welty for respondent Jones.

The statutes of 13 and 27 of Elizabeth and New York, contains a proviso similar in effect to that contained in the twenty-fourth section of our Act. In fact, ours is a transcript of the New York statute, and that Act was taken from the British statutes, and modified only in phraseology.

The statute of 13 of Elizabeth, ch. 5, provides: "That this Act, or anything contained therein, shall not extend or be construed to impeach, defeat, make void or frustrate any conveyance, etc., of, in, to or out of any lands, etc., goods or chattels, at any time heretofore had or made, or to be made upon or for a good consideration, and *bona fide* to any person, etc., not having at the time of such conveyance or assurance, made any manner of notice or knowledge of the covin, fraud or collusion, as aforesaid."

The statute of frauds, as it originally stood in England, did not contain this proviso; but the Courts and the people soon found that something must be done to protect innocent third persons who had purchased of a fraudulent grantee without notice of the fraud, and hence the insertion of the above clause.

Since the enactment of the statute of 13th of Elizabeth the Courts of England have been frequently called upon to decide controversies between innocent purchasers from fraudulent grantees and the creditors of the fraudulent grantors, and so far as we are aware, the decisions have uniformly been in favor of the former.

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In discussing this statute, in *Cadogan v. Kennett*, (Cowp. 434) Lord Mansfield remarked that "such a construction is not to be made in support of creditors as will make third persons suffer. Therefore, the statute does not militate against any transaction *bona fide* made, and when there is no imagination of fraud, and so is the common law."

The same doctrine prevailed in *Doe v. Martyr*, (1 New Rep. 332) and had long prior to that case been recognized by Lord Kenyon, in *Parr v. Eliason*, 1 East, 95.

George v. Wilbank, (9 Ves., p. 190) is a leading case, involving directly the question under discussion here. That was a contest between a *bona fide* purchaser of personal assets from a fraudulent vendee, and the creditors of the vendor. After a full and most able discussion of the question, Lord Eldon concluded as follows: "The claims of the *bona fide* purchaser for a valuable consideration, must be sustained as against the creditor."

In *Prodgers v. Langham*, (1 Sid. 133) the general principle is laid down, that "if a fraudulent grantee convey to a *bona fide* purchaser for a valuable consideration, it is good, and purged of the fraud by matters *ex post facto*."

Mr. Roberts, in his learned work on *Fraudulent Conveyances*, (p. 497) after fully discussing the question, and citing and reviewing numerous authorities, concludes as follows: "The valuable consideration, whenever it occurs, entirely obliterates the fraud, so that it can never again, in any shape, affect the transactions."

With, perhaps, one exception, the Courts of this country have followed the rule laid down in England upon this subject.

Chief Justice Thomson, in the case of *Jackson ex dem. Merit v. Terry*, (13 John. Rep. 471) admitted that the conveyance from J. Turner to A. Turner was a gross fraud, and made expressly to avoid Hubbard's judgment; but that the lessor being a *bona fide* purchaser from A. Turner without knowledge of the fraud, he was not to be prejudiced by it.

Mr. Story, in his treatise on *Equity Jurisprudence*, (vol. 1, sec. 434) under the head of *Constructive Frauds*, says: "Courts of Equity never interpose at all when the property has been conveyed by the voluntary or covinous grantee to a *bona fide* purchaser for a valuable

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consideration, without notice. Such a person is a favorite in the eyes of Courts of Equity, and is always protected against claims of this sort."

The reason for this doctrine is well illustrated by Chief Justice Marshall, in *Fletcher v. Peck*, (6 Cranch, 133) as follows: "If a suit be brought to set aside a conveyance obtained by fraud, and the fraud is clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded."

In the case of *Anderson v. Roberts*, (18 John. Rep. 527) Chief Justice Spencer collects and reviews all the authorities upon this subject, and discusses the question with marked learning and ability. In the course of his opinion he remarks: "The grounds adopted by the Courts for protecting *bona fide* purchasers, without notice, is solid and substantial, and applies with equal force to both descriptions of grantees."

In the same case, Justice Platt, among other things, says: "A *bona fide* purchaser under a fraudulent grantee, without notice, either actual or constructive, acquires a good and valid title, purged of the original fraud, as against creditors."

"Though a sale of goods made fraudulently, and without consideration, may be void as to the creditors of the vendor, yet if prior to their attachment the goods passed into the hands of a *bona fide* purchaser not cognizant of the fraud, and for a valuable consideration, the latter would be entitled to hold." *Trote et al. v. Warren*, 11 Maine Rep. 227; *Sparron v. Chelsy*, 19 Maine Rep. 79; *Fletcher v. Peck*, 6 Cranch Rep. 133; *Rowley v. Bigelow*, 12 Pick. Rep. 306; *Hoffman v. Noble*, 6 Mete. Rep. 68; *Story's Eq. Jurisprudence*, vol. 1, sec. 434; *Dallam's Dig.*, Texas, p. 418.

When Jones purchased this note and paid out his money, Newmark was the holder of it, and appeared to be honestly the owner. Jones saw that the note was fair upon its face, and paid out his money without a suspicion that anything was wrong, and ought to be protected.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The answer of defendant Jones, denying all collusion with the plaintiff, in the judgment transferred to him, and asserting that he is a

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purchaser in good faith and for value of the judgment, raises the question whether a chose in action, not negotiable by the law merchant — the chose having been procured or created by the immediate parties to it to defraud creditors — can be affected or impeached in the hands of any innocent assignee, by the creditors of the debtors making it. We think, with the learned Judge below, that it cannot. It is conceded that the assignee of the judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and stands in the shoes of the assignor, as to all defenses which existed against the judgment between the parties to it. It is like a note assigned after due, the rule as to which is thus laid down in Story on Bills, (sec. 220, p. 260): "In the next place, as to the time of the transfer. In general, it may be stated that a transfer may be made at any time while the bill remains a good, subsisting, unpaid bill, whether it be before or after it has arrived at maturity. But the rights of the holder against the antecedent parties, may be most materially affected by the time of the transfer. If the transfer is made before the maturity of the bill, to a *bona fide* holder, for a valuable consideration, he will take it free of all equities between the antecedent parties, of which he has no notice. If the transfer is after the maturity of the bill, the holder takes it as a dishonored bill, and is affected by all the equities between the original parties, whether he has any notice thereof or not. But when we speak of equities between the parties, it is not to be understood, by this expression, that all sorts of equities existing between the parties, from other independent transactions between them, are intended, but only such equities as attach to the particular bill, and, as between these parties, would be available to control, qualify, or extinguish any rights arising thereon. Still, however, subject to such equities, the holder, by indorsement after the maturity of the bill, will be clothed with the same rights and advantages as were possessed by the indorser, and may avail himself of them accordingly."

The judgment is property, which may be purchased like any other property. The purchaser is bound to inquire into the defenses of the debtor. He has the means to do this; but he could not be held to inquire into latent equities existing in the hands of third persons. The law, when it made this sort of property subject to sale, gave it the pro-

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tection which it extends to all other property. It is only by force of the Statute of Frauds that the judgment or sale of it could be avoided at the suit of the creditor, or by force of common law principles, of which the statute is an affirmance. But neither this statute nor these principles affect an innocent purchaser, nor an innocent purchaser of equities, any more than of legal estates. *Between the parties*, the assignee of equities stands in the place of his assignor, with no better rights; but as to the claims of third persons, the purchaser of an equity stands unaffected by frauds of which he has no knowledge, express or constructive. No authority has been cited which supports the ground taken by appellant, while the general principle which we have announced is asserted in many cases.

The judgment is affirmed.

At the April Term, 1859, a reargument was had in this case, and the Court, by BALDWIN, J., and TERRY, C. J., concurring, rendered the following opinion:

On rehearing: The opinion which we delivered in this case at the last term is correct in principle. We erred, however, in assuming that the assignment was of a judgment of Levy, and made by Newmark to Jones before the attachment of the plaintiff was put upon the property of the defendant. It now appears, that after Newmark's attachment was levied, the plaintiff got out an attachment on his debt, and it was levied on the same property as Newmark's; and that pending these attachments, and before judgment, Newmark assigned the note and the lawsuit to the defendant Jones. It is found by the Court that this note, attachment, etc., of Newmark's were fraudulent, but that the fraud was not known to Jones, who bought for value. The question then comes up whether Jones is protected in his purchase? We think, on this hypothesis of fact, he is not. Newmark's proceedings were all void against the plaintiff. The plaintiff by his levy took the property subject only to the superior rights or the claim of Newmark. He had, under the assumed facts, the real title as against Newmark. In this condition Jones buys; but Jones has only the right Newmark had. Newmark having been in fact superseded by the plaintiff, could not by any deed or act of his put his assignee in any better position. The

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question is not as to the equities of third persons; the question is as to the relative equities of Jones and Wright; and it seems Wright has, as against Jones, the oldest equity and the legal title. While the property was legally subject to his claim, Wright subjected it by his attachment; his title then vested, so to speak. No act of Newmark subsequently could divest it. All this is said on the assumption of the fraud of the Newmark proceedings; for the effect of that fraud unquestionably is to make those proceedings nullities as against Wright. When they were nullities, Wright levied on the property, and, of course, his title dating from the levy is superior to Jones' title dating from the subsequent assignment to him by Newmark. None of the authorities cited by the respondent's counsel apply to such a case as this. The principle of the case of *Anderson v. Roberts* (in 18 Johnson R. 531) is analogous, and two or three cases in Alabama are the same way. It is true that the case in 18 Johns. only holds that after a sale on execution of real estate fraudulently conveyed, the sale being made of it as the property of the fraudulent grantor, an innocent grantor takes no title; but the effect of a levy on chattels is not less decisive in changing the title and vesting it in the Sheriff as trustee for the creditor. After it does so vest, a sale by the fraudulent vendee cannot alter it. The Alabama cases go further, and hold that after the lien of a judgment attaches to property fraudulently conveyed, the lien of the creditor carries the title against a conveyance subsequently made by the fraudulent vendee.

The question is not whether, when Jones took the assignment of the note, he took a good title as against third persons to the note; but whether, when he took, as incident to the note, a title or claim to the property attached, he took a superior right to the plaintiff, who had an older and better claim on it? If, by operation of law, Wright's claim to this property was superior to Newmark's, Wright was as much entitled to priority over Jones, as if his right was given by contract.

We therefore reverse the decree on the finding. We think, however, the case has not been fully tried below, and we remand it that some irregularities may be cured, and an opportunity given to try the case *de novo* on such amendments of the pleadings as may be desired.

Ordered accordingly.

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MOORE v. PATCH, TAX COLLECTOR.

The provisions of the Revenue Act of 1857, which requires the Tax Collector to publish the Delinquent Tax List, giving the name of the owner (when known) of all real estate, and the improvements, together with a condensed description of the property, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the State, and these proceedings by publication, etc., are merely modes adopted by the Legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property holder, but the defect may be remedied by the Legislature.

Where the Legislature passed an Act to remedy the failure on the part of the Tax Collector to publish the names of the owners, together with a list of the property, such Act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such Act is not general, but special, and is passed to meet a given state of facts, and, consequently, that provision of our Constitution which provides that "All laws of a general nature shall be uniform in their operation," does not apply.

Taking the third section of the Act of 1858, together with the first section, it is evident that the intention of the Legislature in the passage of the Act of 1858, was to substitute the assessment roll for the delinquent list required by the Act of 1857, or, rather, to give full and complete effect to that list as a valid warrant for the collection of the taxes therein mentioned, and then to provide, as is done in section three of that Act, for their collection.

The Act of 1858, dispensing with the publication required by the Act of 1857, also dispensed with the proof of that fact.

APPEAL from the Twelfth District, County of San Francisco.

The plaintiff filed his bill in the Twelfth District Court, to restrain the defendant, Tax Collector of the City and County of San Francisco, from selling certain property of plaintiff, described in his complaint. A temporary injunction was first ordered, and, on a final hearing, the same was made perpetual by a decree of said Court. From that judgment the defendant appeals to the Supreme Court. The facts necessary to explain the decision appear in the opinion of the Court.

Shafter, Park & Heydenfeldt for Appellant.

I. Does the Act of 1858 by its terms undertake to legalize the assessment roll so far as to authorize the sale of real estate for taxes, where there was in fact no advertisement under the Act of 1857?

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The Act was approved January 30th, 1858, and it "confirms" the roll "in the hands of the Tax Collector," and "declares it to be legal and binding as a good and valid Tax List, and in all respects sufficient in law as the duplicate assessment list of said city and county for the fiscal year ending June 30th, 1858; and the same is and shall be a sufficient warrant in the hands of the Tax Collector to authorize and empower him to collect the taxes therein assessed."

The language is broad enough to comprehend every description of irregularities, whether committed by the Assessor, the Board of Equalization or Tax Collector.

But, notwithstanding the clear import of the language used, the counsel for the plaintiff insists that it could not have been the intention to dispense with the publication of the delinquent list under the Act of 1857, or, rather, it is contended that the Act of 1858 assumes that such list had been published; and the conclusion is, that where a delinquent tax list was not so published, in fact, it could not be collected under the Act of 1858.

But the Act of 1858 nowhere assumes that a perfect delinquent list had been previously published, nor does it assume that an imperfect one had been published, or make any allusion to any attempt at publication previously made. The position that the Act of 1858 goes upon the supposed assumption in question, is then entirely without foundation.

But, it is said that the Legislature must have assumed a publication of a perfect delinquent list, for the reason, that without such publication the Tax Collector could not make oath as required by sec. 24 of the Act of 1857.

True, he could not; but the answer is, that the Act of 1858 suspends the operation of the Act of 1857 in a particular locality and for a single year. It begins by curing all defects in the assessment roll, and makes the duplicate, notwithstanding those defects, a valid warrant for the collection of all taxes delinquent on its face. The Collector is then (sec. 3) to give notice of ten days through the newspapers, that he will proceed to collect, etc. There is no pretense but that this new form of publication was complied with to the letter. Now, this new mode supersedes, or at least temporarily suspends, the operation of the old one; and the oath required by section 24 of the Act of

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1857, being collateral merely to the mode, is also superseded or suspended.

The general notice then prescribed by the Act of 1858, taken in connection with what the plaintiff knew all along by necessary intendment, meets all just demands growing out of the maxim that "No man should be condemned without a hearing."

II. But it is contended that the Act of 1858 is unconstitutional, on the ground that it is retrospective and divests vested rights.

The Act more properly enforces "vested" obligations. Rights may be divested for public uses, and under proper conditions. However absolute the plaintiff's title may have been to his property, it was no more absolute than his duty to pay his taxes; and if, on the whole, he has been fairly dealt with by the Legislature in the matter of notice he has had all that any citizen can claim as against the public.

It is said, that where the statutes make certain steps conditions precedent to the right to sell, and those steps are not taken, the Legislature has no power to order a sale thereafter on a different set of conditions.

To this we answer, that a failure of the first set of conditions does not, in the case of a tax, absolve the tax-payer. It has never been so regarded here or elsewhere. There has always been a provision in our revenue laws, by which a delinquent's taxes have been conserved and carried forward into the roll of the ensuing year, and the power to collect them has never been considered as lost for the reason that proper steps were not taken to enforce their collection during the year for which they were levied. Still, we do not believe, and therefore do not say, that the Legislature, after the plaintiff had effectually slipped through the Act of 1857 for that year, could compel him to pay his taxes at once by edict; and if the Act of 1858 is a sentence rather than a law, it may be open to objection. But it is a law; it gives all delinquents a new hearing; it provides for the reissuing of a public document in which the results of such new hearing are to be noted, and it provides for publication of ten days before property can be sold. These conditions are varied in some respects from those named in the Act of 1857, but they are just, reasonable, and beneficial to the tax-payer, and the power of the Legislature to prescribe them follows from

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the fact that the tax was unpaid after all, and that the duty to pay it still subsisted. If the duty remained, then the right to enforce its performance remained also. The power being given, the only question that can be made is on the mode in which it was exercised, and that mode, whether it is like or unlike a former one, should be upheld if it is not opposed to any constitutional provision or any rule of universal justice.

As to the charge that the Act of 1858 is retrospective, see *Yosher v. Stonington*, 4 Com. 209; *Mather v. Chipman*, 6 Com. 54; *Beach v. Walker*, 6 Com. 197; *Norton v. Pettibone*, 7 Com. 319; *Watson v. Mercer*, 8 Pet. 88; *Smith on Stat.* 409, 546.

But, it is said that the Act of 1858 is unconstitutional in view of the provision "That all laws of a general nature shall be uniform in their operation."

In the first place, the Act of 1858 is not a general law, but a particular one instead; still it is not partial or invidious. The Act lays down a uniform rule for the class of persons upon whom it was intended to operate, to wit, delinquent tax-payers in the City and County of San Francisco.

It is uniform as to the subject matter and parties to which it relates, and is therefore free from the constitutional objection in question. The Act of 1858 creates no new right in the Government, and imposes no new duty, but devises a new proceeding, remedial in its character, for the vindication of a right and the enforcement of a duty fully perfected, and still on foot when the Act was passed.

Waller & Moore for Respondent.

First. The defendant has neither caused to be published in any delinquent list, either the plaintiff, as owner of the property he threatens to sell; nor caused to be published a condensed, nor any description of that property, as assessed to any owner, known or unknown, nor as being delinquent for taxes unpaid. Nor did he cause to be published for three consecutive weeks, nor for any other period of time, an advertisement of the time and place of sale of such property.

The defendant, therefore, had no warrant or authority of law for making such sale.

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Such publication and advertisement are required by the Act of April 29th, 1857, (Laws of 1857, p. 325) entitled "An Act to provide Revenue for the support of the Government of the State," particularly by sections 14, 15, 16, 17, 20 and 24, of said Act.

Second. Such publication and advertisement are not dispensed with in the Act of January 30th, 1858, (Laws of 1858, p. 4) entitled "An Act to Legalize the Tax List, or Assessment Roll, of the City and County of San Francisco," etc.

Nor could tax sales to be made under the same, be effectual to convey a title to the purchaser, unless the publication and advertisement specified in sections 14 and 15 of the Act of 1857, had been made. Nor without this could the Tax Collector execute deeds to purchasers, nor take the oath required of him by section 24 of that Act, designed to perpetuate testimony in regard to sales.

The Tax Collector not having so published and advertised, has therefore no right to sell. Blackwell on Tax Titles, pp. 45, 47, 79, 80, 21, 254, 264 and 310.

Third. That the Act of 1858 was not intended to supersede sections 14 and 15 of the Act of 1857, as to notice and advertisement, will clearly appear from sections 16, 17, 20, and especially from section 24 of the Act of 1857, and comparing those sections with the Act of 1858.

In the Act of 1857 referred to, all the conditions precedent, on performing which the Tax Collector had a right to sell property for unpaid taxes, were minutely specified. Those conditions precedent, including the advertisement and notice by publication, were to be performed before the fourth Monday in November. A law passed after that date could not legally relate back, so as to dispense with those conditions precedent, to the prejudice of the individual, nor vary those conditions so as to inflict upon him, on account of a past omission; a penalty which did not exist at the time of the omission. See 1 Kent's Com., pp. 418-19-20; also, decision of C. J. Kent in *Dash v. Van Vleck*, 1 Johns. 447; 3 Dall. 391, 397; Decision, Story, C. J., 2 Gallis, 139; 5 Yerg. 320; Nelson v. Allen, 1 Yerg. 360; Constitution Cal., Comp. Laws, p. 42, sec. 16.

A tax is a debt owed by the individual to the State. Property is

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the pledge or mortgage. (Blackwell on Tax Titles, pp. 40-1.) By what right, then, after the debt accrues, can the terms of foreclosure, advertisement and sale, be varied?

Fifth. The defendant has no constitutional right to sell this property. The Constitution of this State provides that "All laws of a general nature shall be uniform in their operation."

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The plaintiff below enjoined the Collector from proceeding to sell his lot for taxes. The ground is that they are illegal. The plaintiff charges that the delinquent list, published by defendant in the fall of 1857, and under the Revenue Act of that year, did not contain the name and property of plaintiff, as required by the fourteenth and fifteenth sections of that Act. An Act was passed by the Legislature in 1858, (Session Acts, p. 4). This Act confirms the roll in the hands of the Collector, and declares it legal and binding, as a valid Tax List, and in all respects sufficient in law, as the duplicate assessment of said county and city, for the fiscal year ending June 30th, 1858, and the same shall be a sufficient warrant in the hands of the Tax Collector, to authorize and empower him to collect the taxes therein assessed.

It is argued for the respondent that this Act, supposing it to cover the case, is unconstitutional. This idea seems to be founded on the supposition that the steps made necessary by the Act of 1857, are conditions precedent to vesting of the tax, and that no obligation to pay the taxes existed, except by force of these proceedings. This, however, is a mistake. The tax is a debt due from the property-holder to the State, and these proceedings by publication and the like, are merely modes adopted by the Legislature to collect them. If property be omitted from the list, this does not discharge the property-holder, but the defect may be remedied by the Legislature. The irregularities, of whatever character, occurring under the Act of 1857, were intended to be cured by the Act of 1858, and we think, if the provisions of the latter Act have been fully complied with, the property might be fully subjected to the payment of the tax.

The objection that the Act is not uniform in its operation, is without force. It is not a general law, but a special Act, made for a given state of facts. There is no necessity for it, except for the particular occasion, and to remedy the particular evil at which it is aimed, and we think it effectual for that purpose.

The more serious objection, however, is urged, that the delinquent tax list required to be published by the Act of 1857, was never published, and that this provision is not repealed by the Act of 1858. The third section of the Act of 1858, is as follows: "The Tax Collector shall, as soon as may be after receiving back the duplicate assessment list, as provided in the last section, give notice by advertisement, to be published by five insertions in two newspapers published in said city and county, that he will proceed to collect the delinquent taxes due on said list; and at the expiration of ten days after the publication of said advertisement, he shall proceed to sell the real estate on which the taxes remain delinquent, in the manner provided in an Act entitled 'An Act to provide Revenue for the support of the Government of this State,' approved April twenty-ninth, eighteen hundred and fifty-seven; and he shall, in like manner, proceed to collect any taxes which may remain due upon personal property."

The fifteenth section of the Act of 1857, (p. 329 of the Session Acts) provides that on or before the fourth Monday in November, the Tax Collector shall cause the delinquent list to be published, giving, in said publication, the name of the owner (when known) of all real estate and the improvements, together with a condensed description of the property, that it may be easily known, and also a similar condensed description of any real estate or improvements assessed to unknown owners, and also the name of every party delinquent for any tax or personal property, and also opposite each name or description give the amount of taxes, including the costs, etc. If a newspaper be published in the county, the publication by this section required shall be made by one insertion one time per week, for three successive weeks, in some county newspaper. Said publication shall designate the time and place for commencing the sale, which time shall not be less than twenty-one days, nor more than twenty-eight days, from the time of the first publication.

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Taking the third section of the Act of 1858 together with the first, it is apparent that the intention of the Legislature was to substitute the assessment roll for the tax list required by the Act of 1857; or rather, to give full and complete effect to that list, as a valid warrant for the collection of the taxes therein mentioned; and then to provide, as is done in section three of that Act, for their collection. It was intended to be a plenary and complete plan for the taxes on that list. This is evident, because, after saying that the list shall be a sufficient warrant for collecting those taxes, it provides for a specific mode of such collection, which was by advertising ten days. It could not have been thought necessary to advertise the list, as in section fifteen of the Act of 1857, and, in addition, to make this latter advertisement. Besides, it would be impossible to follow the directions of the Act of 1857, for the time prescribed had long before elapsed. It has been seen that after the advertisement of the delinquent list directed to be made by the Act of 1857, a sale was to be had; here a sale at a different time is directed to be made by the third section of the Act of 1858. It would result, if we give the construction of respondent to these statutes, that no sale could be had under the Act of 1858; but, indeed, the Act would be wholly inoperative. The provisions of the statute of 1858, therefore, are in direct conflict with the sections fourteen and fifteen of the Act of 1857, and the former must prevail. The whole question amounts to this: Taxes were due from sundry persons for the year 1857; these taxes were not paid. A list of these taxes is made by the proper officers; the Legislature has recognized and validated this list, and a special provision is made for their collection. This provision is not a general law, but a special remedial Act; not made to create any new obligation, but to enforce the original debt. The Government had the power to give this remedy. It was intended to be a complete remedy for the given case.

We do not mean to say, that if these taxes were not due the Legislature could create any obligation for the payment. But being due, and not collected at the proper time, they may be collected by such means as the Legislature has prescribed. The respondent suggests that if this construction be right, that the twenty-fourth section of the Act of 1857 must fall, which requires the Tax Collector, in order to

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preserve testimony, to make oath that he made the publication required by that Act. But if the publication, as therein required, is dispensed with, so is the proof of the fact. The accessory falls with the principal.

A general impression seems to prevail that no tax sale can be made which will be effectual to pass title. Without expressing any opinion on the facts of any given case, it may not be out of place to suggest that consequences of a serious character may result to owners of property, by a too confident reliance upon the idea that taxes may be left unpaid with impunity.

The judgment of the Court below is reversed, and cause remanded.

COWELL *et al.* v. DOUB, TAX COLLECTOR.

Moore v. Patch, Tax Collector, (ante 265) affirmed.

A party seeking to enjoin the collection of tax assessed upon his property, upon the ground that the law provides for the meeting of the Board of Equalization for the correction of the tax list, and that the Board did not meet as required, must show in his bill that there was error to be corrected in his list.

Nor can such party enjoin the collection of the tax upon the ground that notice was not given of the meeting of the Board, as required by law, unless he shows that there was error in the assessed value of his property to his prejudice.

APPEAL from the Seventh District, County of Marin.

This was a suit in equity brought to enjoin the collection of State and County tax assessed upon the property of the plaintiffs, in the County of Marin.

This bill was originally filed in December, 1857, and set out in detail many irregularities in the levy, assessment and equalization of the tax. To this bill defendant demurred; the Court sustained the demurrer, and gave the plaintiffs leave to amend. Between the time of filing the original bill and the decision of the Court upon the demurrer, the Legislature passed an Act extending the time for the collection of the tax. This law, passed February 1st, 1858, confirmed the assessment roll in the hands of the Collector, and provides that the Board of Equalization shall again meet on the third Monday in Feb-

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ruary, 1858, and continue in session from day to day for four days; that notice of the meeting of the Board should be given, by posting, in three public places in the county, and by publication in the *San Francisco Herald*, at least ten days before the meeting of the Board, and that all persons dissatisfied might appear before the Board and have their list corrected, etc. The amended bill sets out facts showing that the law of the first of February, 1858, was not complied with, but this is traversed by the answer. The defendant relies on the law of 1858 as curing any defects in the original levy, assessment, etc. The notice was published in the *Herald* on the sixth day of February, 1858, and the third Monday fell on the fifteenth of the month. It is alleged that this notice was not in time. Defendant had judgment, and plaintiffs appealed.

A. T. Wilson for Appellants.

W. Skidmore for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

Some of the questions in this case have been decided in case of *Moore v. Patch*, at the last term. The Legislature, on the first of February, 1858, (Sessions Acts p. 24) confirmed the tax list or assessment roll, as completed by the acting Assessor of the County of Marin, for the fiscal year ending June 30th, 1858, in the words, or nearly the words, of the San Francisco Act, construed in the case of *Patch*. This we decided the Legislature had the right to do. If any informalities occurred in the assessment of the taxes—the taxes themselves being just debts, and this a mere mode of collecting them—the Legislature could cure them in this way.

It is no objection that the same Act provides for a correction of this list by the Board of Equalization. The case does not show that there was error to be corrected, so far as the appellants' property is concerned.

It is not material whether the notice provided to be given in the fifth section of this Act was given regularly or not. The notice was only important as affording an opportunity for correcting errors in the value

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of the property taxed. But, as said before, the record does not show that there was any error in the value of the property taxed to the prejudice of the appellants.

The judgment is affirmed.

MARKLEY v. RAND.

Where several persons were sued as members of a joint stock company, and the suit was discontinued as to B, one of the defendants, and judgment was taken against all the others, upon which execution was subsequently issued, and the property of one M, who was not a party to the suit, taken to satisfy the same; *Held*, That M cannot, by a bill in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B was a discontinuance as to all of the defendants. The judgment cannot be attacked in this collateral manner.

If the Sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law.

APPEAL from the Fifth District, County of Tuolumne.

This was a bill in equity to set aside a judgment against appellant under the following circumstances:

The defendant, in November, 1853, loaned to J. M. Anderson, president of a joint stock association, the sum of \$1,775, for which Anderson gave his notes signed by himself only as president of the company.

These notes, not being paid, defendant commenced suit against J. M. Anderson, E. B. Drake, R. Rupley, John Stevens, Richard Markley, John Doe and Richard Roe, as members of the association. D. P. Baldwin was also served with process in said suit, (as John Doe or Richard Roe.)

Baldwin appeared in person and as attorney in the suit, putting in an answer for himself, denying that he was a member of the association, and another answer for defendants generally.

In March, 1855, the case was called on the calendar. The plaintiff discontinued as to Baldwin. After such discontinuance, Baldwin withdrew the general answer, and judgment was taken against all the

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defendants except himself, to wit: Jas. M. Anderson, E. B. Drake, R. Rupely, Richard Markley and John Stevens.

Execution was afterwards issued thereon, and the goods of William J. Markley levied upon to satisfy the same.

W. J. Markley files this bill to set aside the judgment and execution. Defendant had judgment, and plaintiff appealed to this Court.

W. P. Barber for Appellant.

We ask for the reversal of the decree below upon two grounds:

I. That the discontinuance as to Baldwin, who is proven to have been a member of this association at the time of loaning the money, was a discontinuance as to all, and that consequently when that discontinuance took place, there was no suit pending on which judgment could be entered up.

II. The judgment and execution are against Richard Markley, and William J. Markley brings the suit, alleging that his goods have been levied on, and he harassed and vexed by reason of said judgment and execution.

Heydenfeldt for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was a bill in equity to set aside a judgment under the following facts: A suit was brought against several members of a joint stock association, one Baldwin among them. Baldwin denied he was a partner, and suit was dismissed as to him, and judgment rendered against several others for whom he was attorney. It is claimed now, that Baldwin was really a partner, and that the discontinuance of the suit as to him was a discontinuance as to all. No fraud is averred, certainly none shown; nor is it shown that this was not a joint debt as to the defendants charged, or that they have offered to pay the judgment, or their several proportions of it even, or that Baldwin suffered this judgment by collusion, or that he is insolvent. But the plaintiff below seems to suppose that this informality — supposing we could inquire into it — is sufficient to entitle him to attack the judgment of a Court

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of competent jurisdiction in this collateral manner. It is not clear, that in a direct proceeding by appeal the Court would reverse such a judgment for any cause assigned. If there was error in the plaintiff in the case below, taking judgment, as he took it, in the face of the answer, by Baldwin denying that he was a partner, the other defendants should have availed themselves of the fact, which would have given them, then and there, the full benefit of the point. They were represented by counsel. If the counsel acted unfairly by them, he was responsible — not the plaintiff, unless he was in collusion with the counsel, which is not charged. There was a full opportunity to contest every fact while the trial was going on, or before the Court lost jurisdiction of the case; and the plaintiff cannot re-try the case by bill in equity. If this were so in every case where by the neglect of the party, or his attorney, a judgment was rendered against him, the case could be taken from the Court of law into a Court of Chancery.

There is nothing in the point that judgment went and execution issued against Markley by the wrong name. This should have been taken advantage of below. If he be not the real defendant, and the Sheriff levies on his property, the Sheriff would be responsible in an action at law, and there is no need of equitable interference.

The decree is affirmed.

SEARS v. HATHAWAY et al.

Plaintiffs and one C., partners in the mercantile business, purchased of defendant goods on credit, which were shortly afterwards sold by plaintiff and his partner at a sacrifice, and the proceeds immediately invested in a homestead in the name of C., who was the brother-in-law of plaintiff. Defendant subsequently caused plaintiffs to be arrested upon the charge of cheating, from which arrest they were discharged. Afterwards, defendant caused plaintiff and C. to be arrested on a charge of concealing property with intent to defraud and delay their creditors; the charge was dismissed as to plaintiff, and C. was sent up to the Criminal Court to answer. Plaintiff thereupon brought his action against defendant for malicious prosecution; *Held*, That if plaintiff was entitled to any damage, he could recover only the actual damage which he sustained by the arrest.

Malice cannot be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law.

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APPEAL from the Fourth District, County of San Francisco.

The facts appear in the opinion of the Court.

Pisley & Smith and Daniel Rogers for Appellant.

E. Cook for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was a case for malicious prosecution. The evidence on the trial tended to show that the plaintiff and one Crowell were partners in the mercantile business in San Francisco. The defendant sold to the plaintiff goods upon credit shortly before the fourth day of April, 1857, upon which day the firm of J. M. Crowell & Co. were sued, attachment levied, and the concern closed. All the goods sold by defendants, and bought by J. M. Crowell & Co., were shortly after the purchase sold at a sacrifice — some on the day of the purchase, some between the purchase and delivery, and others even previous to the purchase, for less than the prices at which they were purchased, and the proceeds, to the amount of \$5,000, invested in the evening of the third of April in the purchase of a homestead by the joint agency of Crowell and Sears; the deed having been taken in the name of John M. Crowell, the brother-in-law of Sears. Hathaway, on the fourth of April, caused the plaintiff to be arrested upon the charge of cheating. Defendant was discharged. Afterwards, Hathaway consulted counsel, and caused Sears and Crowell to be arrested on a charge of concealing property with intent to defraud and delay creditors. This charge was dismissed by the Police Judge as to Sears, and Crowell was sent up to the Court of Sessions.

A trial was had in the District Court for the Fourth District, which resulted in a verdict for plaintiff for \$4,000. On motion for a new trial, the Court ordered the motion to be granted unless the plaintiff reduced his verdict to \$2,000, which he did; the defendant appealed.

No actual damages were shown beyond the payment of a sum of two

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hundred dollars for counsel fees in defending against these suits, and some proof of detention on and after his arrest. There was no proof of express malice, or of any circumstances of peculiar hardship or oppression. The damages seem to have been given in this extraordinary sum as smart money, and not merely compensatory for the actual injuries sustained. The evidence, as disclosed by the record, leaves little doubt of the moral guilt of the plaintiff's conduct, and the plaintiff's complaint seems to arise from the technical fact that this fraud was not evidenced by writing; and, therefore, that his procuring goods of other persons, without intention of paying for them, but to so appropriate them as that neither the goods nor the proceeds could be reached by his creditors, was not, in the absence of some writing, a crime for which he could be convicted under the statute. Conceding all this for the argument, and still the concession leaves the verdict wholly indefensible. A party who stands before a jury in such a case as this, on pure technical law, for a defense against an act of moral turpitude, and claiming a discharge because his prosecutor has not pursued a statutory mode of proof to convict him of a crime punishable by the statute, may congratulate himself that the precautions of the law have availed him to escape its merited penalty; but he certainly ought not to have, in addition to this immunity, a right to claim a small fortune from his victim for having mistaken the remedy, or not been as well versed as himself in the technicalities which sometimes shield guilt from public justice. If he was entitled to receive anything under the circumstances, he was entitled to recover nothing more than the actual damages which he sustained by the arrest. It is folly to talk of damages for an injured reputation caused by the imputation of a crime, the whole moral guilt of which he had incurred.

It is true that Courts rarely interfere with verdicts in cases of this sort. They will only do so in extreme cases; but this is of the very class of cases which constitute the exception to the rule of non-interference. It would be a reproach to public justice if such a verdict could stand.

The judgment is reversed.

Doyle v. Seawall — Newberg v. Henson.

DOYLE v. SEAWALL.

The Supreme Court will not entertain jurisdiction in cases where the record fails to show that judgment and costs amount to over two hundred dollars.

APPEAL from the County Court of Napa County.

Edgerton & Hopkins for Appellant.

Howell for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The judgment of the County Court is for \$114. There is no showing that the costs swelled this sum to more than \$200. This Court, therefore, has no jurisdiction of the case, and the appeal is dismissed.

NEWBERG v. HENSON.

Where there is no properly authorized statement on appeal; *Held*, That the special verdict of the jury is conclusive of the facts found.

APPEAL from the Eleventh District, County of Placer.

Smith & Hardy for Appellant.

Hale, Hillyer & Myers for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

There is in this case no properly authorized statement on appeal. The special verdict of the jury is therefore conclusive as to the facts, and entirely sustains the judgment of the Court below.

Judgment affirmed.

Fisk v. His Creditors.

FISK v. HIS CREDITORS.

The Supreme Court has jurisdiction to hear and determine appeals from the judgment of a County Court on questions of fraud, made on the petition of an insolvent for a discharge from his debts.

Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule; *Held*, That it was error for the Court to instruct the jury "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery, etc." The fraud is as complete without the delivery as with it.

APPEAL from the County Court of El Dorado County.

This was an application by the plaintiff, Fisk, to the County Court of El Dorado county for a discharge from his debts, upon the ground of insolvency. Several of Fisk's creditors filed their objections to his discharge, alleging that he had made a sham and false deed of his property, which was not included in his schedule. The question of fraud was tried by a jury. The Court gave certain instructions to the jury, which appear in the opinion of the Court. The jury found that the question of fraud was not sustained, and the plaintiff was discharged. The creditors appealed to this Court.

Thos. H. Hewes for Appellants.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was a contest, before a jury of six men, on the ground of fraud.

We think this Court has jurisdiction of this case, on appeal, it being one of the special cases provided for by the 336th section of the Practice Act. We have thought it best expressly to decide this question of practice, *in limine*, though by taking jurisdiction of, and deciding many cases of this sort, we have given a practical recognition of the principle heretofore.

The case was tried on the issue of fraud, and facts having been

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introduced tending to show that the insolvent had made and caused to be recorded a sham deed for property shortly before his application, which property was not included in his schedule. The Court instructed the jury, "That, to find the charge of fraud sustained, they must believe the deed made with intent to defeat, hinder or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. In this the Court clearly erred. There may be a delivery without recording the deed, and a recording without any delivery. But as the record can only be made after acknowledgment, by the grantor, of execution and delivery, this is certainly *some* proof of the delivery. But the fraud was as complete without the actual delivery as with it; if the grantor made a sham deed, and had it recorded, and reserved from his schedule the property in the deed, and this with the view of defrauding his creditors, the proof of fraud would be complete.

The judgment is reversed, and the cause remanded.

LISMAN, ADMR. v. EARLY et al.

In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness, whose wife is a sister and heir of the deceased, is incompetent upon the ground of interest.

APPEAL from the Eleventh District, County of Placer.

This was a bill to foreclose a mortgage upon a mining claim given to secure the payment of a promissory note. The action was on the note and mortgage.

The note and mortgage were given to one Michael Lisman, who since died, and the suit was brought by his administrator. On the trial, the plaintiff introduced as a witness one Hertch, who testified on his *voir dire*, that his wife was a sister and one of the heirs of the deceased. Defendants objected to this witness on the ground of interest. The Court overruled the objection, and the witness was allowed

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to testify. The cause was tried by a jury, who returned a verdict for the plaintiff, and judgment was entered thereon. Defendants appealed to this Court.

Tuttle & Hillyer for Appellants.

Thomas & Hawkins for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

There is no doubt that the witness, Hertch, was incompetent on the ground of interest, and his testimony was improperly admitted.

It is urged by respondent, that this being an equity case, the Court will not reverse because of the admission of improper evidence, but will proceed to examine and decide the case upon the legal evidence in the record. This is the ordinary and proper course in such cases, when the evidence in the record, excluding that improperly admitted, is satisfactory, which is not the case here, as it is by no means clear that the judgment can be sustained by the record without the evidence of Hertch.

The judgment is reversed, and a new trial ordered.

SWAIN & MARSH, ADMRS. v. CHASE *et al.*

An affidavit for an order of the publication of the summons, upon the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the State, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the Court jurisdiction of the person of the defendant.

The law presumes nothing in favor of the jurisdiction of Justices' Courts, and a party who asserts a right, under the judgment of a Justice, must affirmatively show every fact necessary to confer such jurisdiction.

APPEAL from the Seventh District, County of Contra Costa.

This was a bill filed in the Court below to enjoin the collection of a judgment obtained in a Justice's Court.

The judgment was obtained by Allen against Chase, upon an order of the Justice publishing the summons in the action. The order was obtained upon the affidavit of Allen; the substance of which is set out in the opinion of the Court. Defendant Chase had judgment in the Court below, and Allen, one of the defendants to the bill, appealed to this Court.

H. Allen for Appellant.

Whitman & Wells for Respondent.

Respondent submits that the primary point to be settled in this case is — Was the judgment of the Justice of the Peace, in favor of *H. Allen*, and against *M. S. Chase*, valid?

Respondent contends that it was a nullity, and void. This point settled in favor of respondent, disposes of the case decided against him.

1st. Justice of the Peace cannot take any jurisdiction by implication. *Van Elten v. Jilson*, 6 Cal. Rep., p. 19.

2d. In favor of the jurisdiction of a Justice of the Peace nothing can be implied. Everything to confer jurisdiction must be affirmatively shown. *Whitwell v. Barbour*, 7 Cal. Rep., p. 64.

3d. No presumptions of law are made in favor of the regularity of proceedings of Courts, or officers of special or limited jurisdiction, or of proceedings unknown or contrary to the common law, even when taken by Courts of general jurisdiction; these parts of the statute, which are essential to jurisdiction, must be shown to have been strictly pursued, or the proceedings will be held to be a nullity. *Thatcher v. Powell*, 6 Wheaton, 189; *Denning v. Corwin*, 11 Wend. 651; *Eartleman v. Jones*, 2 Yerger, 493; *Holmes v. Broughton*, 10 Wend. 75; *Mills v. Martin*, 19 Johns. 24; *Hall v. Howe*, 10 Conn. 520; *Starr v. Scott*, 8 Conn. 480.

Such being the law, does appellant, by his proof, bring himself within its requirements? He introduces what purports to be the Jus-

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Justice's Docket of R. A. Madison, said to be a Justice of the Peace of Contra Costa county. This is no proof; it is not, in any manner, authenticated. It is not signed by the Justice, nor are the entries certified by the Justice, or his successor in office, to be correct, as provided by statute. See Practice Act, sec. 605.

If, however, it be proof of anything, does it prove that personal jurisdiction was ever obtained of respondent Chase, or any service on him, actually or by implication of law.

It fails in that it does not appear either that the person upon whom service is to be made, resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself, to avoid the service of summons.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

The proceedings taken in the Justice's Court in the suit of Allen v. Chase, were not sufficient to give the Court jurisdiction of defendant.

An attempt seems to have been made to procure service by publication; but it does not appear that the provisions of the statute were complied with. The affidavit on which the order of publication was issued, states, that defendant Chase could not, after due diligence, be found in the County of Contra Costa; that he had inquired of one Fogg, who was an intimate friend of Chase, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where Chase could be found within the State.

The statute authorizes service by publication, when the party to be served resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear by affidavit, etc.

The affidavit of Allen does not show that Chase had left the State, or that any diligence has been used to ascertain his whereabouts, beyond inquiring of a single individual, and there is no pretense that he was concealing himself to avoid service. It was wholly insufficient to authorize the order of publication.

The law presumes nothing in favor of the jurisdiction of Justices'

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Courts; and a party who asserts a right, under the judgment of a Justice, must affirmatively show every fact necessary to confer such jurisdiction. *Van Elten v. Jilson*, 6 Cal. 19; *Whitwell v. Barbour*, 7 Cal. 64.

Judgment affirmed.

COMSTOCK v. BREED, *et al.*

The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor, in the same manner as a promissory note by the maker. The intention of the Legislature was to place bonds and notes on the same footing in respect to defense.

To constitute a consideration to a bond or other instrument in writing, it is necessary that some advantage to the promisor, or injury to the promisee, should occur. A past and executed consideration is not sufficient. When the debt of A, already created, is promised to be paid by B, no new term being introduced in the contract, as delay, or the like, it is not binding upon B. It is a mere understanding to pay another's debt, and is within the Statute of Frauds, and without the statute, would be void, as being without consideration.

APPEAL from the Fourth District, County of San Francisco.

This was an action on an indemnity bond executed by the defendants, and payable to the plaintiff. The condition of the bond, and the defense set up to it, are briefly stated in the opinion of the Court. The cause was tried by a jury, who returned a verdict for the plaintiff, upon which judgment was entered, and the defendants appealed to this Court.

A. Bennett for Appellants.

I. There was an entire want of consideration for the instrument sued upon. The consideration for the instrument sued upon was a by-gone transaction; these appellants were strangers to the consideration at the time of the execution of the instrument, and in order to hold them liable, it was necessary to show some consideration moving

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to them at the time of the execution of the instrument sued upon. Addison on Contracts, 23; Story on Contracts, sec. 855; 7 Cal. Rep. 32; Chaffee v. Thomas, 7 Cow. 358; 7 Johns. 87; 8 Johns. 29; 10 Johns. 243; 1 Caines, 583.

II. The instrument sued upon is void by the Statute of Frauds, the consideration not being expressed on the face of the instrument. Packer v. Wilson, 15 Wend. 343; 1 Denio, 226; Bennett v. Pratt, 4 Denio, 275.

Thos. C. Hambly for Respondent Dennia.

I. In answer to the first point made by defendants, it is only necessary to recur to the language of the bond, as follows: "Should the above named obligors, or either of them, immediately after the rendition of such judgment against said Comstock, pay the amount of said judgment in full, and hold the said Comstock entirely free and harmless from the consequences thereof, for the performance of which acts on the part of said obligors, Breed *et al.*, the said Comstock has paid and surrendered a good and lawful consideration, to the full satisfaction of said obligors, and for which they are firmly bound and hereby acknowledge the receipt, then," etc.

Now, what is the consideration of the bond? Why, a payment and surrender to Frothingham & West, at the time the bond was executed, of a good and lawful consideration; solemnly so admitted by them, under their hands and seals.

Can they now allege that there was no consideration but an advance of money to Breed a long time before? By no means; and they are clearly estopped from denying this consideration.

II. Nor is the bond void under the Statute of Frauds, as defendants allege. They say it is an undertaking for the naked precedent debt or default of another, and that no consideration is expressed, other than the money advanced to Breed.

The statute requires "some note or writing" expressing the consideration. Now what is the meaning of the term "expressing a consideration?" I take it to mean alleging a consideration. What does "value received" in a note mean? Why, it simply alleges a consideration. What does our bond say? "A good and valuable considera-

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tion paid and surrendered." This is surely a very strong and clear compliance with the statute, and wholly fulfills its demand.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

This suit was brought on a bond of indemnity, on which bond Frothingham and West were sureties, not connected, except as herein-after stated, with the consideration. The bond recites and acknowledges the general consideration of value received and surrendered, and is conditioned to pay to Comstock, who was a Receiver in a certain pending suit in one of the Courts of San Francisco, between Breed and Dennis, such moneys advanced by Comstock to Breed, as the Court might, by judgment, order to be paid by Comstock. The defense set up by these sureties is, that these moneys had, some five months before the execution of the bond, been advanced by Comstock, without the instance or any participation in the transaction, by these sureties; and they say that this being the only consideration for their covenant, it is *nudum pactum*.

This raises the question: 1st. Whether, at law, the consideration of a sealed instrument — it expressing a consideration — may be impeached by an obligor? and, 2d. If so, was the fact asserted competent proof of a want of consideration? The first question is answered by the statute, (C. L., p. 165) which expressly gives this right to the obligor. The old, unmeaning distinction between sealed and unsealed instruments, is destroyed by the statute, and it was the design of the Legislature to place bonds and notes on the same footing in respect to defenses. It is well settled, that though a consideration be recited in a note, the defendant may show that in fact there was no consideration; and the same rule holds as to bonds.

In order to constitute a consideration, it is necessary that some advantage to promisor, or injury to promisee — the degree not material — should occur. A past and executed consideration is not sufficient. If the debt of A already has been created, the mere promise to pay it by B — no new term being introduced into the contract — as delay, or the like, is not binding. It is a mere undertaking to pay another's debt, and it is within the Statute of Frauds, and, without the statute,

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would be void, as without consideration. *Chaffee v. Thomas*, 7 Cow. 358; Story on Cont., sec. 855.

If, therefore, *solely* in consideration that Comstock *had* advanced this money to Breed, these sureties promised to repay it, evidently they had received no consideration for the promise, from the past fact. If, having advanced the money, the sureties promised, in consideration of Comstock's not calling for it, until judgment should be rendered against him for it, the case might be different. We do not see that the mere fact of a Receiver holding moneys in trust for parties, paying a portion as an advance to a party whom he believes or supposes will be entitled to it, is such an illegal consideration as to vitiate a bond for its repayment. The Receiver may hold money which it is apparent or very probable must ultimately go, on final settlement, to a particular person, whose convenience may be greatly promoted by receiving it in advance of his strict right to it, as in cases of administrators or other trustees; and we do not see, if he chooses to take the risk of making a premature payment, that there is anything opposed to public policy, or to the law, in the act, which would infect a bond of indemnity with a fatal taint of illegality. Such an advance would rather be without law, than against law. But it is unnecessary, perhaps, to lay down any definitive rule in this case on that subject. The record does not show any consideration beyond the recitals in the bond, and the facts alleged in the defense.

There is nothing in the point that Dennis stands in any better position than Comstock, to whose rights and place on the calendar he seems to have succeeded. The instructions of the District Court oppose these views.

The error of the Judge below has already been sufficiently indicated for the purposes of a new trial, when the issues can be determined upon the principles here announced.

Judgment reversed and cause remanded.

Houseman v. Chase.

HOUSEMAN v. CHASE *et al.*

A party in possession of public land, claiming title to it, must be presumed to be the owner of it, and can mortgage it. Where another party enters under, and in privity with the title of the mortgagor, he will not be allowed to defeat the mortgage upon the ground that the same was not executed in pursuance of the Statute concerning Chattel Mortgages.

APPEAL from the Fourteenth District, County of Sierra.

A statement of facts appears in the opinion of the Court.

Meredith & Hawley for Appellants.

I. Upon the pleadings and proof in this cause, as well as on the facts found, plaintiff, Houseman, was by law entitled to the judgment and relief prayed for, and the Court below erred in rendering judgment for a sum of money only, against defendant Keller, and refusing a decree of foreclosure as against said Keller and said defendants, Chase and Chase. *Hutchinson v. Perley*, 4 Cal. R. 33; *Winans v. Christy*, 4 Cal. R. 70; *Plume v. Seaward*, 4 Cal. R. 94; *Richards v. Williams*, 7 Wheat. R. 59; *Elridge v. Knolt*, Cons. R. 102, 215; *Pongar v. Weaver*, 6 Cal. R. 548; Act Concerning Conveyances, Wood's Dig., p. 100; Act in Relation to Personal Mortgages, Wood's Dig., p. 108; *Merrill v. Gorham*, 6 Cal. R. 462.

W. W. Upton for Respondent.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

This was a proceeding to foreclose a mortgage upon certain land in Nevada county, given by one Keller to plaintiff, which mortgage was duly acknowledged and recorded in the proper county.

Defendant, Chase, who was the vendee of Keller, set up, by way of defense, that the land described in the mortgage was public land of the United States, and that the mortgage not having been executed in accordance with the Statute concerning Chattel Mortgages, is void as to defendant, who was a purchaser without actual notice.

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The Court gave judgment against Keller for the sum mentioned in the note, but refused to decree a foreclosure of the mortgage, and plaintiff appeals.

At the time of the execution of the mortgage, Keller was in possession of the property claiming title, and must be presumed to have been the owner of it. The defendant, Chase, having entered under Keller, and in privity with his title, cannot be allowed to dispute it in this action. The mortgage from Keller was duly acknowledged and recorded, and Chase must be deemed a purchaser with notice.

It follows that the judgment of the Court below is erroneous, and it is reversed and the cause remanded, with direction to enter a decree foreclosing plaintiff's mortgage, and ordering the premises to be sold to satisfy the same.

PEOPLE v. MILLER.

When an indictment for murder is used as a substitute for, and in place of, an indictment for manslaughter, it must, where time is material, contain the averment as to time, which would be essential in an indictment for manslaughter.

It is generally true that every essential fact must be stated in the indictment, and this means every fact material to the offense of which the party may be convicted, and the allegation of a day within the period of limitation, is material, whenever the offense is subject to limitation.

If the defendant is out of the State a portion of the time, it must be so averred in the indictment. *Prima facie*, the lapse of time is a good defense; and where the statutory exception is relied on, it must be set up.

APPEAL from the Fifth District, County of San Francisco.

The facts are stated in the opinion of the Court.

Robinson & Beatty for Appellant.

The only error assigned in this case is, that the indictment shows that the offense of which the appellant was convicted, was committed more than three years before the indictment was found.

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Sec. 97 of the Criminal Practice Act, (Wood's Digest, page 278) reads as follows: "An indictment for any other felony than murder, must be found within three years after its commission."

It is admitted by the Attorney General, that if the proof had shown that the offense was committed by the defendant while in this State, and more than three years before the finding of the indictment, he could not have been properly convicted of the crime of manslaughter.

He, however, to support the judgment in this case, relies on sec. 242 of our statute, which reads as follows: "The precise time at which it was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding of the same, except when time is a material ingredient of the offense."

He argues, that although the indictment alleges the offense to have been committed more than three years before the finding of the indictment, yet as the precise time is not necessarily stated in the indictment, the offense may possibly have been committed at a later period than that charged, and within the three years.

Sec. 242, cited above, is simply a repetition of a rule of criminal pleading, which is to be found in every elementary work on criminal pleadings. But the main point is, when time is, and when time is not, material in an indictment. At common law, time was said to be immaterial, for the simple reason that there was no limitation to indictments for felony. Page 301 of Blackstone's Commentaries, note 1.

When there is a statute of limitations, time becomes so far a material fact, as that it must be alleged that the offense was committed within the time of limitation; that is, the offense may be charged to have been committed on some day certain, and that day must be within the time of limitation. See Chitty's Criminal Law, p. 223.

This same doctrine is fully endorsed by the Supreme Court of Alabama, in the case of the State v. Beckwith, Stewart, page 318.

The statute only provides that the "precise time at which it was committed, need not be stated."

It is clear, that the statute requires that some time be stated. If it was a case of murder, any day might be stated, because there is no limitation; therefore, in this case, the indictment, as an indictment for murder, was good; but as an indictment for manslaughter, it was

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bad, because it should, within itself, show a state of facts which would exempt the party from punishment.

The statute makes three years a bar in every case, except when the defendant is out of the State when the offense was committed. (See secs. 97 and 99 of the Criminal Practice Act.) Here the indictment shows the defendant was in the State when the offense is alleged to have been committed, and also that it was committed more than three years before the finding of the indictment. These facts constitute a perfect bar to the prosecution. If all the allegations in the indictment be true, the party is not punishable. How, then, is it possible to punish a party under that indictment? Clearly, it could not be done in any other way than by a waiver of his privilege under the statute.

The only authority relied on by the Attorney General to support this case, which we deem it necessary to notice, is the one in 9th Cowen, page 655. At first sight, this might appear to support the ruling of the Court below; but on a more critical examination, it is in fact rather confirmatory of our views. The Court says: "*Non constat*, on this motion, but that, on its appearing in evidence that the crime was perpetrated more than three years previous to the indictment being found, and on this being objected, as it might be on not guilty, the prosecution then answered, by proving that the prisoners were within the exception." Now, it is clear from this quotation, that the only ground on which the indictment is sustained, is that on its appearing (as the Court admits it must have appeared in the indictment) that the offense was committed more than three years before the finding of the indictment; that the prosecution then showed the case was taken out of the statute by the absence of the party. If it were possible to show any facts in this case which would take it out of the operation of the statute, then, the authority, so far as it goes, is in favor of the People. If, on the other hand, no state of facts exists, or might have been found at the trial, which takes it out of the Statute of Limitations, then, we contend, it is good authority on our side. It is a well settled rule of practice, both in civil and criminal proceedings, that the *allegata* and *probata* must coincide. You cannot contradict

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your own pleadings. The only apparent exception to that rule, is in relation to allegations as to time.

The only case where the time of a promise being made becomes material is when the Statute of Limitations might operate as a bar. In that case, the time must be stated, so far correctly, or so near correctly, as to show the promise is not barred by the Statute of Limitations. See 3 Texas Reports, Swenson *et al.* v. Walker's Admr., page 95; McClenney v. McClenney, 3 Texas Reports, page 196; see also 2 Texas Reports, page 541.

Attorney General for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was an indictment for murder, under which the defendant was convicted of manslaughter. The act is charged to have been committed more than three years before the finding of the bill; and three years is the period of limitation to the prosecution of the offense of manslaughter. It is true, that a party may be convicted of manslaughter under a general indictment for murder; the indictment for murder answering as a good indictment for manslaughter. But when the indictment for murder is used as a substitute for, and in place of, an indictment for manslaughter, it must, if time be material, contain the averment as to time, which would be essential in an indictment for manslaughter. The object of pleading is to apprise a party of the precise charge made against him, and to enable him to defend himself and to avail himself of all his legal rights and privileges. It is generally true that every essential fact must be stated in the indictment; and this means every fact material to the offense of which the party may be convicted; and the allegation of a day within the period of limitation is material, whenever the offense is subject to limitation. (Wharton Cr. L., pp. 111 and 114.) If, for example, robbery was an offense not barred by lapse of time, but larceny was barred within a year, though the rule is that every robbery includes a larceny, we apprehend a conviction for larceny could not be had under this indict-

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ment of robbery, if it were found after the period of limitation for prosecutions for larceny.

It is true that the Statute of Limitations excludes from computations the time the defendant may be out of the State, but the rule is, that this exception must be stated in the pleading. *Prima facie*, the lapse of time is a good defense, and if the statutory exception is relied on, the State should set it up. This is the rule in civil pleadings under our system, and it is not less strict in criminal cases.

The case in 9 Cowen, cited by the Attorney General, seems to be against this view, but that case stands opposed to well settled precedents in the English and American Courts. The contrary doctrine seems to be held in *State v. Bockwith*, 1 Stewart, 318; *Shelton v. State*, 1 Stewart & Por. 208; and *State v. Roach*, 2 Haywood, 552; see also 1 How. Miss. 260; *Wharton Cr. L. supra*, 1 Chitty Cr. L. 253.

Upon principle, we can see no distinction between an indictment for murder, which, if good for manslaughter, shows on its face that the crime for manslaughter is barred, and an indictment for the special offense of manslaughter with the same statement as to time.

We cannot hold that the condition of the defendant under the more general indictment is any worse than if the indictment were for the precise and specific offense.

Judgment reversed.

STEINBACK v. FITZPATRICK *et al.*

In an action of ejectment to recover the possession of a tract of land, the plaintiff must aver either title or possession. The mere taking from the land a portion of the herbage growing thereon, is not sufficient to give a right of possession. Nor is a complaint in such action sufficient, which fails to aver a continued adverse holding by the defendant.

APPEAL from the Twelfth District, County of San Francisco.

Knight v. Fair.

This was an action to recover the possession of a lot of land in the City of San Francisco.

The allegations of the complaint are briefly stated in the opinion of the Court. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Court below, and judgment given for defendants. The plaintiff appealed to this Court.

B. W. Brooks for Appellant.

Stanley & Hays for Respondent.

TERRY, C. J., delivered the opinion of the Court — **BALDWIN, J.**, concurring.

The demurrer to the complaint was properly sustained.

The first count alleges that one Spencer, the grantor of plaintiff, was seized in his demesne as of fee and right, by taking the esplees thereof to the value of one dollar, and that plaintiff, by virtue of a conveyance from Spencer, is entitled to the possession.

This is not a sufficient statement of a cause of action, under our statute. No title or actual possession is shown in the grantor of plaintiff, and the mere taking from the land of a portion of the herbage growing thereon, is not sufficient to give a right of possession.

The second count is defective, because it does not aver a continued adverse holding by the defendant.

Judgment affirmed.

KNIGHT v. FAIR, SHERIFF.

In an action against a Sheriff for special damages, resulting from a refusal on the part of the Sheriff, to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at Sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits: *Held*, That such complaint is insufficient.

Knight v. Fair.

APPEAL from the Ninth District, County of Siskiyou.

This was an action for special damage, against the defendant, as Sheriff of the County of Siskiyou, for a failure to deliver to the plaintiff a deed to certain real estate purchased by the plaintiff at an execution sale, made by the defendant as Sheriff of said county. The defects of the complaint are stated in the opinion of the Court. Defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The Court below sustained the demurrer, and judgment was entered for defendant. Plaintiff appealed to this Court.

J. A. Fletcher for Appellant.

J. Berry for Respondent.

The complaint is wholly defective, and "under no enlightened system of jurisprudence should such pleadings be upheld, tending, as they do, to obscure the true issues involved, to surprise litigants, and embarrass Courts and lawyers." It does not show what interest or estate Calhoun had in the premises; it does not show that he ever had any interest whatever, not even that he was ever in possession of the premises, or of any part thereof, or of the esplees and profits thereof; and there could be no error, under the most liberal rules of construction, in sustaining the demurrer, where the plaintiff shows no right whatever, and therefore no damages. *Payne & Dewey v. Treadwell*, 5 Cal. 310; *Gamer v. Marshall*, 9 Cal. 268; *Bird v. Lisboa*, 9 Cal. 1; *Thornburg v. Hand*, 7 Cal. 554.

The complaint must show in what manner the plaintiff has sustained damages. *Stevens et al. v. Rowe, Sheriff*, 3 Deneb, 327.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This case was for damages sustained by the plaintiff, by reason of the refusal of the defendant, Sheriff of Siskiyou county, to execute to him a deed for land bought at public sale; but the complaint is fatally defective in this, that it alleges special damages, arising from the in-

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ability to get rents and profits from the estate — a tavern in Yreka — without averring that the defendant in execution had any title to the premises, or that the plaintiff, if the Sheriff had made him a deed, would have been either entitled to receive, or been able to recover, possession of the property, or rents or profits. For this error the Court properly sustained the demurrer.

Judgment affirmed.

RITTER v. PATCH, TAX COLLECTOR.

AN injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection, to the owner, would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing.

A tax is not a cloud upon the title to real estate; and its unlawful collection, by distress or seizure of chattels, is no more than an ordinary trespass.

APPEAL from the Fourth District, County of San Francisco.

This was an action to restrain the defendant, as Tax Collector of the City and County of San Francisco, from the collection of a large amount of State and county tax, assessed upon the property of the plaintiff. The bill avers a number of irregularities in the assessment, and in general terms charges, that if the defendant is allowed to enforce the collection of the tax, "great and irreparable injury will be done him," (plaintiff). There is no averment in the bill, showing in what manner this injury would result to the plaintiff, nor is there any charge that defendant is not able to respond in damages for such illegal act.

The Court below issued the injunction upon the complaint, and at a final hearing of the case, decreed that the injunction be made perpetual, and the defendant be forever restrained from the collection of said tax. Defendant appealed to this Court.

Shafter, Park & Heydenfeldt for Appellant.

Berri v. Patch.

J. B. Hart for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

Injunction to restrain the defendant from proceeding to collect a tax on personal property.

Waiving other obstacles of a very serious import, which oppose the plaintiff's proceeding, we think that the bill states no sufficient ground for equitable interposition. The remedy by injunction is unauthorized in cases like this, except where the injury is irreparable, if, indeed, that furnishes a sufficient ground for interference. This must appear in the bill by some issuable averment, and be sustained, if denied at the hearing. It is not shown that the Tax Collector would not be able to respond in damages. On the contrary, he asserts that he and his sureties are amply able to answer in any damages incurred by proceeding to collect the tax. The tax is no cloud upon the title of real estate, and its collection, by distress or seizure of chattels, is no more than ordinary trespass, if the tax be illegal, or the conduct of the officer unauthorized. The New York cases (1 Abbott, 4; *Ib.* 79; *Ib.* 250) go much further than it is necessary for us to go, in this respect. But, if the principle contended for be adopted, Chancery might restrain, from anything we can see to the contrary, every threatened, unauthorized invasion of real or personal property. This would be to throw into Chancery a great portion of all the torts committed or threatened.

Judgment reversed and bill dismissed.

BERRI v. PATCH, Tax Collector.

An injunction will not lie to restrain the collection of taxes, unless it be shown that the injury to the owner would be irreparable.

Ritter v. Patch, Tax Collector (ante, p. 299), affirmed.

APPEAL from the Fourth District, County of San Francisco.

This was a bill to restrain the defendant from the collection of the

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State and county tax assessed upon the property of the plaintiff, upon the ground of the illegality of the assessment. The facts are the same as those in the case of *Ritter v. Patch*, Tax Collector, (*ante* p. 299). Plaintiff had judgment in the Court below, and defendant appealed.

Shafter, Park & Heydenfeldt and Tracy for Appellant.

Janes, Lake & Boyd for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The judgment in this case — the principle being the same as that in the case of *Ritter v. Patch* — is reversed, and bill dismissed, on the authority of that case.

PEOPLE *ex rel.* TALLANT *et al.* v. THE BOARD OF SUPERVISORS OF SAN FRANCISCO COUNTY.

The People *ex rel.* *McLane v. Bond*, Assessor, (10 Cal. 563) affirmed.

The Board of Supervisors of the City and County of San Francisco, have no control over the Treasurer, in the payment of the interest and principal of the Sinking Fund of that city. The allowance or disallowance, auditing or refusing to audit, of the Board, are alike immaterial.

APPEAL from the Fourth District, County of San Francisco.

The facts sufficiently appear in the opinion of the Court.

F. P. Tracy for Appellants.

F. M. Haight for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

The principles of this case have already been settled in the case of *The People v. Bond*, Assessor, 10 Cal. 563. This is a *mandamus*

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to compel the defendants to allow the Auditor to audit, and the Treasurer to pay, the sum of \$197,000, the interest and Sinking Fund for the years 1857 and 1858, under the Act of May 1, 1851, entitled, "An Act to authorize the Funding of the Floating Debt of the City of San Francisco, and to provide for the payment of the same."

The proceeding was discontinued on the hearing, as against the Auditor and Treasurer, and judgment for peremptory *mandamus* rendered against the defendants.

We have already held that the Board of Supervisors had no control over the Treasurer in respect to this matter. Their allowance or disallowance, auditing or refusing to audit, are alike immaterial: therefore, this proceeding against the defendants is improper. For this reason the judgment is reversed and the case dismissed.

HUNT v. WATERMAN *et al.*

A vendor's lien does not exist in this State, where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished, whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land.

The fact that such mortgage is defective, does not revive the lien, as it is the intention of the vendor which controls, and this is as well known by an informal act as one properly done.

A general averment in the complaint — to enforce the vendor's lien — that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated.

APPEAL from the Eleventh District, County of El Dorado.

This was a bill filed in the Court below, for the enforcement of a vendor's lien to a quartz lode.

The facts as disclosed by the opinion of the Court, are as follows:

In this case the plaintiff seeks to enforce a vendor's lien for the purchase money of a certain quartz vein sold by the plaintiff to the defendant, and charges that the other defendants are purchasers of the prop-

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erty from Waterman, with notice of this indebtedness. The bill shows that the plaintiff took a mortgage on this property for the payment of this purchase money, but avers that by reason of some defect in the deed or acknowledgment, it is not available as a security for the plaintiff's debt. It is not very clear whether the plaintiff meant to rest his claim for relief on the mortgage or on the vendor's lien, or on both. But, from the bill, demurrer and decree, we take it that he abandoned the notion of the validity of the mortgage, and relies on the vendor's lien.

The decree is for the enforcement of the parol or tacit lien. Defendants appealed to this Court.

John Hume for Appellants.

First. It appears from the complaint, that at the time of the sale to Waterman, plaintiff took from him a mortgage to secure all the unpaid purchase money. That the taking of said mortgage was a waiver of a vendor's lien. That if no vendor's lien existed, he has shown no cause of action against the defendants appearing in this suit.

Second. That the vendor's lien was equally waived in this case, whether the mortgage was properly acknowledged or not, as the taking and recording the mortgage showed an intention to rely upon the mortgage, and not upon the vendor's lien.

In regard to the first point, the American rule as to what will be regarded as a waiver of a vendor's lien, is very clearly and fully laid down, as follows: "A lien will be considered as waived whenever any distinct and independent security is taken, whether by mortgage of other lands, or pledge of goods, or personal responsibility of a third person, and also when a security is taken upon the land either for the whole or a part of the unpaid purchase money, unless there is an express agreement that the implied lien shall be retained." *Vide* Leading Cases in Equity, vol. 1, pages 272, 273; 4 Kent, 151 to 153, 3d ed.; *Fish v. Howland*, 1 Paige, 20 to 30; *Cole v. Scott*, 2 Wash. 141; *Gilman v. Brown*, 1 Mason, 192, 221; *Little v. Brown*, 2 Leigh's Rep. 383; *Conover v. Warren*, 1 Gilman, 498; *Wilson et al. v. Graham et al.*, 5 Munf. 297.

It appears from the complaint in this case, that a mortgage for the

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unpaid purchase money was taken by plaintiff, and by him caused to be recorded, which was a waiver of the vendor's lien, and notice to subsequent purchasers of such waiver; and that plaintiff relied upon the mortgage, also of the time of payment of the money.

An unacknowledged or recorded mortgage is a higher security than a vendor's lien. (*Vide* Leading Cases in Equity, vol. 1, page 280; *Gilman v. Brown et al.*, 1 Mason, 192, 221.) Neither are good as to subsequent purchasers without notice; both are good between the parties. But the unacknowledged mortgage is the higher security, being a lien by express contract, while the other "is a right which has no existence until it is established by the decree of a Court in the particular case." *Gilman v. Brown*, 1 Mason, 192.

"There being a higher security, the taking of it will be a merger, waiver, or extinguishment of the lower security upon the same property, *expressum facit cessare tacitum*." *Little v. Brown*, 2 Leigh, 283.

"When, by the express agreement of the parties, there is a lien upon the estate for a part of the consideration of the conveyance, it excludes the idea of an implied lien for the residue." *Fish v. Howland*, 1 Paige, 31.

Again, any conduct which shows an intention on the part of the vendor to give up the lien, will be a bar to its prosecution. Leading Cases in Equity, vol. 1, page 273; *Fowle v. Rust's Heirs*, 2 Marshall, 294; *Clark v. Hunt*, 3 J. J. Marshall, 553.

In this case there can be no question about the intention of the vendor to secure his debt by mortgage, which if it had done, would have been a waiver of the vendor's lien. He expressly alleges in his complaint, that he took the notes and mortgage therein mentioned to secure the purchase money unpaid; that he filed the same with the County Recorder, and procured the same to be recorded. An intention then to rely upon the mortgage was, at the time of the execution thereof, a waiver of the vendor's lien.

If the vendor shall have since found that his mortgage was not executed in accordance with the provisions of the registry laws of this State, still, having once relied upon it, and thus waived his lien, he cannot now go back and restore the lien. The lien once waived is gone forever. When the party has by his own act shown his intention

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to abandon one security for a better, he cannot afterwards ask a Court of Equity to repair his errors, and restore him to rights which he has lost by his own acts. No man can take advantage of his own wrong, carelessness or negligence, nor will a Court of Equity interfere to relieve him from the just consequences of the same. If there was any defect in the acknowledgment or execution of the mortgage, which would prevent it from being considered notice to third persons, the vendor should not have taken it. It was his duty to see that it was properly executed. That some kind of acknowledgment was added to the instrument is certain, because otherwise it could not have gone to record.

Thos. H. Hewes for Respondent.

In respect to the allegations in the complaint relative to the mortgage, we say, that it does not appear therefrom that a mortgage was in fact taken.

The complaint speaks of it as a "pretended mortgage," which the "defendants claim to be invalid," etc. It virtually asserts that the mortgage constituted no lien, and the defendants admit the correctness of the assertion.

To avoid any question upon the validity of the mortgage, we relied upon the "equitable mortgage," or lien as vendor, held by us; and in so doing, we think we have done no act of which the defendants can complain. Their rights are in no manner changed or impaired. But conceding the validity of the mortgage, did we thereby abandon our vendor's lien?

This question is passed upon in *Boos v. Ewing*, 17 Ohio Rep. 500. The facts in that case are very similar to those in this case. The authorities in that case are carefully reviewed, the question elaborately discussed both by Court and Counsel, and to their reasoning and argument we respectfully direct the attention of this Court. The decision in that case is directly in point and in our favor.

BALDWIN, J., delivered the opinion of the Court—TERRY, C. J., and FIELD, J., concurring.

The question in this case is directly presented, whether, in this

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State, a vendor's lien exists when a mortgage security is taken for the purchase money. The decisions of the various Courts have been numerous on this branch of jurisprudence, and are not harmonious. The better rule, supported by the weight and number of the authorities, is to hold the silent lien of the vendor extinguished, whenever the vendor manifests an intention to abandon or not to look to it; and it is held that he does this whenever he takes other and independent security upon the same land, or a portion of the same land, or on other land. When he looks to other security he loses this tacit lien. *Brown v. Gilman*, 4 Wheat. 290; 1 Mason, 212; *Fisk v. Howland*, 1 Paige Ch. R. 20, where the authorities, English and American, are fully reviewed.

The editor of *Leading Cases in Equity*, reviewing the case of *Macreth v. Simmons*, (15 Vesey, 350) cites and reviews a very great number of cases which decide and discuss the general doctrine, and this particular point. The case of *Boos v. Ewing*, (17 Ohio, 521) cited by respondent, seems to be the other way, and is noticed by the editor as a case opposed to the general current of decision.

The fact, if we regard the averment of the bill as properly stating it, that the mortgage was defective in itself, or its acknowledgment, does not help the plaintiff. For, as we have seen, the question is as to the intention of the vendor, which is as well shown by an informal act as one regularly done. If the mortgage was properly executed, it may be enforced, of course; but the whole case seems to rest here on the validity of the vendor's lien. It is not stated how, or in what, the mortgage was defective, and this general and loose averment is not sufficient to withdraw the case from the influence of the general rule we have announced.

That the case may be fairly tried upon its merits, in view of the law as we have held it to be, the decree is reversed, and the cause remanded for further proceedings on another trial.

Isaac Stevens v. Irwin.

ISAAC STEVENS v. IRWIN, SHERIFF.

A subscribing witness to a written instrument, if within the jurisdiction of the Court, must be produced, or some sufficient reason given for his absence.

Within the jurisdiction of the Court, is meant, within the State.

A power of attorney, not affecting real estate, is not required to be recorded, and the fact of such instrument being acknowledged and recorded, does not authorize it to be read in evidence without proof of its execution.

A witness who is called to impeach another, may answer that he would not believe such other witness on oath. This has been the uniform practice in this State, and no injury has resulted from such practice.

APPEAL from the Fourteenth District, County of Sierra.

This was an action of replevin to recover certain personal property, taken by the defendant, as Sheriff, under a process against B. C. Stevens.

The plaintiff had judgment in the Court below, and defendant moved for a new trial, which was denied, and he appealed to this Court.

The facts sufficiently appear in the opinion of the Court.

Vancleif & Stewart for Appellant.

1st. The Court erred in admitting the testimony of ——— as to the handwriting of Cooke, a subscribing witness to the power of attorney.

2d. The Court erred in permitting the question to be asked the witness McCummings, whether he would believe James Morgan under oath.

3d. The Court erred in overruling defendant's motion for a new trial.

Counsel discussed the facts at considerable length, and referred to the following authorities in support of the second assignment of error: 1 Greenleaf's Evidence, sec. 461; Phillips v. Kingfield, 1 Appleton, 375.

R. H. Taylor for Respondent.

1st. The first point made by appellant, is not well taken. Conceding that the Court erred in admitting the testimony of Musser, the

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defendant was not prejudiced thereby. The power of attorney could have been admitted in evidence without proof of the handwriting of the subscribing witness. Wood's Digest, page 103, sec. 29.

2d. It was no error to permit the impeaching witness to testify whether he would believe the witness Morgan on oath. *Johnson v. The People*, 3 Hill, 178; *People v. Rector*, 19 Wendell, 579; *State v. Boswell*, 2 Dev. 209 and '10; 2 *Ib.* 522; *Fulton Bank v. Benedict*, 1 Hall N. Y. S. C. R. 558; *Chess v. Chess*, 1 Penn. R. 32; 2 Phil. Ev. 432; *Cowen & Hill*, Notes to Phil. Ev., part 2, pp. 754 to 758.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was an action of replevin against the Sheriff for certain chattels. The question before the jury was one of fraud, the defendant setting up that the goods were in possession of one B. C. Stevens, a brother of plaintiff, against whom the defendant, as Sheriff, had process; the plaintiff asserting that the goods were his, and that B. C. Stevens was only his agent, managing and controlling his business, and without interest or ownership in the property. The business seems to have been conducted in the name of the plaintiff, who was shown to have been absent from, if not residing out of, the State. The case appears to have been closely contested on the proofs, which, as usual in such cases, were conflicting, circumstantial and numerous. The apparent possession having been shown in the defendant in the process, it became important for plaintiff clearly to explain and account for this circumstance. This he sought to do by showing the agency of B. C. Stevens for him; and as the best and most satisfactory proof of this fact, offered a power of attorney from the plaintiff to B. C. Stevens, giving him power consistent with his acts of management and control of the property and business, the subject of inquiry. The plaintiff offered to prove this power, which was attested by one Cook, of San Francisco, as subscribing witness, by proving by a gentleman present at the trial the signatures to the paper. Against the objection of defendants, this mode of proof was allowed by the Court; and this ruling is assigned for error.

Beebe v. Brooks.

The Court erred in admitting the evidence. The subscribing witness was within the jurisdiction of the Court, by which is meant, within the State. The subscribing witness must, in such cases, be called, or some sufficient reasons given for this omission. *Jackson v. Root*, 18 Johns. 611.

The fact that the power was acknowledged before a Notary or a Justice of the Peace, and recorded, makes no difference; for this power is not a recordable instrument within the Registry Acts; it does not affect the title of real estate, even if that would be sufficient to admit it to be read without further proof, when introduced for the purpose of affecting other property than the realty.

It is also assigned for error, that the Court should not have permitted a witness who testified to the bad reputation of another witness whom he was called to impeach, to answer that he would not believe the other on oath. It is true, Mr. Greenleaf on Evidence, (sec. 461) questions the propriety of this course, but Phillips, Starkie, and other approved writers, and many adjudged cases, hold it to be proper; and the practice in this State has been uniform, we believe, the same way. We see no injury in the practical working of the rule; it may sometimes be necessary to define more clearly the sense the witness entertains of the standing and reputation for truth of the impeached witness; and we do not think it advisable, from any mere question of the soundness of an old established rule, to create confusion in the practice. The error already noticed is decisive of the case here.

Judgment reversed and cause remanded.

BEEBE v. BROOKS et al.

An indorser of a promissory note, after maturity, is entitled to demand and notice of non-payment, before he is liable to pay.

The law requires a demand to be made within a reasonable time, and notice of non-payment must be seasonably given.

APPEAL from the Ninth District, County of Siakiyou.

This was an action brought to recover a sum of money due on a promissory note, and for a decree of sale of certain personal property pledged for the payment of the note.

The action was against the maker and indorser; the note was indorsed after it fell due. The cause was tried in the Court below without a jury, and the Court found as a fact, that Herzog, the indorser, had no notice of the dishonor of the note. Judgment was given for the plaintiff, against Brooks, the maker, and a non-suit as to Herzog, the indorser. Plaintiff appealed from that portion of the judgment dismissing the action as to Herzog.

P. L. Edwards for Appellant.

I. The indorsement of the respondent was made nearly two years after the maturity of the note, and it seems difficult to conceive the utility of any demand of payment, or notice of non-payment, after that time. The note was negotiable, and to give the ordinary effect to such demand and notice, the former must have been made on the last day of grace, and the latter must have been diligently given according to the circumstances of the case. Here, however, the note had been long due when the respondent made his indorsement.

II. Where a bill or note is indorsed after maturity, the indorsement is equivalent to drawing a new bill, or making a new note, and the indorser becomes an original promisor. Chitty on Bills, 215; Story on Promissory Notes, notes p. 627, sec. 479.

A leading case in support of our position is that of *Brown v. Davis*, 3 Term R. 80; see also *Bank of North America v. Barriere*, 1 Yeates, (Pa.) 360; *Allen v. Rightmire*, 20 John. R. 365; *Hall v. Smith*, 1 Bay's R. 330.

It is conceded that there are many authorities to the contrary; but granting that there are such, and even that they outweigh those in our favor, we still insist that upon principle and right reason, the law ought to be pronounced in our favor. As late as 1849, the principal authorities on both sides of the questions were reviewed in the State of Pennsylvania, and the true doctrine, as we think, settled in our favor. *Jordan v. Hurst*, (12 Penn. State R. 269). This case most triumphantly overrules that of *McKinney v. Crawford*, (8 Sergt. & R. 351),

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which had sought to overrule *The Bank of North America v. Barriere*, 1 Yeates, 360.

III. There is a large and respectable class of cases, in which the rule as to notes and bills indorsed when over due is, that demand and notice are dispensed with, and only diligence is necessary according to the circumstances. In other words, the only penalty of neglect is a responsibility for the injury which it actually occasions to the indorser, and the question of reasonable diligence is always a question for the jury. *Chadwick v. Jeffers*, 1 Richardson, 397; *Gray v. Bell*, 2 *Ib.* 67; 3 *Ib.* 71; cases cited 1 Amer. Leading Cases, 360.

If this be the true doctrine, then the plaintiff ought not to have been nonsuited; but the question ought to have been submitted to the jury, whether he had exercised reasonable diligence in trying to collect the amount of the note from the maker.

No brief on file for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The assignment of errors by the appellant in this case raises but one question, that is, whether, if a note be indorsed after it is due, the indorser is entitled to demand and notice, before he is liable to his indorsee? The authorities, it is conceded, are not consistent. But we think that the weight and number are both in favor of the affirmative of this proposition. It would be a useless and almost an endless task to review them all. Mr. Parsons, in his recent work on Contracts, takes this view of the question. *Parsons on Cont.*, 2 vol., p. 231, note.

We think that the rule should be as uniform as possible in its operation upon the same description of commercial paper. Even if we did not consider ourselves foreclosed by authority, we should hesitate long before we reached the conclusion that the indorser meant, by placing his signature upon an overdue note or bill, to become unconditionally liable for that amount. We suppose that the universal understanding of business men is, not that an indorsement is not equivalent to a promissory note upon which the indorser may be sued the next day, but

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that it amounts to no more than a guaranty of the solvency of the maker; and that the indorsee may, if he makes demand upon the maker and fails to get the money, have recourse upon the indorser. This is the extent of the indorser's liability. It is true that no time is expressly limited, as in cases of bills or notes not due, for demand and notice to the indorser; but the law requires a demand to be made in a reasonable time, and notice of default seasonably given. No notice having been given in this case to the defendant, Herzog, the indorser, the Court below properly gave judgment for him.

Judgment affirmed.

BARRINGER v. WARDEN *et al.*

Where a complaint shows *prima facie* upon the facts stated, that the claim or debt upon which suit is brought, is barred by the Statute of Limitations, the defendant may take advantage of the defect by demurrer. But when the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained on this ground. This is the chancery rule, under the English system, and as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the former.

The provision of the Statute of Frauds which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply to the promise of A to pay money he owes by contract with B, to C. This is paying A's own debt, and creating his own obligation, not assuming another's.

Where A, who is indebted to B, promises, in consideration of his release by B, to pay the amount to C, who is a party to the arrangement, it is a sufficient consideration to support such promise.

APPEAL from the Ninth District, County of Siakiyou.

This was an action to recover a sum of money. The facts, as alleged in the complaint, are as follow:

Some time in the year 1856, J. A. Ripson sold to Matthias Woolsey, an undivided one-sixth interest in a mining claim, and placed Woolsey in possession. The transfer was in writing; Woolsey was to pay six hundred dollars, so soon as his share of the claim should yield that amount of money, after deducting one dollar per day for expenses.

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On the sixth day of November, 1856, Ripson assigned to plaintiff his claim on Woolsey for six hundred dollars, the amount Woolsey had agreed to pay for the interest purchased by him. After this assignment from Ripson to plaintiff of the debt on Woolsey, the latter sold the one-sixth interest, which he had purchased of Ripson, to the defendants in this suit, at the same price and upon the same terms as those upon which he had purchased of Ripson. Both Woolsey and the defendants had notice of the assignment from Ripson to plaintiff, and at the time of the sale from Woolsey to the defendants; and in consideration of such sale, and in further consideration that plaintiff would accept them as his debtors, and discharge Woolsey, the defendants undertook and promised to pay to plaintiff six hundred dollars, as soon as the one-sixth interest purchased by them should yield or be entitled to that sum, after deducting one dollar per day for expenses. The complaint avers that the one-sixth of the claim purchased by defendants has yielded more than six hundred dollars, after deducting one dollar per day for expenses; and also avers, that on the — day of May or June, 1858, the defendants sold and parted with their entire interest in the one-sixth of the claim purchased by them of Woolsey, but have failed and refused to pay the six hundred dollars to plaintiff. This complaint was filed October 16th, 1858. To this complaint the defendants demurred on the grounds:

First. That it appears upon the fact of the complaint, that the cause of action accrued more than two years prior to the commencement of the action; and,

Second. That the agreement of the defendants to pay plaintiff the six hundred dollars, was void under the Statute of Frauds, being a promise on their part, not in writing, to pay the debt of another.

The Court below held that both grounds of demurrer were well taken, and gave judgment for the defendants, from which plaintiff appealed to this Court.

Clark & Gass and Buckner for Appellant.

I. Plaintiff did not become the assignee of the debt until November 6th, 1856, which was within two years next preceding the institution of the suit. Defendants' promise to pay plaintiff being necessarily

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subsequent to plaintiff's acquiring the debt by assignment, their promise must have been within the two years. But there is still another reason why the Court erred in holding the cause of action to have accrued more than two years before the institution of the suit; no right of action accrued until the working of the claim had yielded six hundred dollars, in addition to one dollar per day for the expense of working it, or until the defendants parted with their interest in it, and this is alleged to have been in May or June, 1858, four or five months only before the institution of the suit.

Again, in this case, the Statute of Limitations cannot be taken advantage of by way of demurrer. In *Sublette v. Tinney et al.*, (9 Cal. 423) this Court held, that where it appeared upon the face of a bill in equity, that the cause of action did not accrue within the time limited by the statute, that advantage might be taken of the statute by demurrer. In actions at law, however, the statute must be specially pleaded.

Upon the second ground of demurrer, the Court below equally erred in rendering judgment for the defendants.

II. The promise alleged in the complaint, and upon which this action is based, is not a promise by the defendants to pay the debt of Woolsey, but an original promise on their part, for a valuable consideration, to pay the purchase money of a claim purchased by them, to the plaintiff, instead of paying the same money to Woolsey, from whom the purchase was made. The debt was their own, and instead of paying the money to Woolsey, who would immediately have paid it to plaintiff, they agreed to pay it directly to plaintiff. If the payment by them to plaintiff would, in addition to satisfying their own debt to Woolsey, have also satisfied the debt from Woolsey to plaintiff, this is not a matter of which they can complain, or which is to their prejudice. The same result would have followed if they had paid the money to Woolsey, and he had paid the same money to plaintiff. In either case both debts would have been discharged, and in either case the debt was their own they were paying. This is not at all the case provided for by the Statute of Frauds, in which the promise is required to be in writing. The statute only covers the case where A, without being indebted to B, and without any consideration moving

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him thereto, promises to pay the debt of B to C. That is not this case, where A purchases a house of B, and in consideration thereof, agrees to pay the price to C; he is only discharging his own debt, and such a case is not contemplated by the Statute of Frauds. *Brewster v. Skelton*, 8 Johns. 376.

No brief on file for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The Court below erred in sustaining the demurrer to the complaint. Although it is true, that where a complaint shows *prima facie* upon the facts stated, that the claim is barred by the Statute of Limitations, the defendant may take advantage of the defect by demurrer, yet it must clearly so appear. In chancery, under the English system, this was the rule; at law it was otherwise; there the statute must have been pleaded; but as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the equity rule. But when the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained on this ground. In the present instance, the six hundred dollars were not to be paid absolutely at a given time, but this sum was to be paid as soon as the payor's share of the claim sold should yield that amount, after deducting one dollar per day for expenses; and there is no averment that this state of things happened within the statutory limit. Nor is the case, as stated, within the Statute of Frauds. That statute requires a promise to pay the debt of another to be in writing, expressing the consideration. But this requirement has no reference to a promise by A, to pay money he owes by contract with B, to C. This is his debt; the mere direction in which he pays it, not altering the character of the contract from an original obligation. There is no difference between a debtor promising to pay his creditor directly so much money which he owes him, and his promising his creditor to pay a third person the same sum, by agreement between the three. The last promisor is paying his own debt, and creating his own obligation, not assuming another's. This has been often decided, and is too obvious

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to require authority or further illustration to make the proposition evident. Moreover, the promise to pay the six hundred dollars is averred to be a promise made to plaintiff, in consideration of plaintiff's discharge of Woolsey, his original debtor; and this is a sufficient consideration to support a promise made directly from promisor to promisee.

Judgment is reversed and cause remanded.

STOCKTON v. GARFRIAS.

Where defendant conveyed by deed, to plaintiff, a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line; *Held*, That in an action of trespass by the plaintiff against the defendant, for cutting timber upon the land previous to such agreement, the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the *locus in quo*.

The agreement would not retroact so as to show that to be a trespass which at the time was lawful.

Held, in such case, it was error in the Court to instruct the jury, that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession. The cutting of timber, by itself, was neither possession or title as against the owner.

APPEAL from the First District, County of Los Angeles.

The facts sufficiently appear in the opinion of the Court.

George Cadwalader for Appellant.

P. L. Edwards for Respondent.

BALDWIN, J., delivered the opinion of the Court — *TERRY, C. J.*, and *FIELD, J.*, concurring.

This was trespass for entering upon the plaintiff's land and cutting timber. There was no proof that the plaintiff was in *actual* possession of the spot of land alleged to be trespassed on at the time of

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the trespass. The plaintiff had bought the land of the defendant, and by a survey made of the premises, it was ascertained (or is asserted) that the lines of plaintiff's tract, as given by the deed, did not embrace *this* land. But the plaintiff attempted to show that a few days before the suit was brought, but after the trespass complained of, the plaintiff and defendant agreed that the line was such as to embrace this land. The whole question of fact was whether the cutting of the timber was on the land of the plaintiff or not. It was contended by the defendant that it was not; that the deed did not comprehend the *locus in quo*: and some evidence by the Surveyor and others was given, tending to show that the spot was not within the deed. How the fact is we cannot say; but that matter was a question peculiarly for the jury. If the deed did not, by its terms, include this tract, or if the terms of the deed were ambiguous, it is not impossible that the boundary lines may have been properly settled by agreement, or that the admission of the defendant may have been proper proof of their location. But, conceding this, it is clear that this agreement, if made, did not estop the defendant from showing title in himself previously to the agreement. It was competent for him to show that by the deed the property was not that of the plaintiff; that is, that the deed of the defendant did not embrace the *locus in quo*; and, though the plaintiff might show that, by agreement, the lines were settled, this agreement would not retroact so as to show that to be a trespass which at the time was lawful.

The Court erred in instructing the jury, under the circumstances, that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession; for the very question was, whether the premises in dispute were within the lines of the deed, so that the delivery of the deed would carry the title to such premises. The cutting of timber, by itself, of course, is neither possession or title — certainly not as against the owner, as the defendant claimed to be — and as, perhaps, if his construction of the deed were right, he was at the time of the asserted trespass.

The judgment is reversed and cause remanded.

Griffith v. Grogan.

GRIFFITH v. GROGAN *et al.*

Defendants were indebted to plaintiff in the sum of \$10,000; subsequently parties had a settlement, and defendants gave to plaintiff, in part payment of the debt, a note of third parties, for \$2,500, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement, of the defendants, who paid \$1,250, and gave to plaintiff another note of same parties for the balance, payable in one year: *Held*, In an action by plaintiff against the defendants to recover the balance, that defendants are liable for the amount.

Unless the note was received by express agreement as payment, it did not extinguish the debt. It only operated to extend the time of payment of the debt, to the time the note fell due, and hence the Statute of Limitations would commence running only from that time.

The acceptance of a note of a third party, by the creditor, is considered as accompanied with the condition that the note shall be paid at its maturity.

The obligation of the debtor to pay in such case, does not rest upon notice by the creditor of the non-payment of the note, but upon the fact that the note was not paid; and hence, delay on the part of the creditor in calling on the debtor, will not absolve him from his obligation to pay.

A part payment of a demand, of one of two debtors, will not discharge such debtor making the payment, from the payment of the balance. His obligation is to pay the whole.

APPEAL from the Twelfth District, County of San Francisco.

This was an action to recover a sum of money.

In March, 1853, the plaintiff, Griffith, loaned to the defendants, Grogan & Lent, \$10,000, for which they were to pay the plaintiff three per cent. per month.

In December, 1854, the defendants rendered their account to the plaintiff, and a settlement of the balance due was made. In such account the plaintiff is charged with a note of Hale & Vincent, for \$2,500. This note was received without objection by the plaintiff, and was then left by him with the defendants for collection. Upon its maturity, the note was not paid, and the plaintiff, after some months' delay, called upon the defendants for the amount for which it was taken in the settlement. The defendant, Lent, then advanced \$1,250 of the amount in cash; and a new note of Hale & Vincent for the balance, payable in one year, was given to plaintiff. This arrangement

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was made in October, 1855, under the supervision of Lent, who appears to have acted upon the impression that his own liability would be discharged by the payment of one-half, his copartnership with Grogan being at that time dissolved. The new note not being paid, the present action was brought to recover the balance remaining due upon the account rendered upon the settlement, the subsequent payment by Lent being credited thereon. On the trial, the plaintiff produced the new note of Hale & Vincent, and offered to deliver the same up to the defendants.

The cause was tried by a jury in the Court below, who returned a verdict for the plaintiff for \$1,717.77, and judgment was entered thereon. Defendants appealed to this Court.

Whitcomb, Pringle & Felton for Appellants.

I. It will be seen that there is a clear distinction between the case at bar and the case where the note or bill of a third person is given for a pre-existing debt. In the case at bar, after the first settlement the defendants were not indebted to the plaintiff at all; allowing that the first settlement was fraudulent, still it was only voidable, not void, and until actually avoided by the plaintiff by the surrender of the note which he received on the settlement, it was an extinguishment of all claims of the plaintiff against the defendants. The plaintiff had simply a right to avoid; this right he has never exercised. He voluntarily, and with full knowledge of all the facts, canceled the note he received in settlement, thereby putting it out of his power to rescind this contract, and received therefor one-half money and one-half in a new note of Hale & Vincent, made payable in a year.

II. The second point which we make is this: That the plaintiff should have alleged and proved a notice to defendants, that the second note was not paid, and have demanded the payment of the money before bringing suit.

Admitting that defendants could become liable to plaintiff at all, it would only be in case the second note of Hale & Vincent was not made. Now, whether this note was or was not paid, was a fact of which plaintiff alone could have notice, and the defendants could not know, until apprised by plaintiff, that the condition on which they were

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to be liable, had happened. It is a familiar principle, that notice and demand are necessary before bringing suit, where the liability depends on a condition, the happening or non-happening of which is peculiarly within the knowledge of the person in favor of whom the liability is to accrue. Now, in this case, on the hypothesis that the plaintiff received this second note in conditional payment, he bound himself to use reasonable diligence to collect it. He was bound to notify the defendants that this condition — that of nonpayment — on which their liability depended, and the happening of which he alone knew had really happened, and that they were liable. He had no right, either as a matter of law or common sense, to commence a suit on a liability of the existence of which defendants were kept in ignorance by himself. *Dayton v. Trull*, 23 Wend. 345.

Sidney V. Smith for Respondent.

I. That the taking of a note of a third person for a pre-existing debt, is not payment of satisfaction, except it be so expressly agreed; it is merely an extension of the time of payment of the original debt.

Upon this point the doctrine is well settled; the cases are all reviewed in 2d American Leading Cases, (pp. 162-196) the leading case there cited being *Tobey v. Barber* (5 Johns. 98); and the correctness of the doctrine is recognized by this Court in *Brewster v. Bours*, 5 Cal. 501.

II. Whether it was the intention of the parties that the note was given and taken in full discharge, or not, was a question for the jury. 2d Am. Lead. Cases, 180.

III. This Court, in *Armstrong v. Hayward*, (6 Cal. 183) decided that a release to one joint debtor, to avail either him or his co-debtor, must be a technical release under seal; and no such release is pretended in this case.

But the appellants say there was no pre-existing debt, and that therefore this case is clearly distinguished from the class of cases to which respondent has referred; and they give as their reason for it, that Griffith never rescinded the transactions of December, 1854, because, with a full knowledge of all the facts, he accepted the \$2,500 note, and delivered it up to Hale at the time of the settlement in Oc-

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tober, 1855; and in proof of this, they refer to Hale's evidence. They therefore contend that there was an entire waiver of the fraud of December, 1854, and they asked the Court so to instruct the jury.

The Court below properly refused the instruction as asked for, because it is well settled that while the party defrauded may, by accepting that which was the subject of the fraud, lose the right to rescind, yet without more, he does not, by that act alone, lose his right to recover for the fraud. *Allaire v. Whitney*, 1 Hill, 484; *Whitney v. Allaire*, 4 Denio, 554.

IV. It was not necessary that notice of nonpayment should have been given to Grogan & Lent.

In *Dayton v. Trull*, (23 Wend. 345) cited by appellants, the case was not that of a note of a third person, but it was a bill of exchange drawn by the original debtor on a third person, which bill was not produced, nor was it shown to have been presented for payment.

The authors of *American Leading Cases*, (vol. 2, page 183) refer to the law merchant as controlling this class of paper, and say that it is the duty of the holder of such paper to make it available for the purpose for which it is given, and that therefore a plea that the plaintiff has taken the note of a third person, on account of the cause of action, is sufficient to create a bar to the suit, which can only be removed by showing that the ordinary course of business had been pursued with reference to the security thus taken, and that it has notwithstanding proved inadequate as a means of payment.

Dayton v. Trull was decided in accordance with the law merchant, which requires that the maker of a bill of exchange shall be notified of the presentment and nonpayment.

In the case before the Court, the note for \$1,500 was duly presented to Hale & Vincent for payment, and payment refused. Inasmuch as the note was not indorsed by Grogan & Lent, nor were they parties to it, it was not necessary, under the law merchant, to give notice to them.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

The money placed in the hands of the defendants, in March, 1853,

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cannot, in strictness, be termed a deposit. The defendants were to have the use of the money, and to allow interest upon it, although the plaintiff was at liberty to withdraw such portion of the same as he chose, at any time. It was, in fact, a loan payable in whole or in part, on demand. In what manner, therefore, the defendants used the money, it is of no consequence to inquire. It was to them, and not to any investments of the money, the plaintiff was to look for repayment.

In December, 1854, the defendants rendered their account to the plaintiff, and a settlement of the balance due was made. In such account the plaintiff is charged with a note of Hale & Vincent for \$2,500. This note was received, as it would appear, without objection by the plaintiff, and was then left by him with the defendants for collection. Upon its maturity, the note was not paid, and the plaintiff, after some months' delay, called upon the defendants for the amount for which it was taken in the settlement. The defendant, Lent, then advanced \$1,250 of the amount in cash, and a new note of Hale & Vincent for the balance, payable in one year, was given to the plaintiff. This arrangement was made in October, 1855, under the supervision of Lent, who appears to have acted under the impression that his own liability would be discharged by the payment of one-half, his copartnership with Grogan being at that time dissolved. The new note not being paid, the present action was brought to recover the balance remaining due upon the account rendered upon the settlement, the subsequent payment by Lent being credited thereon. On the trial, plaintiff produced the new note of Hale & Vincent, and offered to deliver the same up to the defendants.

The only questions material for the determination of the case, relate to the effect upon the claim of the plaintiff of taking the note of Hale & Vincent in the settlement of December, 1854, the effect of the renewal of the note, and the application of the Statute of Limitations to the demand.

The consideration of the note of \$2,500 is of no moment. Whether given for a loan of a part of the money received from the plaintiff, or upon a sale of flour, is immaterial. The only point for consideration relates to the intention, or rather the agreement, with which it was received by the plaintiff. Unless received by express agreement as

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payment, it did not extinguish the debt. It only operated to extend until its maturity, the period for the payment of the debt. This is the settled doctrine as to the notes of the debtor, or of third persons, taken for an antecedent debt. Their acceptance is considered as accompanied with the condition of their payment at maturity. Thus it was said, as long ago as the time of Lord Holt, that "a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so." (Clark v. Mundal, 1 Salk. 124.) And that where the note of a third person "is given in payment of a precedent debt, it is always taken under this condition to be payment, if the money be paid thereon in a convenient time." (Ward v. Evans, 2 Ld. Raymond, 928.) And such has been the rule in England ever since. The case of Tobey v. Barber, (5 John. 68) is the leading American authority on the point in question, and has been followed, with few exceptions, in the several States. That was an action upon a covenant in a lease to pay rent. In defense to a part of the claim, the defendant gave in evidence a receipt of the plaintiff of one hundred and sixty-three dollars, purporting in terms to be in full for the rent for two quarters. The plaintiff then proved that the note of one Coffin, payable in four months, constituted a portion of the money named in the receipt; that Coffin failed before the maturity of the note, and took the benefit of the Insolvent Act, and that the note was not paid. The admission of this proof was objected to, but the Supreme Court held the same admissible, and in its opinion said: "The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled, and repeatedly recognized in this Court, that taking a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of *laches* in not presenting it for payment in due time. He is not obliged to sue upon it; he may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt until a default be made in the payment of the note. (1 Salk. 125; 5 Term Rep. 513; 6 Term Rep. 52; 7 Term Rep. 66; 1 Esp. N. P. 3; 1 Cranch, 181; Herring v. Sanger, 3 Johns. Cas. 71, and Roget v. Merritt and Clapp,

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2 Caines, 117.) There is no evidence in this case that the plaintiff agreed to run the risk of the solvency of Coffin, and to take the note as absolute payment, except it be the inference arising from the receipt itself, and that is not enough to establish such a positive agreement."

In *Jackson v. Weed*, (9 John. 310) the plaintiff sued for goods sold and delivered, for which the note of a third person was taken, and a receipt in full given; and it was left to the jury to determine whether the plaintiff had agreed to receive the note as payment, and to run the risk of its being paid. The jury having found for the plaintiff, the Court refused a new trial, and in its opinion said: "The books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterwards turn out to be of no value."

In *Olcott v. Rathbone*, (5 Wend. 490) the cashier of a bank, on the maturity of a note, accepted a check of a third person for part of the money, and a new note for the balance, and thereupon delivered up the old note, and it was held that on the dishonor of the check, an action would lie upon the original note, to recover the amount of the check, and that the delivering up of the original note, was not evidence that the check and new note were received in payment. See also *Hays v. Stone*, 7 Hill, 128; *Jaffrey v. Cornish*, 10 New Hamp. 505; *Porter v. Beverly*, 10 Peters, 532; *Schemertron v. Laines*, 7 John. 311; *Elwood v. Deifendorf*, 5 Barb. 398; *Van Eps v. Dillaye*, 6 Barb. 244; *Maye v. Miller*, 1 W. C. C. 328.

The authorities proceed upon the obvious ground that nothing is to be considered as payment in fact, but that which is in truth such, unless something else is expressly agreed to be received in its place. That the mere promise to pay, whether by the original debtor or a third party, cannot of itself be regarded as an effective payment, is manifest. Testing, then, the case at bar by these authorities, the defense fails. The only evidence that the plaintiff received the note of Hale & Vincent for \$2,500, in payment, is derived from the account rendered by the defendants, and his own allegation in the complaint. Neither are evidence of an agreement to receive the note in satisfaction of the debt. Neither are inconsistent with the conditional acceptance of the same. They are not more expressive than the receipt in

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full in *Tobey v. Barber* and *Johnson v. Weed* or the surrender of the original note in *Olcott v. Rathbone*. And all the attendant and subsequent circumstances go to show that the plaintiff never intended to take the note in absolute payment, and assume the risk of its ultimate collection upon himself. It does not appear that he knew anything of the responsibility of the makers; and it is not reasonable to suppose that he would have released, without any consideration, a claim upon defendants, who were abundantly responsible, for the note of parties of whose means he was wholly ignorant. The question in any view, was one of fact to be determined by the jury, and their finding is conclusive. No stress can be placed upon the delay in calling upon the defendants for payment, after the maturity of the note. They were fully aware of its nonpayment; the note was in their possession for collection, and their obligation to meet its amount did not rest upon any notice, but upon the fact that it was not paid at maturity.

The renewal of the note in part could not alter the original relations of the parties as debtors and creditors, except in the increased extension of the time of payment, until the maturity of the renewed note. The makers were at the time wholly insolvent, and their insolvency was known to the plaintiff. That the renewed note was taken under these circumstances in satisfaction of the balance, is at least highly improbable. The evidence disclosed by the record does not establish any agreement to this effect, and the presumptions of the law are against its existence. The whole arrangement appears to have been made under the supervision, if not by the direct request, of Lent. It may be that it was the expectation of Lent, that he would be entirely released of responsibility upon the whole demand, by paying his portion. But if so, he was mistaken in the legal effect of the transaction. A part payment of the demand by one of two debtors, was no consideration for a discharge to him of the balance. The payment of the entire amount was the obligation of both; the partial payment was but a partial discharge of the existing obligation, and furnished no claim for the relinquishment of any rights for the residue. (*Armstrong v. Hayward*, 6 Cal. 183.) To have availed him, the release to Lent should have been a technical one under seal.

The Statute of Limitations does not bar the demand. It is true,

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that the action is for the balance due upon the amount rendered in December, 1854, and were it not for the notes of Hale & Vincent, the statute would have run against the demand. These notes operated, however, as an extension of the period of payment, until October, 1856, and the present action was brought in December following.

The case appears to have been tried upon the impression that it was essential to the plaintiff's recovery to make out a misrepresentation by one of the parties as to the solvency of Hale & Vincent, and the consideration of their note, and several of the instructions asked in the Court below, and several of the points made in this Court, are founded upon that impression. These we do not notice, as from the views we have taken, they are entirely immaterial to the determination of the rights of the parties.

Judgment affirmed.

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An indictment which charges an offense in the following language is insufficient:

"In and upon one John Provisso feloniously did make an assault with a deadly weapon, to wit, a pistol loaded with powder and ball, with intent then and there to kill said Provisso, without any just cause or provocation, but with an abandoned and malignant heart."

The allegation of premeditation, or malice aforethought, is a necessary ingredient to the crime of murder, or of an assault with intent to commit such crime.

APPEAL from the Court of Sessions, County of Contra Costa.

The defendant was indicted for an assault with a deadly weapon, with intent to kill. He plead not guilty; was tried by a jury who returned the following verdict: "We, the jury, find the defendant guilty as charged in the indictment." Upon this verdict judgment was rendered, and the defendant was sentenced to five years' confinement in the State prison. The defendant moved the Court to arrest the judgment upon the following grounds:

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1st. The facts stated in the indictment do not constitute a public offense.

2d. The indictment does not substantially conform to the requirements of sections 237 and 238 of the Act regulating Criminal Practice.

The motion was overruled, and the defendant appealed to this Court.

M. J. Chase for Appellant.

W. W. Theobalds for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

The indictment charges that defendant at, etc., "in and upon one John Provisso feloniously did make an assault with a deadly weapon, to wit, a pistol loaded with powder and ball, with intent then and there to kill said Provisso, without any just cause or provocation, but with an abandoned and malignant heart."

The statute requires that an indictment shall be direct and certain as to the person charged; the offense charged and the circumstances constituting the offense, when necessary to constitute a complete offense, (sec. 239) and the offense charged, must be so clearly and distinctly set forth that a person of common understanding may know what was intended, and the Court enabled to pronounce judgment according to the right of the case.

The indictment in this case does not comply with these requirements; and indeed it is difficult to determine from the paper itself whether it was intended by the attorney who drew it as an indictment for an assault with intent to commit murder, or an assault with a deadly weapon with intent to inflict bodily injury, which is an offense of much lower grade.

The Court below seems to have regarded it as an indictment for an assault to commit murder, and sentenced defendant to five years' imprisonment; but the language employed is more consistent with the supposition that it was intended to charge the lower offense under the second subdivision of section 50 of the Act concerning Crimes and Punishments.

It is true the indictment charges the act to have been done with

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intent to kill, but it does not allege premeditation or malice aforethought, which is a necessary ingredient to the crime of murder, or of assault with intent to commit such a crime, while it contains averments of the absence of considerable provocation, etc., which are not at all appropriate to an indictment for an assault with intent to murder, but are necessary to make out the statutory offense of assault with a deadly weapon.

It follows that the Court erred in denying the motion in arrest of judgment.

Judgment reversed and cause remanded for further proceedings.

**LIES v. DE DIABLAR AND DE LA GUERRA, EXECUTOR OF
PEDRO DIABLAR, DECEASED.**

A mortgage of the homestead of the family, executed by the husband only, is void. To make such mortgage valid, the wife should join with the husband in the execution of it.

Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead.

The homestead right is as much for the benefit of the children as for the benefit of the wife.

An order of the Probate Court setting apart property as a homestead, will not defeat a mortgage which has properly vested as a lien upon the property, where the mortgagor was not a party to such proceedings.

It does not matter when or how the homestead was acquired, or whether it was common or separate property; it can only be conveyed in the manner prescribed by law.

APPEAL from the Second District, County of Santa Barbara.

This was a bill to foreclose a mortgage. The bill alleges, that previous to the year 1846, Pedro Diablar (the mortgagor) and Tomasa Badillo were married according to the laws then in force in California. After the marriage, and previous to the year 1849, Pedro Diablar became seized of a certain lot of ground upon which he erected a

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dwelling-house, which was the home of the family. That in the year 1852, Tomasa Badillo, wife of the said Pedro, eloped from her said husband, and lived an adulterous life. That at the time of her elopement she left two children with the husband.

On the twenty-sixth of April, 1853, the said Pedro made his will, in which he acknowledged his marriage with Badillo, and stated that by her he had two children, who were then minors, and whom he declared his sole heirs to his property. "Also, I divest and deprive my aforesaid wife from the title or right that she may have in this property, for having abandoned her obligations and tender children, as is publicly notorious in this place."

On the eleventh day of July, 1854, the said Pedro executed and delivered to plaintiff a certain mortgage of the premises occupied as a homestead — the substance of the mortgage is set out — which was acknowledged and recorded.

On the twenty-seventh of October, 1854, Pedro died, without having revoked his will. At the time of his death, the full sum of money specified in the mortgage was due and unpaid. That the will was admitted to probate, and letters testamentary were granted thereon. That subsequently plaintiff presented his mortgage to the executor and Probate Judge, and the same was approved and allowed by both of them. That the children of Pedro and his widow claim to have some right in the mortgaged premises, and that such claim is set up by virtue of an order of the Probate Court setting apart said premises to the widow and children as a homestead; and that plaintiff was not a party to said proceeding, and had no notice of the same. The bill then concludes with the usual prayer for the sale of the premises, etc., to satisfy said mortgage debt.

Defendant demurred to the bill on three grounds:

1st. The Court has no jurisdiction of the subject of the action.

2d. The complaint does not state facts sufficient to constitute a cause of action.

3d. Right of the parties has been determined by the Probate Court setting aside the premises to defendants as a homestead.

The Court sustained the demurrer, and judgment was entered for defendants. Plaintiff appealed to this Court.

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Eugene Lies for Appellant.

I. The assignment of homestead in the premises to the widow by the Probate Court, cannot be considered an adjudication. It was *inter alios acta*, as amply shown by the pleadings. This plaintiff had no notice, and was not a party to that proceeding.

II. The deceased, Peter Diablar, whose wife had eloped from him, executed alone a mortgage of the homestead. Furthermore, he made a will, whereby he disinherited his adulterous wife. All this we contend he had a right to do, and the mortgagee's cause of action rests upon that right. *Story's Conflict of Laws*, secs. 84, 87, 102, 103, 112, 225, 138.

Isaac Hartman for Respondents.

I. The Court below had no jurisdiction of the case.

When a claim has been presented to the Probate Court, and allowed, the District Court has no jurisdiction. *Ellison v. Halleck et al.*, 6 Cal. 386; *Belloc v. Rogers*, 9 Cal. 143; *Hentsch v. Porter*, 10 Cal. 559.

II. In law, the premises were the homestead of the family, and the execution of the mortgage by the husband alone did not affect the homestead right of the wife and children. *McHenry v. Moon*, 5 Cal. 90; *Sargent v. Wilson*, 5 Cal. 504; *Poole v. Genard*, 6 Cal. 234; *Revalk v. Kraemer*, 8 Cal. 66; *Buchanan's Estate*, 8 Cal. 507; *Dunn v. Tozer*, 10 Cal. 167.

III. The order of the Probate Court setting aside the premises as a homestead was a protection against creditors. *Rix v. McHenry*, 7 Cal. 89.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

We think that the plaintiff below cannot maintain his claim, to subject to his mortgage, executed in 1854, the premises, (to the extent of \$5,000 in value) for the reason that these were the homestead of the family. The adultery or abandonment by the wife did not divest the property of the character of homestead. It is not material when the title to the homestead accrued. It was within the competency of

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the Legislature to declare what property should be exempt from forced sale, and what should be the mode of its disposition, provided antecedent claims of creditors or others were not affected by the law. The Legislature has provided that the homestead should not be sold except in a particular way, which is, by the wife joining the husband in the deed. It is a mistake to suppose that this provision was solely for the benefit of the wife. It was as much for the benefit of the children. The husband can make no disposition of the property except in the statutory mode, and it does not descend as assets of the estate if he leaves a family.

It is not necessary to inquire whether the husband could make any disposition of the estate by will, which would deprive the wife, under the circumstances, of her right to participate in the benefits of the homestead; though we do not see that the statute has made the crime of adultery, or abandonment, or desertion by the wife of the homestead, or of the family, a cause of defeating or impairing her right.

The proceedings of the Probate Court—the plaintiff not having been a party—were not, of themselves, operative to defeat his claim to this property; but the radical objection to the plaintiff's recovery is, that no title, under the facts stated, inured to him—the deed of the husband alone to the homestead premises being simply void.

We think it not material to inquire what the Mexican law prevailing at the time of the marriage was; nor at what time the property was acquired; nor whether it was common or separate property. For, as before intimated, the Legislature could constitutionally declare the modes of transfer of property to take effect *in futuro*, subject only to the provision that rights already vested had not intervened. No man has any vested right to dispose of any property, by whatever title he holds, in any way other than that which the law prescribes. The law might prescribe that real estate of every kind should pass by deed of husband and wife; it has prescribed that a particular description of real estate—the homestead—should only pass in this way; and it is not material by what title or when the party acquires the property.

The judgment is affirmed.

Muldrow v. Norris.

MULDROW v. NORRIS.

The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general, of all matters in controversy, without specification it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission.

If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to *all* the matters submitted, and operates to render the submission conditional, and the award binding only in case the arbitrators pass upon every subject, either specifically referred to them, or brought to their notice under the general terms of the submission.

Where one of the principal matters in dispute, passed upon by the arbitrators, was subsequently set aside by a higher Court, and the judgment rendered upon the award vacated by reason of the error of the arbitrators in passing upon said matter, it left the award as though such item submitted had never been passed upon, and consequently the award did not effect the purposes of the submission by settling all matters of controversy between the parties. The consideration which moved the parties to enter into the submission had failed, and hence the award is void.

The award being void, a release of action, filed by one of the parties in pursuance of the submission, is also void.

A useless and invalid determination upon one item properly presented within the general terms of the submission, must, on principle, be as fatal to the entire action of the arbitrators as an omission intentional, or unintentional, to notice the item at all.

The doctrine that an award may be good in part and bad in part applies to instances where there has been an excess of power in the arbitrators by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter forming no consideration for other parts of the award, and the settlement of which could not have contributed to induce the arbitration.

APPEAL from the Eleventh District, County of Yolo.

This was an action brought upon an award and agreement of the parties, submitting certain matters of difference between them to arbitration. The agreement of submission is as follows:

“Whereas various matters of difference have for a long time existed

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between the undersigned, which, for the purpose of having the same speedily and properly adjusted, they desire to submit to the judgment and decision of disinterested persons, to be selected by the parties hereto — therefore, we hereby agree to submit to Thomas J. White, Charles Horner and William McDaniel, all matters of difference, suits, actions or causes of actions, now existing or pending between us, which arose or accrued to either of us at any time before the first day of December last past, to determine the same; and we do further agree, that the award of the said Thomas J. White, Charles Horner and William McDaniel, or of any two of them, upon the matter hereinbefore submitted, shall be final and conclusive between us, and that we will abide the same; and we hereby constitute the said Thomas J. White, Charles Horner and William McDaniel, or either of them, our attorney, or attorneys to confess at any regular term of the District Court of the Sixth Judicial District in and for Sacramento county, or other Court having jurisdiction of the same, a judgment against us or either of us, in accordance with the terms of said award. And we further agree, that upon such judgment being rendered, we will take no appeal from the same, nor sue out any writ of error, *certiorari*, or other writs, for the purpose of carrying the same to a higher Court, or for the purpose of staying or preventing the issue of execution therefor. The authority hereinbefore conferred to confess judgment upon said award, is intended to be irrevocable, *provided* an award be made as aforesaid by or before the first day of April next.

“The said Thomas J. White, Charles Horner and William McDaniel, or any two of them, shall have power, etc. (Here follows a clause for the payment of the costs attending the arbitration and costs of suits now pending, etc.)

“This submission is intended to embrace all actions or suits upon which judgment may have been heretofore entered, as well as actions and suits now pending, and causes of actions and other matters of difference. All actions or suits now pending on appeal taken, shall be dismissed upon the making of said award or at any regular term of the Court or Courts in which the same may be pending, after the making of the same, upon the motion of either party hereto, and shall not, in the meantime, be prosecuted; nor shall any writ be sued out, or other

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proceeding instituted, in the meantime, for the purpose of carrying said judgment to an Appellate Court, or for the purpose of reversing or modifying the same, nor any other purpose; nor shall execution in the meantime be sued out on the same.

“Witness our hands and seals, this fourteenth day of February, A. D. 1851.

“SAMUEL NORRIS, [L. S.]

“WILLIAM MULDROW. [L. S.]”

Before the first of April, the arbitrators made an award upon all topics of controversy between the parties, in which they directed Norris to pay to Muldrow the sum of \$23,500, and by virtue of the authority contained in the submission, confessed a judgment for that amount in favor of Muldrow and against Norris in the District Court for Sacramento county. Norris subsequently moved the District Court to set aside this judgment. The motion was overruled, and Norris appealed therefrom to the Supreme Court. (See 2 Cal. Rep., p. 74.) The Supreme Court reversed the ruling of the District Court, and vacated the judgment, upon grounds which appear in the opinion of the Court in this case. Thereupon Muldrow brought this action.

Upon the trial in the Court below the plaintiff introduced the submission, the award, the bond, and a release from plaintiff to defendant, releasing all actions, demands, etc. The defendant gave in evidence the judgment of the Supreme Court setting aside the judgment confessed on the award.

The case was tried in the Court below, without a jury, and judgment rendered in favor of the plaintiff for \$10,000. Norris moved the Court for a new trial, which motion was overruled, and he appealed to this Court.

Robinson, Beatty & Botts for Appellant.

The appellant insists that there was no award made by the arbitrators binding on him in law.

That an award of arbitrators decides the right of parties as effectually as a judgment at law, or a decree in chancery, and is as binding, is not denied. But their conclusiveness must be understood with the

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qualification that the award was a valid and binding one; or, in other words, the arbitrators must have jurisdiction. *Tewis ex rel. v. Tewis ex rel.*, 4th Monroe, 47, 48.

The arbitrators acquire their jurisdiction, or power of deciding, from the agreement to submit; and the authority conferred and the duty imposed by the submission must be observed. It is that which gives jurisdiction. *Jackson v. Hunt*, 6th Johns. 14; *Harrington v. Rich*, 6th Vermont Rep. 666, 672; 2d Cowen & Hill's Notes, 223.

What were the various matters of controversy, litigation, etc., submitted to the arbitrators, we have no means of knowing. But this we do know from the award itself, as reported by the arbitrators, upon the presumption heretofore stated, that three subjects of controversy were submitted to them, namely:

The claim for damages growing out of a breach of a lease.

The claim for damages for the refusal of Norris to furnish thirty head of cows with calves.

The claim set up by Muldrow for Norris's interference with the ferry.

On each and all of these the award finds against Norris, and orders him to pay to Muldrow the sum of \$23,500, to wit: \$4,000 for the cows, \$6,000 for the ferry, and \$13,500 for the land; and for this sum judgment was confessed by the arbitrators. But this judgment was set aside by this Court because the award was contrary to law, or the finding not sustained by the facts. The arbitrators, therefore, had no authority under the submission and the law to confess such judgment. But by the terms of the submission, whatever award was made, a judgment could be confessed for. If the judgment confessed was held to be invalid, the award must also be invalid; particularly as the judgment was set aside for defects in the award.

If it is answered to this, however, that inasmuch as the decision of this Court vacated the judgment confessed because of error in the arbitrators, on one portion only of the award, and on one of the subjects submitted to them, and that the award shall stand good for all the rest, we reply:

"It is conceded that an award may be good in part and bad in part. But this doctrine applies only where the submission is of particular sub-

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jects, and the award covers those and other subjects, and there is no connection between the two classes of subjects, and they are in nowise dependent on each other, it will be enforced as to these within the submission, and held void as to the others." It is purely a question of authority or power, "if that which is void affects not the merits of the submission the residue shall be held valid." 1 Wend. 326; 13 Johns. 264; 2d Cow. 638.

The arbitrators had no authority to decide any controversy unless they decided all the controversies. If any one was omitted that was presented to their attention, their power failed; or if they acted on any one in any manner whatever, so that their action was useless, or invalid, or wrong, their whole award must fail; because the submission embraced all matters of dispute, and the omission to render a valid award as to any one of them, or their improperly deciding any of them, so as to leave it open for future contest and litigation, "affected the merits of the submission." To omit a duty is as much an error as to usurp a power. Nay, more so, for the omission of the duty renders the whole award void, while the decision of a subject not submitted avoids it only *pro tanto*. *Randall v. Randall*, 7 East, 81, 83; *Wright v. Wright*, 5 Cowen, 197; *Karthans. v. Ferrer*, 1 Peters, 222; *Melchel v. Stavely*, 13 East, 58; *George v. Lansely*, 8 East, 13; *Emery v. Hitchcocke*, 12 Wend. 156.

P. L. Edwards for Respondent.

I. In opposition to the views expressed by the counsel for the appellant, we maintain, that in the legal sense, and within the meaning of the submission, all matters in difference between the parties were passed upon and decided by the arbitrators. That one item or demand was allowed, to which the respondent was not entitled, either legally or equitably, cannot affect the legal conclusion. The damages allowed for this item, according to the decision cited, were not allowable either at law or in equity. They were not, within the meaning of the submission, a subject of controversy or difference either in a Court of law or equity. Such was the opinion of the Court below in the present case.

In *Randall v. Randall*, 17 East, 79, cited by the counsel, there was in the submission a clause *ita quod*, all matters in difference should be

decided by a certain day. That case differs from the present; for here there is no condition except as to the time within which the award should be made. All matters of difference were submitted; but still the award might be good in part, although bad in another part, provided that the award should be made within the time limited. The submission was not *ita quod* all matters in difference should be decided, but *ita quod* a decision should be made before the time limited.

In *Mitchell v. Slaval*, 16 East, 58, as cited by the learned counsel, Lord Ellenborough said, "That the arbitrators were called upon to act in a matter in controversy, and have not acted. The award is, therefore, not final; but there is no award at all respecting a matter of difference which is stated to have *been notified* to the arbitrators. It was a condition of the submission that they were to arbitrate upon all matters in difference, etc."

Now, is not that case broadly distinguishable from the present? Here no matter of difference was notified to the arbitrators, upon which they refused or failed to act. They passed upon all differences brought to their notice; and the gravamen of the objection on the part of the appellant is, that according to the opinion of this Court already cited, they went further and allowed damages upon a demand neither legal nor equitable, and for which there could rightfully be no recovery either legal or equitable. As far as the arbitrators could act, they did so. Their award is good to the extent of the legitimate demands of the parties, and beyond this it is only void.

Although an award ought to decide on all the questions contained in the submission, still, to avoid it for want of such decision, it should appear that such questions were "actually in controversy between the parties." And "where part of an award is void by reason of the arbitrator having exceeded his power, it does not vitiate the residue." *Jackson v. Van Allen et al.*, 14 John. R. 96.

In opposition to the counsel, we insist that there is here no remaining subject of controversy. All is ended upon the payment of the judgment under review; that which is supposed to remain as a subject of difference is only hypothetical, imaginary! According to the highest judicial authority of the State, it never was, and never can be, the subject of a legal or equitable recovery. It, then, was a myth, intan-

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gible and unavailable, and so now and forever remains! It is, therefore, no subject or matter of difference within the legal intent and meaning of the submission!

II. Having noticed the principal points made by the counsel, we proceed to fortify the case of the respondent by other responsive considerations and authorities:

1. The appellant has uninterruptedly retained and enjoyed all the benefits of the submission and award on his part. These are the facts, and it is so to be held, for there is not a pretense to the contrary to be found in the pleadings or evidence. If such had not been the facts, the appellant should have shown to the contrary. The law is, that "If one of the parties to an *unauthorized* award perform it on his part, and the other party accepts such performance, the latter thereby ratifies the award." "Acts of arbitrators may be ratified." *Culver v. Ashley*, 19 Pick. R. 300. Here the whole award of money was against the appellant, he having every other subject of difference in his own possession. Shall he now, after the lapse of years, and after the intervention of the Statute of Limitations, be allowed to hold all the property which was the subject of the differences, and yet avoid the whole award? Can he be allowed to hold all the advantages of the submission and award on his part, and yet avoid their force and effect so far as it is against himself?

2. The true question is, whether the powers of the arbitrators were wholly conditional, or whether, all matters being submitted, it was made a condition that all matters of difference should be ended by them?

"The question, therefore, is reduced to this: Whether, under the reference, (arbitration) it is necessary to the validity of any award to be made pursuant to it, that it should decide all matters in dispute? And this is a mere question of construction, for there is no rule of law requiring it; its necessity arises from the contract of the parties. The old rule was, that unless the submission expressly made it conditional with an *ita quod*, an award of a part only was good, etc." *Wrightson v. Beywater*, 3 Exch. R. 199. And if the matters omitted are "not necessarily dependent upon and connected with the other points, the award should be sustained." *Ib.*

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3. In *Birks v. Trippet*, 1 Sanders' Rep. 32, which has always been regarded as a leading case, it was held, that even admitting "that a submission has been conditional with an *ita quod*, yet this is a good award, for he hath awarded general releases from both parties; and although the defendant had notified his debt to the arbitrator; yet the arbitrator was not bound to allow it," etc. "And here he has given his judgment that the plaintiff should be released by the defendant; and so he has made his award thereof, and of all differences whatsoever."

Afterwards, Dord Tenterden said he was glad that the case of *Birks v. Trippet* enabled him "to give judgment in favor of the plaintiff;" and the whole Court held, that the arbitrators, "by having awarded mutual and general releases, must be deemed to have adjudged and finally decided upon the matters in those pleas respectively mentioned, and the *general release* would be an answer to any actions or claims founded upon them," etc. *Wharton v. King*, 22 Eng. Com. L. R. 223.

So, again, "where all matters in difference are referred to an arbitrator, an award directing the execution of general releases closes all accounts between the parties up to the time of the submission." *Trimingham v. Trimingham*, 30 Eng. Com. L. R. 604.

The reason of the rule requiring a decision of all matters in difference is, that if either party cannot have the advantages of the award by reason of its nullity, then the other should not have the advantages on his part; and the award must be held void in the whole. 2 Sanders' R. 293, notes.

FIELD, J., delivered the opinion of the Court—BALDWIN, J., concurring.

The submission of the parties embraces all matters of controversy existing between them, previous to December, 1850. What those matters were the submission does not state; it only recites that they were various, and that the agreement was entered into "for the purpose of having the same speedily and properly adjusted." From its language it must be inferred that the parties stipulated to withdraw their several matters of difference from the consideration of the ordinary tribunals, upon the condition that they should be all adjusted and

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settled by Judges of their own selection, and full peace be thus obtained, and not mere partial freedom from litigation.

The rule is general, that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general, of all matters in controversy, without specification it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission. The authorities to this effect are numerous and decisive. Thus, in *Randall v. Randall*, 7 East, 81, the submission embraced three subjects: one to determine all actions between the parties; another to fix the value to be put upon hop holes and potatoes in certain land; and the third, to ascertain the rent to be paid for other land. The arbitrators made their award upon the first two subjects, but omitted to notice the last, and the Court held that the whole award was vitiated by the omission. "The authority," said Ellenborough, C. J., "given to the arbitrators, was conditioned, *ita quod* they should arbitrate upon these matters by a certain day. If, then, they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect; and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award, being good in part and bad in part, the good part shall not be vitiated by the arbitrator having also directed something to be done which is superfluous and bad. But here the very condition on which the parties submitted to the award has failed." And in the same case, Le Blanc, J., said: "The contract of the parties is in effect this—One says that he will submit to the arbitrators to ascertain what he is to pay for the hop poles, etc., upon condition that it shall also be referred to them to decide what rent is to be paid for certain land. And he may fairly have said that unless both those matters of difference were referred he would not refer either of them singly. If, then, the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to."

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In *Mitchell v. Stavelly*, 16 East, 58, to the action on an arbitration bond the defendant pleaded, among other things, that a certain matter of difference between the parties was laid before the arbitrators, but was not included in their award, and the Court held the plea good. The submission was of all matters in difference, and Ellenborough, C. J., said: "The award, therefore, is not only not final, but there is no award at all respecting one of the matters in difference referred, which is stated to have been notified to the arbitrators. It was a condition of the submission that they were to award upon all matters in difference between the parties. That is an important difficulty, against which the plaintiff has to contend, and it would be to no purpose to amend the pleadings."

To the same effect is the case of *Wright v. Wright*, 5 Cowen, 197. That was an action upon an arbitration bond conditioned to abide the award of certain arbitrators, upon the usual general submission, with the *ita quod* clause. The defendants pleaded that the arbitrators left undetermined a controversy between the parties which was brought to their notice; and, on demurrer to the replication to the plea, the Court, per Sutherland, J., said: "It is a general rule, that where the bond of submission contains an *ita quod* clause, the award will be void unless it comprehend all the matters submitted. This rule is invariable where the particular matters submitted are specified in the bond. But where the submission is general, and an award concerning one or more things is made, it will be presumed, until the contrary is shown, that nothing else was referred to the arbitrators, or brought before them by the parties. But if the arbitrators award in relation to one or more things, and say that they will not meddle with the rest, the whole is void, because they have not pursued their authority; and in such a case it is immaterial whether the submission was general or special, for, if general, it appears on the face of the award that the arbitrators had notice of the matters which they refuse to decide."

The submission or bond in the several cases cited contained an *ita quod* clause; and this fact is considered as distinguishing those cases from the one at bar. The *ita quod* clause, so called, is only a condition that the award should be rendered upon the matters submitted by a specified day. The designation of the day is one part of the condi-

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tion essential to be complied with, but not more so than the other part, that the award should be upon the matters submitted.

In the cases of *Mitchell v. Stavely*, 16 East, 58, and *Wright v. Wright*, 5 Cowen, the award was rendered within the time designated, and the decisions were made upon the omission of the arbitrators to pass upon all the items specified in the submission, or laid before them under its general terms. The same was evidently the case with the award in *Randall v. Randall*, 7 East, as the objection taken was not to the time the award was rendered, but that one of the three subjects submitted was left undetermined. See also, *Brown v. Merrill*, 4 Eliz., Dryer, 216; *Risden v. Inglet*, 2 Cro. Eliz. 838; *Ormelade v. Coke*, 3 Cro. Jac. 354; *Bradford v. Bryan*, 7 Mod. 349.

The point, then, of the decisions, so far as that part of the *ita quod* clause is concerned which affects the present case, is this: that if the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to *all* the matters submitted, and operates to render the submission conditional, and the award binding only in case the arbitrators pass upon every subject, either specifically referred to them, or brought to their notice under the general terms of the submission.

The language of the submission of the parties in the case at bar, is much stronger that the award must embrace all the matters in controversy, than the usual formal *ita quod* clause, "so that the award be made of the premises," etc. It recites that there are "*various matters of difference*;" that for the purpose of "*having the same speedily and properly adjusted*," the parties have agreed to submit "*all matters of difference, suits, actions*," etc.; to the arbitrators "*to determine the same*;" that the award "*upon the matters heretofore submitted*," shall be final and conclusive, and that they will "*abide the same*," and that they authorize a confession of judgment "*upon said award*; and, as if to avoid any misconstruction, the parties further declare that "*the submission is intended to embrace all actions or suits upon which judgments may have heretofore been entered, as well as suits or actions now pending, and causes of action and other matters of difference*," etc. Nothing can be clearer than that the parties contemplated an

award upon all the matters submitted; and not an award upon a portion only of such matters.

We have noticed the objections of counsel to the absence of the *ita quod* clause, because the old authorities give force to its presence. We do not think its absence or presence of any moment, or that its presence would, in any respect, vary the construction of the submission. The distinctions drawn by the old cases upon this point, are more subtle than just. See *Bisden v. Inglet*, 2 Cro. Eliz. 838, and, as far back as 1741, Chief Justice Willis observed, in *Bradford v. Bryan*, 1 Willis, 270, that if it were not for the cases he should be of opinion that, when all matters are submitted, though without the condition of the *ita quod* clause, all matters must be determined; assigning as the reason that it was plainly not the intent of the parties that some matters only should be determined, and that they should be left at liberty to go to law for the rest. At the present day the distinctions are not regarded, and the construction given to a general submission is not controlled by the *ita quod* clause. "These nice distinctions," says Sergeant Williams, in a note to case 6 of Saunders, "are now disregarded; Courts of justice being at present more liberal in the construction of awards than formerly. And therefore, an award may be good, though made of less than is contained in the submission; as if the submission be of all actions, trespasses, demands and controversies, and the award be made of some only, the award is good; for no more shall be presumed to have been made known to the arbitrator. But if, in fact, other causes of action in being were made known to the arbitrator, then such award would be bad, as well where the submission is conditional with an *ita quod*, as where it is absolute." 1 Burr, 277; *Hawkins v. Colclough*, 1 Bac. Abr. 141.

"Usually, in submission," says Watson on Arb. 17, "to arbitration, there is introduced a condition — 'so as the award be made of and upon the premises' — which, from the first words, is called the '*ita quod*.' Where the submission is made with an '*ita quod*,' it has always been holden that, if the arbitrator do not make his award of all the matters submitted to him, and whereof he had notice, the award is entirely void. But, where the submission is without an '*ita quod*,' an award of one of several matters submitted to the arbitrator

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was *formerly* considered good. This distinction between general and conditional submissions runs through all the old authorities. This distinction does not *now* prevail to that extent; indeed, it has been considered by high authority, that it would not now be holden that, where all matters in difference are submitted, though without an '*ita quod*,' the arbitrator must make his award of all matters submitted to him, and whereof he has notice, otherwise the award would be entirely void. The effect of this condition has, in a modern case, been much considered by the Court of Exchequer. That Court there laid it down that it always depends on the true construction of the submission whether it is necessary to the validity of an award that it should embrace all matters referred. Where the submission is with an '*ita quod*,' it is requisite that all matters should be disposed of by the award; but, if the submission is without such a condition, then the whole submission is to be looked to in order to ascertain whether it was the intention of the parties that all matters should be embraced by one award."

Regarding, then, the submission of the parties as conditional, and their agreement as one to abide an award upon all the matters submitted, and not an award upon a part, only, of such matters, we proceed to consider the consequence to the case at bar. The award rendered shows that three matters were laid before the arbitrators, and passed upon by them. Other matters in dispute may also have been considered, but whether so or not is immaterial. Three were passed upon — one a claim for damages growing out of a breach of a lease; another a claim for damages for the refusal of the defendant to furnish thirty head of cows and calves; and the third, the claim for damages for interference with a certain ferry on the American river. Upon the first claim the arbitrators allowed \$13,500; upon the second \$6,000; and upon the third \$4,000; making in all \$23,500. For this sum judgment was confessed by the arbitrators under a provision in the submission in favor of Muldrow, and against Norris, in the District Court. This judgment the defendant moved to set aside; the District Court denied the motion, but this Court, on appeal, held the ruling of the District Court erroneous, and reversed the judgment. Upon its reversal, the present action was brought upon the award. The reversal was ordered for the error committed by the arbitrators, and

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apparent upon the face of the award in estimating the amount of damages for the breach of the lease. The calculation was based upon the fact that the product of twenty acres of land was worth \$9,000, from which the arbitrators inferred the product of two hundred acres would have been worth \$90,000. The damages thus estimated, said the Court, were too remote and speculative, and involved too many contingencies; that the rule adopted was clearly illegal, and an award rendered upon such a basis was unconscionable. It is to be observed that the Court did not decide that Muldrow was not entitled to any damages for the violation of the lease, but only that the rule adopted by the arbitrators for the estimation was illegal. The award then stood precisely as though one and the main item submitted had never been passed upon.

The award had not effected the purposes of the submission — settled all matters of controversy between the parties. Muldrow's claim for damages was still left undetermined, and the only consideration which could have moved Norris to enter into the submission and to stipulate to abide the award had failed. Muldrow could still have sued for the damages for the violation of the terms of the lease. His release does not affect the question. That was executed upon the direction of the arbitrators, and was based upon the supposition that the award was to stand, the judgment confessed thereon to be enforced, and a release from Norris to be given. It could not avail in any respect as a defense to an action for the breach of the lease. The case, then, stands precisely as though the arbitrators had never considered the item, and in this view there is no question that the whole award is vitiated. See cases cited above, and particularly *Bradford v. Bryan*, 1 Willis, 268.

An useless and invalid determination upon one item properly presented within the general terms of the submission, must, on principle, be as fatal to the entire action of the arbitrators as an omission intentional, or unintentional, to notice the item at all. This is not a case within the doctrine that an award may be good in part and bad in part. That doctrine only applies to instances where there has been an excess of power in the arbitrators by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter forming no consideration for other parts of

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the award, and the settlement of which could not have contributed to induce the arbitration. It is not, and never has been law, that in any other instance upon the submission of several matters, or in a general submission upon the proper presentation to the arbitrators of several matters, an award upon a part was good. "In all cases," says Watson on Arb. 243, "when an award, void in part, may be supported for the residue, it must always be understood that it does not appear that the arbitrator has omitted to make his award of some matters submitted to him; for in that case, if the void part were one of the matters in controversy, and that was bad for uncertainty or otherwise, the award would be void *in toto*, as the arbitrator had not made his award upon all matters referred to him. The principle upon which it is so held, is, that the consideration for which the party submitted was, that the arbitrator should make an award of all matters in difference, and which consideration has failed."

It follows, from the views we have taken, that the award, as left after the decision of this Court reported in 7 Cal. 74, was insufficient to support the present action, and the bond of the defendant to abide such award falls with it.

Judgment reversed.

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In the trial of a criminal case, the Court has no right to charge or instruct the jury orally, without the consent of the prisoner. The fact that the Judge told the prisoner's counsel, after the charge was given, that he would put his charge in writing, if desired, does not help the case; nor will it do to say that the instruction, as given, could do no harm; for the very point of inquiry is, as to what the Court did charge. The charge must be put in such shape as the prisoner can get the benefit of it. He is entitled to stand on his strict legal rights, and has a right to avail himself of any errors to defeat the conviction; nor is it necessary that he should except to the charge at the time it is given. On motion for a new trial the prisoner may bring up any ruling of the Court which denies him the benefit of a statutory privilege like this.

APPEAL from the Thirteenth District, County of Mariposa.

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This was an indictment and conviction for the crime of murder. The grounds of the appeal sufficiently appear in the opinion of the Court.

Samuel A. Merritt for Appellant.

The only error assigned is, that the Court charged the jury orally without the consent of parties. The District Judge having committed an error, tries to get out of it by attempting to state the charge as "nearly as could be remembered."

I submit, is it not almost an impossibility for a Judge to recollect, after a lapse of eleven days, all, or even substantially, his oral charge to a jury? and that, too, in the midst of a crowded term of Court, where many other criminal cases are being tried daily, and where one case might easily be confounded with another, in the mind of the Judge! The object of the statute, in requiring the charge to be in writing, is too evident to need argument; and the proposition is so simple, that it seems almost impossible that a District Judge should be so *careless* as to neglect its provisions.

Again, the District Judge tries to get out of his position, by saying "that he distinctly stated to the counsel, that the said charge would be given in writing, if required, and there was no expression of dissent, nor was there any exception taken by either party." Counsel for People contend that this was a waiver on part of prisoner. Now it will be observed that the District Judge does not say when he made this statement, whether before or after he had given oral instructions. Certainly if he made this statement after he had committed the error, that statement could not cure it. Silence may give consent in some cases; but certainly, in a criminal case, the waiver should be shown affirmatively by the record. *People v. Beeler*, 6 Cal. 246; *People v. Demint*, 8 Cal. 423; *People v. O'Hara et als.*, decided at this term of this Court.

Attorney-General for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The defendant was convicted of murder. His counsel insist that

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there is error in the record of conviction, in this: That the Court charged the jury orally, without consent of the prisoner or his counsel. The charge is given in the statement of the Judge below, as he states, as nearly as can be remembered, and the Judge adds that he stated to the counsel that the charge would be given in writing, if required, and there was no expression of dissent, nor was there any exception taken by either party. The statute, for wise purposes, requires the charge of the Judge, in criminal cases, to be in writing. Every lawyer knows how difficult it is to obtain an exact account, in writing, of words spoken during a trial—especially a criminal trial. In such trials, the exact language used is often forgotten, or differently understood by different persons; and, in the press of business, with his attention diverted to various matters, it is next to impossible for a Judge to remember, days after the trial, precisely what occurred during its progress. And yet, in such cases, the life of the prisoner may depend upon a single word or syllable, omitted or added. It will not do to say that the instruction, as given, could do no harm, whether given in writing or orally; for the very point of inquiry is, what did the Judge charge? The error is in not putting the instruction in such a shape as that the prisoner could certainly get the benefit of it, as the statute intended. If we assume that, whenever it is shown that the instruction was right, the prisoner cannot complain, it would result that the statute would be wholly inoperative and useless; for if the instruction as given, be wrong, the prisoner could avail himself of the error, whether the charge be in writing or not. The principle of this case was decided in *People v. O'Hara*, at this term. We say in this case: "The right to have the instructions in writing, so as to preserve them in an authentic form, and to secure an entire accuracy of statement, is given by the statute, and there is no presumption indulged in criminal cases that any right is waived. The record must show the waiver. We think the policy is good; and there can, or ought to be, no difficulty in the Court or District Attorney's seeing that the proper entry is made on the record, whenever this right is waived."

The fact that the Judge told the counsel he would put the instruction in writing, if desired, does not help the error. This was after the charge was given. The mischief intended to be prevented by the act

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might have been partly done. The charge could not be orally given without the consent of the prisoner. He had given no such consent. He and his counsel were entitled to stand on their strict legal rights. They were not bound to assist in curing any errors of which they might avail themselves to defeat a conviction.

We presume, after the charge was given, they did not desire it to be in writing. The mere declination to insist on a right, in a criminal case, is not a waiver of that right. But it was not even that; all that this failure, not to insist, amounted to, was a failure to request the Court to correct the error it had already committed. Nor is it so clear that the error could be corrected in that way; the object of the statute being to prevent mistake on the part of the jury, as to the law, as well as to preserve authentic evidence of the very language used to the jury in the charge. The prisoner was not bound to except at the time. The rule would be different in civil cases; but in criminal cases, the prisoner, on motion for a new trial, may bring up any ruling of the Court which denies him the benefit of a statutory privilege like this. This was decided in effect in O'Hara's case, before referred to.

Judgment reversed and cause remanded for a new trial.

BOWEN v. MAY *et al.*

The provisions of the thirty-second section of the Practice Act, which, in actions against two or more defendants, all of whom are not served, authorizes judgment to be entered to bind the joint property of all the defendants, does not apply to actions for the foreclosure of mortgages on real estate.

The fact that two or more persons join in the execution of a mortgage of lands, does not raise a presumption that the estate mortgaged is joint property.

In order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared as such in the conveyance, otherwise the estate conveyed will be held by the grantees as tenants in common.

APPEAL from the Fourteenth District, County of Sierra.

This was a bill for the foreclosure of a mortgage.

The action was brought upon notes and a mortgage executed by

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both of the defendants. The mortgage is in the usual form of a joint mortgage; and, to secure the payment of three several promissory notes given for the purchase money of a mining claim, grants, bargains and sells to the plaintiff the said premises.

Personal service was had upon defendant Elliott, and upon failure to answer judgment was rendered by the Court on the application of plaintiff, ordering a sale of the mortgaged property for the payment of the debt and execution against the joint property of defendants, and the separate property of defendants served with process.

A motion was made in the Court below to set aside the judgment on the ground that no service of process was had on either defendant.

The Court overruled the motion, and this appeal is taken by defendants from the order overruling said motion, and from the final judgment.

The return on the summons is in the following language:

"STATE OF CALIFORNIA, } District Court Fourteenth Judicial Dis-
"County of Sierra, } trict in and for Sierra County.

"BRACKETT BOWEN,

v.

"J. J. MAY AND ED. E. ELLIOTT. }

"THOMAS ALDRICH, being duly sworn, says: that he is a white male citizen of the United States, and over twenty-one years old; that upon the twenty-third of June, A. D. 1858, at Alleghanytown, in the County of Sierra, he served a certified copy of the summons hereto attached, and a certified copy of the complaint attached to said summons, issued in the above entitled cause, upon the defendant Ed. E. Elliott, by delivering the same to him personally at said place.

"THOMAS ALDRICH.

"Sworn to, subscribed before me this }
23d day of June, A. D. 1858, }

"B. D. S. MARVIN, *Notary Public.*"

M. Kirkpatrick for Appellants.

I. The Court erred in adjudging that defendant May was indebted to respondent.

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II. The Court erred in decreeing a sale of the mortgaged premises.

III. The Court erred in decreeing a sale of May's interest in the mortgaged premises.

IV. The Court erred in overruling defendants' motion to set aside the decree.

1. Upon the first, second and third points, I submit that the decree is erroneous, in this — that the Court has no jurisdiction of the person of defendant May, yet the Court adjudges that said May is indebted to the respondent, and decrees a sale of his interest in the mortgaged premises. It is said that this decree is authorized, sec. 32, Prac. Act.

This section should receive a strict construction. I contend that it is inapplicable to equity cases — foreclosure cases. "Judgment" may be entered against parties "jointly indebted on a contract, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served." This language is not comprehensive enough to include a case like this.

Again: It nowhere appears that the mortgaged premises is the "joint" property of the defendants. It is only the joint property of a defendant not served that can be thus subjected.

2. I contend that sec. 32, Practice Act, so far as it permits judgment to be entered against a defendant not served, is unconstitutional. Sec. 8, art. 1st Const. Cal. provides, that no person "shall be deprived of life, liberty or property without due process of law." Here the defendant is deprived of his property without any process of law whatever. The Court, without jurisdiction of his person, decrees the sale of his property. If the Legislature can go thus far, may it not in any case permit property to be taken without process of law?

W. W. Upton and Vanclef & Stewart for Respondent.

This return shows that Thomas Aldrich was competent to serve the process, (Practice Act, sec. 28) and that he did the acts required to be done in the service of the summons and complaint, to wit: delivered the same personally to defendant. Practice Act, sec. 29.

Independent of the return on the summons, the Court finds, as a fact, that process was served, etc.; and the finding of the Court is

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conclusive as to that fact, until some showing is made to the contrary. *Alberson v. Bell and Wife*, 9 Cal. 315.

It may be objected that service of process was not had upon both of the defendants.

The complaint and mortgage which is made a part of the complaint, show that the two notes sued on were joint as well as several; that the mortgage was the joint contract of both defendants, given for the purchase money, and that the mortgaged property was the joint property of both defendants. No personal judgment was taken to be enforced against the property of the party not served. The record shows that the judgment is authorized by sec. 32 of Practice Act.

The only advantage of this provision is to enable the plaintiff to enforce his judgment against the joint property. Such provisions are common in other States, and are enforced by the Courts. *Carnan v. Townsend*, 6 Wendell, 206; *Melvin v. Kimball*, 23 Wendell, 293.

There is no distinction made by our statute between judgments at law or in equity; both are called judgments, and the thirty-second section of Practice Act applies to all cases of judgments upon joint contracts without exception.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

The provisions of the thirty-second section of the Practice Act, which, in an action against two or more defendants, all of whom are not served with process, authorizes judgment to be entered to bind the joint property of all, does not apply to proceedings for the foreclosure of a mortgage on real estate.

The fact that two persons join in a mortgage of lands does not raise a presumption the estate conveyed is joint property. Joint tenancies are not favored by our system — the statute having abrogated the common law rule of conveyances in this respect — so that in order to constitute a joint estate in lands in two or more persons, such estate must be expressly declared in the conveyance itself, otherwise the estate conveyed will be held by the grantees as tenants in common. Wood's Dig., art. 380.

Judgment reversed and cause remanded.

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 WHITLEY, CONTESTANT, v. J. H. McKUNE, DISTRICT JUDGE
ELECT.

The failure of the officers conducting an election in a given district to be sworn as the Election Laws provide, will not invalidate the entire election, without reference to its influence on the general result.

The rule is well settled, that the mere receiving and counting votes, improperly given, will not invalidate an election.

An act, however erroneous, which does no injury to a party, cannot be the subject of a legal complaint on his part.

The fact that the ballot-box was temporarily out of the possession of the officers of the election, will not invalidate the election, especially where no fraud, collusion or suspicious circumstances are shown.

The provisions of our statute clearly indicate that the Legislature did not mean that the returns of a candidate should be set aside, where an election was held at the proper time and place, and for the proper officers, unless it affirmatively appeared that there was such irregularity as affected the result of the election.

Where such irregularities have occurred, it rests with the contestant to show them. The returns are *prima facie* evidence of the fact they import; and the returned candidate, after being commissioned, is *prima facie* entitled to the office.

APPEAL from the County Court of Sacramento County.

The facts of this case appear in the opinion of the Court.

J. H. Gass and H. O. Beatty for Appellant.

The objections to appellant's statement may be resolved into two: 1st. That the statement is not sufficiently specific; and, 2d. That the provisions of the statute said to have been violated are merely "directory," and that they may be disregarded with impunity.

On the first point, the respondent refers to Skerrett's case, reported in 2 Parsons' Select Equity. In this case it was held, that a general allegation that A was not duly elected, but that B was, was not sufficiently specific; but there were other charges of a character very similar to those contained in the appellant's statement, that were admitted to be sufficiently specific, and were considered and passed on as such by the Court. Our statute, sec. 58 of the Election Law, provides that no statement of the causes of contest shall be rejected, nor the proceedings dismissed, for want of form, if the particular causes of

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contest shall be alleged with such certainty as will sufficiently advise the defendant of the particular proceedings or causes for which such election is contested.

What could be more precise and exact than the allegations of this statement? Time, place and circumstances are all given. For instance, it is charged that the Judges in certain election districts, specifying the districts, were not sworn; that in a certain district, describing it, so many votes, specifying the number, were counted for the respondent without having been ascertained to have been given for him in the manner required by law, specifying the manner in which they were dealt with; that in another district, specifying it, the ballot-box was surrendered to the keeping of strangers, etc., etc. Can it possibly be urged, in the face of such allegations as these, that the respondent was not advised of the nature and character of the irregularities complained of? No declaration at common law, no complaint under our Practice Act, would be required to be more specific; nay, a criminal indictment would admit of less particularity.

Upon the second point: Are the irregularities complained of in the statement, and admitted by the motion to dismiss, to be committed with impunity? Are all the provisions prescribing the mode of conducting to be disregarded, and, at most, to be considered as merely "directory?" This is the great point to which the respondent bends his energies. He cites Cook's case, 14 Barb., and 4 Selden; the Pennsylvania cases of Boileau, Skerrett, Carpenter and Kneass, reported in 2d Parsons' Select Equity Cases.

It is true, that the Courts of both New York and Pennsylvania held that some of the provisions of the statutes of those States, concerning the mode of conducting elections, were merely directory, and might be disregarded with impunity; but, upon these cases, we have to remark — *First*. That none of them go so far as the Court is asked to go in this case; *Secondly*. That they are unsatisfactory, in this — that whilst they declare that some of the statutory provisions are merely directory, they admit that some are mandatory, without furnishing any guide or test by which we may distinguish the one from the other; *Thirdly*. That upon the particular point — and it is the only one in these cases involved in the case at bar — of the necessity

of compliance with the provision requiring the Judges and Clerks to be sworn, they are directly opposed to the uniform and unbroken current of decision in the House of Representatives. See *McFarland v. Purviance*, p. 131; *Same v. Culpepper*, 221; *Easton v. Scott*, 272, and *Draper v. Johnson*, 703, Book of Contested Elections.

It is also to be remarked, that the cases in *Barbour*, *Selden* and *Parsons*, being all upon *quo warranto*, seem to be based mainly upon the indisposition upon the part of the Court to reject votes given under such circumstances, when the effect would be to confer an office upon the candidate who apparently received a minority vote. The whole tone of the opinions show that the decisions might have been far otherwise had the effect of rejecting the irregular vote been, as it would be here, to lead to a new election.

But nowhere has this absurd doctrine, by which the positive provisions of law have been nullified by Courts under the pretense that they were "directory"—a phrase without meaning, and invented for the occasion—been more ably and signally rebuked than in the opinion of this Court in the case of the *People v. Weller*. There the doctrine is put upon the true ground, and the only one upon which it can be maintained. According to the theory of that opinion, the test of the efficacy of statutory requirements is this: Does the statute affix a penalty to the breach? Is the disobedience of the essence of the thing required? In other words—has the penalty been incurred substantially as well as formally?

It is certainly a little singular, that the Court, in the cases of *Skerrett* and *Carpenter* referred to, while treating the statute requiring the officers to be sworn as merely directory, and of no importance, at the same time says, that all presumptions are in favor of the solemn acts of sworn officers of the law, and that they will hesitate to interfere with or set aside the acts of public officers sworn to perform their duties, etc., etc. See 2 *Parsons' Select Equity Cases*, 520, 540.

Observe how particular is the statute in providing for a faithful record of the ballot before it is destroyed. It shall be, not examined by the Judges—that would be too indefinite—but read aloud, each name separately and distinctly, by one of the Judges, the public looking over his shoulder; two Clerks shall note each name, as read, by tallies.

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Why by tallies? Because, to keep count by tally, is to repeat aloud each score, and to proclaim every five, whereby a constant comparison is made by the two tellers, so that any discrepancy between them may be at once ascertained, and immediately corrected.

To say that these requirements are not of the essence of the mode of conducting an election, and that they may be disregarded with impunity, is to say, that the Legislature can throw no guard or checks around the ballot-box, and that bad and dishonest politicians may with impunity commit those outrages at elections which have been the bane and disgrace of California, and which our statute was enacted to prevent.

The 52d section of the Statute concerning Elections, (See Wood's Digest, p. 380) declares that "no irregularity or improper conduct on the part of the Judges, shall be construed to amount to such malconduct as to annul the election, unless the irregularities or improper conduct shall have been such as to procure the person, whose right to the office may be contested, to be declared duly elected, when he had not received the highest number of legal votes."

How is this provision to be construed? The respondent contends that it imposes upon the appellant the burden of showing that if the rejected vote had been properly kept and counted, the respondent would not have received the highest number of votes. We contend, the only effect of the clause is this: although the vote of the precinct or election district may be rejected for irregularity in taking it, if, throwing out the whole vote of the precinct, or rather, giving it all to his opponent, the respondent would still be elected, but by a decreased majority, then the irregularity shall not be permitted to vitiate the election; and this is perfectly clear from the examination of the next, or 53d section, which is intended to make the same provision for Justices of the Peace, Constables, and other county officers, that the 52d section makes for officers of districts. Moreover, the construction contended for by the respondent involves an absurdity. Here the complaint is, that the vote not having been ascertained in the manner provided by law, and the ballots having been destroyed, the result is unascertainable. To say we are obliged to show how the unascertained and unascertainable vote really stood, would be to require an impossibility. We show, that of the votes counted for the respondent, a num-

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ber greater than the majority by which he was returned, was illegally counted for him. The ballots are gone. When we go behind the return of the Clerk, we are referred to the tally list, and the report thereon of the Judges. Thus is the record substituted for the ballots, upon which the certificate and commission are based, and upon which the respondent ultimately relies. When we have shown that he was returned only by a majority of two hundred and eight; that this return is based upon four or five hundred votes counted for him, which, as far as the law knows, may have been given for anybody else, we have shown malconduct in the Judges, and an impossibility of ascertaining the real result, which, in our humble opinion, vitiates this election.

Suppose the case put by the Court in "*The People v. Cook*:" A gang of rowdies destroy the ballot-box in a particular precinct; the number of votes destroyed are greater than the majority of the returned candidate. Under a provision similar to ours, the New York Court does not hesitate to declare that such a state of things would vitiate the whole election; notwithstanding the contestant could not show that the officer returned would not have been elected if the votes destroyed had been properly counted.

Take the facts as they occurred at Mormon Island and at Folsom, where the ballot-box was exposed to public interference — is this not a substantial disregard of the requirement of the statute? Is it not malconduct on the part of the Judges? and does it not invalidate the votes of those precincts? When the ballot-box, in violation of the careful and stringent provisions of the statute, has been placed in a position where it can be tampered with, does not the law, in its jealousy, infer that it has been tampered with? If not, these provisions are nullities, and there is no mode left us of securing the purity of elections. See the case of the *People v. Backus*, 5 Cal. 275.

No brief in the record for respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

This proceeding is taken under the statute of this State, (Wood's Dig., pp. 375 to 382) art. 2155, secs. 51 and 52, and the object of

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it is to contest and to vacate the election of defendant, McKune, as Judge of the Sixth Judicial District. The complaint was, on motion, dismissed by the County Judge, before whom the proceedings were had; and this appeal is from that order. The effect of this motion is not greater than that of a general demurrer, and if that could not be sustained, neither could this motion be. This involves an inquiry into the legal sufficiency of the complaint. The complaint alleges that, at the general election in September last, McKune was returned as having received two thousand six hundred and thirty-four votes for this office, and that C. T. Botts, his only competitor, received two thousand four hundred and twenty-six votes; and that McKune, receiving his certificate, was commissioned for six years.

The first specification is, that the returns are irregular, null, and void, in this: That, in the First District of the City of Sacramento, where three hundred and nine votes were returned for McKune, neither the Judge, Inspector, nor Clerk, conducting the election, were sworn, as the law required.

It will be seen that no charge of the fraud is made in this allegation, nor of collusion between McKune and these officers, nor of willful neglect of duty on the part of the officers, nor that the vote for McKune, so returned from these polls, was larger than the vote returned for Botts, nor that McKune received any benefit, or Botts any injury, by the counting in of the votes so returned. The naked question presented by this specification is whether the failure of the officers, conducting an election in a given district, to be sworn, of itself invalidates the entire election, without reference to its influence or the result. This proposition cannot for a moment be maintained. If it could, no State, or even County election, ever would stand; for, probably, no election has ever occurred in the State, at which some informality, of equal grade and importance to this, did not occur.

The rule is well settled that the mere receiving and counting of votes, improperly given, does not invalidate an election. This has been held in New York, in Massachusetts, Pennsylvania, and many other States; indeed, everywhere, we believe, where the question has been raised. The universal rule is, that an act, however erroneous, which does no injury to a party, cannot be the subject of legal complaint on

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his part. Our statute is conclusive on this point. Art. 2156, sec. 52, declares "that no irregularity or improper conduct in the proceedings of the Judges, or any one of them, shall be construed to amount to such misconduct as to annul or set aside any election, unless the irregularity or improper conduct shall have been such as to procure the person whose right to the office may be contested, to be declared duly elected, when he had not received the highest number of legal votes." This specification, therefore, is manifestly bad.

The next is "of the votes as given for the said McKune, in the said district, two hundred thereof were not ascertained to have been written on, or printed on any ballot, as the law directs; but were guessed at, or inferred thereon. That the Judges, Inspectors or Clerks, failed to keep any legal tally paper in said district, and failed to return any tally paper to the Clerk of the County of Sacramento." It is not easy to see what the precise charge is, which the pleader meant to convey by this statement; nor do the counsel for the appellant agree in their explanations at the bar. Whatever it was it seems liable to the same objections already made; for it is not shown that there was a miscount of legal votes in favor of McKune. The only just complaint which could be made in this connection is, that votes were counted for McKune, which he did not receive; and, whether the votes were guessed at or not, if the guess was not erroneous, no injury could possibly result to Botts on that account. The specification as to the keeping of the tally will be noticed hereafter. It is to be observed that it is not alleged that a tally paper was not kept, but that no legal paper; this is a conclusion, not a fact.

The complaint then states, that of the votes so returned, as given for McKune, twenty-eight were given and intended for Botts, and should have been so counted. This is a good statement, as showing an error of twenty-eight votes against McKune.

The next specification has been already answered. It merely charges that, in the Second District, neither the Inspector, nor Judges, nor Clerk, were sworn. That three hundred and sixteen votes were returned as given for McKune in this district; and, of the votes, eighty were *never ascertained to have been written or printed upon any ballot*; but were guessed at or inferred to be thereon. In another

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part of this specification, that twenty-three of the votes counted for McKune, were really given for Botts. This last statement is sufficient so far as it goes; the rest is bad.

The next specification is like the above, except that it refers to the Fourth District, in Sacramento; twenty-two votes for Botts, counted for McKune.

The next is also similar, applying to the Third District; ten votes for Botts, counted for McKune.

The next specifications are as follows: "And the said Daniel H. Whipley is informed and believes, and so charges the truth to be, that at the precinct of Folsom, in the township of Granite, in the district aforesaid, one hundred and twenty-five votes were returned as having been given for the said McKune, as aforesaid, and that thirteen were given and intended for the said Botts, and should have been so counted, and that the Judge, Inspectors, and Clerks of the said precinct were guilty of misconduct in this: that they permitted the ballot-box to be removed from the room in which the election was held, before the ballots were counted; and the said ballot-box, when removed as aforesaid, was left in charge of a person who was neither a Judge, Inspector nor Clerk of said election."

And the said Daniel H. Whipley further states, that he is informed and believes, and so charges the truth to be, that from the precinct in the township of Sutter, known as the "Cottage," one hundred and sixty-eight votes were returned as having been given for McKune, as aforesaid; that of the said votes one hundred and twenty-six were never ascertained to have been written or printed upon any ballot deposited in the manner prescribed by law, but the same were inferred or guessed at, and so illegally returned for said McKune, as aforesaid; that neither the Judges, Inspectors nor Clerks were sworn at said precinct; and that the ballot-box was removed from the room in which the election was held, and committed to the custody of persons who were neither Judges, Inspectors nor Clerks of said election, before the ballots were counted; that, in running out or counting up the tallies at said precinct, nine votes which were cast for Charles T. Botts were omitted — his vote run out eight, when it should have been seventeen at that precinct.

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And the said Daniel H. Whitley further states, that he is informed and believes, and so charges the truth to be, that, at the precinct known as "Mormon Island," in the said district, where thirty-eight votes were returned as having been given for the said McKune, as aforesaid, the ballot-box was removed from the room in which said election was held, and intrusted to the custody of a person who was neither a Judge, Inspector nor Clerk of said election, before said votes were counted.

And the said Daniel H. Whitley further states, that the precinct known as "Michigan Bar," in said District, where one hundred and two votes were returned as having been given for said McKune, as aforesaid, sixty of which were never ascertained to have been written or printed on any ballot, deposited in the manner prescribed by law; but the same were inferred or guessed at, and so illegally and improperly counted for the said McKune.

And the said Daniel H. Whitley further states, that he is informed and believes, and so charges the truth to be, that at the precinct known as "The Magnolia," in the township of Brighton, in the county aforesaid, from which fifty-eight votes were returned as having been given for the said McKune, as aforesaid, neither the Judges, Inspectors nor Clerks of the election were sworn; and that the ballot-box at said precinct was removed from the room in which said election was held, and was intrusted to the keeping of a person who was neither a Judge, Inspector nor Clerk, of said election, before the ballots deposited therein were counted.

The only questions which it is necessary to consider are these: 1. Does the mere failure of the officers of elections, to qualify according to law, vitiate the election? 2. Does the fact that the ballot-box was out of the possession of the officers of the election — no fraud, or collusion, nor circumstances of suspicion being shown — have that effect?

Unquestionably public policy requires that every safeguard should be thrown around the elective franchise, and every protection which can shield the ballot-box from corrupt or improper influences given to it. But a strictness of requirement which forms the mere fact of the existence of informalities not shown to be injurious in their results, would suppress the declared will of the people constitutionally

expressed, leads to as dangerous consequences. We consider the law well settled by authority, that the mere failure of the officers to take the oath does not invalidate the election. If this were so, it might lead to more fraud than it would prevent; for these officers might omit the oath for the purpose of throwing out the notes of a precinct. The following cases hold the doctrine just announced: *Truehart v. Alldrick*, 2 Texas, 217; *People v. Cook*, 14 Barbour, 259; 19 Wend. 139; 4 Denio, 168; 14 Pickering, 236; 16 Pickering, 153; and this is supported by the universal rule, that where one acts under color of office, his acts are binding, though not legally qualified: *People v. Bartlett*, 6 Wend. 422. In 2 Parsons' Equity Cases, these questions are all reviewed with learning and ability, and the same doctrine is held. But it is useless to consume time in citing authorities from other States, for the Statute of California, already quoted, is decisive on the point. And we think it equally clear on the other and remaining proposition, which is, that the ballot-boxes at two precincts were not all the time within the view and control of the Inspectors, etc. It is observable that no charge of suspicious circumstances, or of any actual fraud is made in this connection; nor is it shown that any votes were changed, or any alteration made of ballots, or the result in any way affected by this circumstance; nor does it appear for what length of time, nor in what way, nor under what state of facts this was done or permitted. We presume it would not be contended, that if the officers happened to lose sight of the box for a moment, or in case of a row, or a fire, they rushed out of the room, leaving the box, that this would constitute any sufficient cause for invalidating the returns or votes. If the question was connected with circumstances of suspicion, the case might be different; but if we were to hold that this circumstance alone, as stated, invalidated the returns, it would be in the power of any officer or other persons to defeat an election, by throwing the ballot-box out of the window, or carrying it to the next room.

The following provision of the statute plainly indicates for what grounds the contest may be maintained: 1. For malconduct on the part of the Board of Judges, or any member thereof. 2. When the person whose right to the office is contested, was not, at the time of

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the election, eligible to the office. 3. When the person elected shall have been convicted of crime, etc. 4. When the person elected shall have given a bribe to the Judges, etc. 5. On account of illegal votes. Then follows the 52d section already quoted. The 53d section provides, that when an election is contested on account of any malconduct on the part of the Board of Judges of any township election, or any member thereof, the election shall not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township or townships shall change the result as to such office in the remaining vote of the county. Sec. 54 provides that nothing in the fifth ground of contest shall be so construed as to authorize an election to be set aside on account of illegal votes, unless it shall appear that an amount of illegal votes shall have been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given for such other person.

These provisions very clearly indicate that the Legislature did not mean that the returns of a candidate should be set aside when an election was held, at the proper time and place, and for the proper offices, unless it affirmatively appeared that there was such irregularity as affected the result of the election; and when these irregularities of mere mode occur, it rests with the contestant to show that they changed the result. Indeed, as the returns are *prima facie* evidence of the facts they import, and as the returned candidate—especially after being commissioned—is *prima facie* entitled to the office, the contestant must show that the election was not only conducted irregularly, but that in consequence of irregularities, the declared result was different from what it would otherwise have been.

The complaint, taking such portions of it as is sufficiently stated for true, does not show enough to entitle the contestant to his prayer; for the votes improperly counted for McKune, transferred to the list of Botts, are not enough to change the result.

The judgment is affirmed.

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The true construction to be given to the Registration Act is, that the failure of a grantee to record his deed, does not absolutely, and without exception, avoid the deed as to third persons. The failure to register only protects *bona fide* purchasers for a valuable consideration.

Open and notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title. But the possession must exist at the time of the acquisition of title or deed of the subsequent vendee, from the common vendor.

A deed made to a man who is dead at the time of its execution, is a nullity.

The word "heirs" in a conveyance, is not a word of purchase, carrying title to the heirs, but only qualifying the title of the grantee.

A deed made under and in pursuance of a general power of attorney, which authorized the attorney "to make and execute conveyances," and where the purchase money was received by the principal, cannot be assailed for the want of authority to execute it.

The Registration Act only protects purchasers; creditors, as such, are not included within its provisions. But a judgment creditor, purchasing at his own sale, without notice, is a *bona fide* purchaser within the Act.

The knowledge of an agent, in the course of the agency, is the knowledge of the principal, and the agent cannot be forced to disclose it. But if the agent acquires information apart from, or independent of such source, he is not protected from disclosing it.

APPEAL from the Sixth District, County of Sacramento.

The facts as stated in the opinion of the Court, are as follow :

This was an action of ejectment to recover a lot in Sacramento city. The title was in one William Glenn, against whom, on the eleventh of October, 1855, plaintiff recovered judgment in the District Court for Sixth District, and on the twenty-sixth day of July, 1856, the plaintiff became the purchaser, at Sheriff's sale, made under the judgment. It seems that this property was owned by one McPherson, who sold it in payment of a debt to one Forbes, and that Forbes, desiring to hide it from his creditors, procured a deed of it to be made to Glenn. Glenn left the country, and made a power of attorney to his brother, Thomas Glenn, to transact his business, sell his lands, etc., with power of substitution of other attorneys; that Glenn sold the lot to Knox by deed dated twentieth of September, 1851. The deed was not recorded. Knox died in 1854. On the twenty-second day of March, 1856,

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Glenn executed a deed to Knox and his heirs, which was recorded twenty-seventh of March, 1856. Knox's administrator, Hubbard, was in the notorious possession of the property at the time of the plaintiff's purchase. Two questions are made by the record:

1. Was the possession of the administrator of Knox notice of the unrecorded deed from Glenn to Knox?

2. If not notice at the time of the obtaining of the judgment of the plaintiff, was the recording of the deed to Knox and his heirs before the sale under execution, sufficient?

Plaintiff had judgment, and defendants appealed.

Crocker & Robinson for Appellants.

1st. The plaintiff having purchased the property at a sale on his own judgment, is not a purchaser within the rules of equity, so as to enable him to claim notice of outstanding titles.

When a judgment creditor purchases at the Sheriff's sale on his own judgment, no notice to him of the equity of third persons is necessary, as he is not entitled to protection as a *bona fide* purchaser, as he pays no new consideration. *Arnold v. Patrick*, 6 Paige, 316; *Williams v. Hollingsworth*, 1 Strobbart Eq. 103; *Bush v. Bush*, 1 Strobbart Eq. 379; *Kirbay v. Dillard*, Speer's Eq. 20; *Shultz v. Carter*, Speer's Eq. 542; 1 P. Williams, 278; Rep. Temp. Fairb. 28; 3 Hare, 416; *Beaver v. Filson*, 8 Barr, 327; 1 Story's Eq. Juris., sec. 410, note 1; 2 Story's Eq. Juris., sec. 1503, b.

A purchase by a third person stands on a very different footing in this respect, from a purchase by the plaintiff in the judgment. 2 Binnely, 46.

So also a creditor who takes real estate in payment of his debt, is not a purchaser for value, so as to entitle him to protection against prior equities. *Dickson v. Tillinghast*, 4 Paige, 215; *Roman v. Adams*, 1 S. & M. Ch. 45, 49; *Powell v. Jeffries*, 4 Scammon, 387; 11 Wend. 533; 1 Dw. Ch. 103.

A purchaser at Sheriff's sale, with or without notice, acquires no better title than the debtor had. *Freeman v. Hill*, 1 Dev. & Batt. Eq. 389; *Polk v. Gallant*, 2 Dev. & Batt. Eq. 395.

A judgment creditor is bound by all prior equities, and so is a pur-

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chaser at Sheriff's sale under the judgment. *Bank of S. C. v. Campbell*, 2 Rich. Eq. 179, 191.

Equity controls the general lien of a judgment so as to protect the equitable interests of others. 2 Paige, 266.

And it will limit the lien to the actual interest the debtor has in the estate. 4 Paige, 15; 6 Paige, 315.

A purchaser of the judgment debtor, before judgment, whose deed is not executed until afterwards, will thus be protected against the judgment. 6 Paige, 315, 316, note *a*; 1 P. Wms., 278; 2 Wash. C. C. R. 78.

Where the agent of the judgment creditor purchased the property at Sheriff's sale, but paid no money, applying the amount as a credit on the judgment, he cannot protect himself against a prior equity, of which he had no notice. *Swayze v. Burke*, 12 Peters, 11, 24, 25.

That the purchaser had secured the payment of the purchase money, is not sufficient to protect him against prior equities. 7 J. C. R. 65.

To entitle a party to protection in equity as a *bona fide* purchaser, he must have actually paid the purchase money and received his deed, before notice of the equity. 6 Barb. S. C. R. 19, 26; 1 Paige, 280; 11 Barb. S. C. R. 490.

In equity, the lien of a judgment does not attach upon the mere legal title to lands in the debtor, where the equitable title is in another; and a judgment creditor seeking to make it liable will be restrained, as he loses nothing, having parted with no money. 1 Paige, 280; 11 Barbour S. C. R. 490; 6 Barbour S. C. R. 19, 26.

2d. The plaintiff had notice of the title of Knox under whom defendants hold, or at least sufficient facts were known to him to have put him upon inquiry.

He had actual knowledge of the possession of the premises by Knox, and those holding under him. He was told at the sale, before it was struck off to him, that he was not buying a title. There was a deed upon record from Glenn to Knox, and though it was executed after the decease of the latter, it was sufficient to put him upon inquiry.

If, at the sale, the purchaser receives sufficient information to put him upon inquiry, it is sufficient notice. 1 Paige, 283.

Information from third parties is sufficient to put the party upon

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inquiry. 3 Metcalf, 406; 1 Cowen, 622; 2 Dev. & Batt. Eq. 360; Hardin, 37.

But the most material evidence of notice, is the actual possession of the property by Knox and those holding under him, and the fact that this possession was known to the plaintiff, before his purchase.

This question has been before this Court in several cases, and in some of them, the well-established rule that possession is notice to all persons of the title of the possessor, has been set aside. We think so clear and evident a departure from this ancient rule of property, upon so important a question, making, as it does, so great an invasion upon the rights of property, should be promptly overruled by this Court, before its evil effects have been too extensively felt.

The ancient rule which we contend for, has been established by the following authorities:

English: 2 Vesey, 440; 16 Vesey, 249, 254; 17 Vesey, 433; 1 Jac. & Walker, 181; 1 Hare, 43; 2 Ball & Beatty, 416; 4 Dow Parl. Rep. 245; 2 Sch. & Lefroy, 583; 1 Merivale, 282; 2 Powell Mort. 576, note. Maine: 32 Maine, 286; 8 Greenleaf, 94. New Hampshire: 4 N. H. Rep. 397; 5 N. H. 181; 2 Foster, 500. Vermont: 2 Vermont Rep. 544. Massachusetts: 3 Pick. 149; 3 Mass. 575. Connecticut: 3 Conn. Rep. 146. New York: 3 Paige, 421; 5 J. C. R. 39; 2 Paige, 300; 10 Barb. S. C. R. 354; 6 Paige, 383. Pennsylvania: 3 S. & R. 283; 5 Binney, 132; 1 Wharton, 303, 318; 7 Watts, 261, 382; 5 W. & S. 427. Delaware: Harrington Rep. 48. Ohio: 13 Ohio Rep. 408. Indiana: 4 Blackford 94, 383. Illinois: 5 Gilman, 186. Missouri: 1 Missouri Rep. 77. Kentucky: 1 Littell, 350; 1 Monroe, 193, 235; 2 J. J. Marshall, 164, 178. Maryland: 1 Mar. Ch. Dec. 523; 10 Gill & Johns. 316. New Jersey: Saxton, 441; 2 Green Ch. 143. Georgia: 2 Georgia Decisions, 205. Alabama: 12 Ala. Rep. 17. South Carolina: 2 Hill Ch. 421. Mississippi: 11 S. & M. 21. Tennessee: 2 Humph. 335. United States: 10 Howard, 348, 375; 1 McLean, 22.

Such a train of decisions certainly ought to settle the law, if decisions and precedents are to have any force and effect.

But even under the rules laid down by this Court in previous cases,

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that possession is notice of equitable titles not in a condition to be recorded, we contend the judgment of the Court below should be reversed upon this point alone.

We contend, therefore, that the defendants, who hold under Knox, come under the rule laid down by this Court in *Ellis v. Jeans*, 7 Cal. Rep. 409, and *Bryan v. Ramirez*, 8 Cal. 461.

It has been held, and we think very properly, that an unrecorded deed is evidence of an equity equal to a title bond. 4 Dana, 260.

As to the last deed executed by Glenn to Knox, after the decease of the latter, though it could not operate as a conveyance to him, yet it is good as a conveyance to his heirs. 12 Mass. 447; 1 Pick. 27; 8 Greenleaf, 148; 2 Peters, 201; 14 Missouri, 420; 2 Brock. 156.

But even if it should be held void as a conveyance, it is still good as an executory contract, and the heirs could compel the execution of a proper deed to them. When there is an intention to convey, and a good consideration given, but the legal title has not passed, equity will compel the execution of a proper instrument. 1 Hoffman Ch. Rep. 382; 1 Bramb. 63.

And such deed would relate back to the original contract of sale. A deed made in pursuance of a contract, is good by relation from the making of the contract. 1 John. Cas. 81, 85.

3d. The District Court erred in ruling that Welty, plaintiff's attorney, need not testify as to notice of Knox's title, acquired from parties other than the plaintiff.

This was clearly error, for the law is well settled, that notice of title in a third person, given to an attorney or agent, is notice to the principal. *Fulton Bank v. N. Y. & S. Canal Co.*, 4 Paige, 136; *Griffith v. Griffith*, 9 Paige, 316; *Bank of U. S. v. Davis*. 2 Hill, 451, 461; *Sutton v. Dillaye*, 3 Barb. S. C. R. 529; *Mech. Bank v. Seton*, 1 Peters, 309.

It cannot be claimed that Welty was privileged from testifying as to this notice, received, not from his principal, but from third persons; for it is a well established rule, that the privilege of an attorney is restricted entirely to communications from his client, and does not apply to facts derived from other parties. 7 East, 357 and note; 1 Phillips' Ev. 162.

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Moore & Welty for Respondent.

The main question involved in this case, viz., was defendants' possession of the premises, if known to plaintiff before his purchase, sufficient to put him, a subsequent purchaser for a valuable consideration, upon inquiry, and charge him with notice of defendants' interest? It is admitted that plaintiff has a perfect legal title to the premises, and he must prevail in this action unless he had a sufficient notice of defendants' claim, to place him in the position of a fraudulent purchaser. Under our system, there are two kinds of notice; actual notice in fact, and record or constructive. At common law, actual notice was necessary in every case; but the rule was found to be inconvenient and troublesome and in this country it has been changed in nearly every State, by the passage of registry laws. Among the earliest legislation of this State, after its organization, was the passage of an Act concerning the Execution, Acknowledgment and Registration of Conveyances. The twentieth section of this law provides that "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate, or any part thereof, when his own conveyance shall be first duly recorded." (Wood's Dig., p. 103, sec. 26.) This language is plain, positive and comprehensive. If a person holds a "subsequent" deed "duly recorded," the only questions that can arise in reference to the validity of his title, are: 1st. Is he a purchaser "in good faith"? and, 2d. Has he paid a "valuable consideration"?

Who are "subsequent purchasers in good faith"? or, in other words, what acts or knowledge, on the part of a subsequent purchaser, will make him a purchaser *mala fides*? In this case we are not to inquire whether the defendants held equities of which plaintiff had notice, but did plaintiff have any knowledge of this unrecorded deed prior to his purchase; for we submit there is a wide difference between the principles governing a case, where both parties claim legal title from the same grantor, one by virtue of a deed which he has neglected to record, and the other by deed duly recorded, and a case where one party claims the legal title, and the other equities, which by law he

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was unable to register and give notice of. In the former case, the first purchaser has so far violated and disregarded the positive requirements of the law, that his grantor has been enabled to perpetrate a fraud by making a second conveyance to an innocent purchaser. It was his duty to have recorded his deed; and if he did not, and the property is again conveyed, he alone must suffer the penalty which the statute imposes, while, on the other hand, the party holding an equitable claim, has done all the law requires. If he were to record his equity, it would do him no good, as it is not such an instrument as the law authorizes to be recorded, and would therefore impart no notice to subsequent purchasers. This class of claimants, the law has ever regarded with much favor. They have been guilty of no wrong, and as a matter of necessity, and of justice to them, the Courts in many of the States have said, that open and continued possession on their part, is sufficient to put subsequent purchasers upon inquiry. But this rule does not apply to claims under unrecorded deeds. The law positively requires deeds to be recorded, in order to make the conveyance valid, as against subsequent purchasers. The statute has provided a public repository for all evidences of change of title, and it is the duty of every man to comply strictly with this salutary provision of the law. When two parties claim title to the same premises, from the same grantor, the question will be (if the case is free from fraud) as to priority of record. This view has been sustained by this Court, by repeated decisions, and the distinction which we have drawn has been as often recognized. The question was first presented in the case of *Call v. Hastings*, 3 Cal. Rep. 179; *Mesick v. Sunderland*, 6 Cal. Rep. 297; *Stafford v. Lick*, 7 Cal. Rep. 479; *Ellis v. Janes*, *Id.* 409.

The decisions of this Court upon this point, stand not alone. They are supported by nearly all the Courts in States where registry laws exist, and in England the old doctrine has been greatly modified. 21 Mo. Rep. 313.

In Rhode Island it has been decided that "open and continued possession of land by a person having an unrecorded deed, and claiming land as his own, is not presumptive notice of the existence of such deed to subsequent purchasers. *Harris v. Arnold*, 1 Rhode Island Rep. 125; see also *Withers v. Carter*, 4 Gratt. (Virg.) Rep. 407.

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In 32 Maine, 287, cited by appellants, the Court said: "Prior to the Revised Statutes, visible possession of an improved estate, by the grantee under his deed, was implied notice of the sale to subsequent purchasers, although his deed had not been recorded. But the Revised Statutes, (chap. 91, sec. 26) introduces a new principle, and abolishes constructive notice, arising from possession under a deed not recorded, and requires actual notice of such deed to subsequent purchasers to prevent them from holding the estate."

In the case of *Jackson v. Van Valkenburgh*, (8 Cow. 254) Judge Woodworth reviewed the authorities upon this question, and cited, with approbation, *Jolland v. Stainbridge*, (3 Vesey, 478) in which Lord Alvanley said: "The person who takes subsequently must know exactly the condition of the prior deed, and must have intended to defraud."

In support of this doctrine, the same learned Judge quotes the language of Lord Hardwicke, in *Hine v. Dodd*, (3 Atk. 275) as follows: "Nothing short of fraud, or clear and undoubted notice, will do."

In *Jackson v. Burgett*, (10 John. 457) actual notice of the unrecorded instrument was held necessary; so also in *Dunham v. Dey*, 18 John. 555.

In *Dey v. Dunham*, (2 John. Ch. Rep. 182, 190) Chancellor Kent again reviews this doctrine at length and agrees with Lord Hardwicke in *Hine v. Dodd*, that "A notice that was to break in upon the Registry Act, must be such, as with the attending circumstances will affect the subsequent purchaser with fraud. A notice merely to put the party upon inquiry, will not be sufficient." See also *Jolland v. Strainbridge*, 3 Ves. 478; *Great Falls Co. v. Worster*, 15 New Hampshire, 412.

Mr. Justice Scott, in *Beattie v. Butler*, (21 Mo. Rep. 321) discusses this question at some length, and after a review of the authorities, concludes as follows: "But the possession of the tenant, if notice at all, was only notice of his own right, and not that of his reversioner; this seems to be the settled doctrine." See also 7 Watt. 261; 1 Atk. 589, 490; 4 Binn. 184; 2 Sumner, 557, and 6 Sergt. & Rawle, 184.

This brings us to the consideration of another question raised by

appellants, viz.: Is plaintiff, who purchased at Sheriff's sale, upon his own judgment, a *bona fide* purchaser for a valuable consideration? In some of the earlier decisions in England and this country, a distinction was drawn and maintained between a purchaser who was also the execution creditor, and a purchaser who was a stranger to the judgment and execution. In the former case it was said that the purchaser took the property for a pre-existing debt, paying no new consideration, and must therefore take subject to the outstanding equities in the hands of third persons, while the latter paid the purchase money on the day of sale, and took the property discharged of all equities of which he had no notice. But upon what just reasoning the distinction was maintained, it is not easy to discover. Let us state an example: A advances money to B, for which he obtains a judgment; he issues execution and levies upon B's property; he attends the sale, and being willing to give more than any one else, becomes the purchaser. But because he paid the purchase money to B in advance, and not to-day, he is not a *bona fide* purchaser for a valuable consideration, and must take the property with some secret trust, or have his title defeated altogether by the production of an unrecorded deed, of which he had no notice. But, says the old theory, A takes the property for a pre-existing debt, and parts with no new consideration. This is not the case; the law takes the property, and an officer of the law sells it to the highest bidder. A purchases the property, not as creditor, but as purchaser. The character of creditor ceases, and the rights of purchaser immediately attach. In this State the statute not only permits, but invites, the creditor to purchase; then why should he not stand upon the same footing of other purchasers?

There is no sound reason why he should not. Modern Courts have abolished the old distinction, and the rule now is, "that no difference exists between a purchaser at private sale, and one at Sheriff's sale." *Robinson v. Rowan*, 2 Scammon Rep. 501.

The case of *Scribner's Lessees v. Lockwood*, (9 Ohio, 184) is directly in point. *Parker's Lessees v. Miller et al.*, 9 Ohio Rep. 108; *Jackson v. Post*, 15 Wend. 288; *Graham v. Samuel*, 1 Dana, 166.

Our theory is, that the plaintiff here stands upon the same footing

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with other purchasers, and that his lien and title relate back to the date of the entry of his judgment, and must prevail over defendants' unrecorded deed. This was the doctrine of this Court in the case of *Smith v. Randall*, 6 Cal. Rep. 47.

In the case in 2 Binn. 52, relied upon by appellants, Judge Breckenridge says: "The purchaser at a Sheriff's sale, is as much a purchaser, and as much entitled to protection under a want of notice, as any other. The consequences would be monstrous, if the law would suffer him to be disturbed by secret trusts, or to be affected by the culpable negligence of those who were under a moral and legal obligation to do something which would save others from laying out their money without consideration."

The case in 11 Mo. 77, cited by appellants, is an authority directly against them. The Court says: "This case does not differ in principle from those of *Hill v. Paul*, (8 Mo.) and *Reed v. Austin's Heirs*, (9 Mo. 722). The doctrine of these cases is, that the lien of a judgment prevails over a prior unrecorded deed, and this may be regarded as the settled law of this Court."

"The lien of a judgment will prevail over a prior unrecorded deed. That the deed was executed before the debt was contracted, cannot alter the case; the credit may have been given upon the very lots conveyed by this unrecorded deed." *Frothingham v. Stacker*, 11 Mo. 78; *Reed v. Austin's Heirs*, 9 Mo. 722; *Hill v. Paul*, 8 Mo. 479; *Helm v. Logan's Heirs*, 4 Bibb, 78.

In the case of *Coffin v. Ray*, (1 Metcf. 214) C. J. Shaw said: "The attachment of real estate is considered as in the nature of a purchase, and the attaching creditor is affected with notice of a prior conveyance, in the same manner as a purchaser." *Priest v. Rice*, 1 Pick. Rep., p. 167; *Semple v. Bird*, 7 Serg. & Rawle, 285.

The record contains one other question which we will briefly notice. On the trial in the Court below, appellants called as a witness, D. W. Welty, one of plaintiff's attorneys, and among other things, asked him whether he (witness) had any knowledge of defendants' interest prior to plaintiff's purchase. This was objected to. The Court sustained the objection, and this is assigned as error. See *Greenleaf's Evidence*, vol. 2, p. 311, sec. 244; 7 Cal. Rep. 450.

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BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

We have given the important questions raised by the record, our most serious attention. The amount involved in this particular case is not considerable, but the principles are of the greatest importance. The questions are not free from difficulty; indeed they are full of embarrassment, arising not only from several decisions of our own Court, which, to say the least, do not seem altogether consistent, and from the conflicting nature of the decisions in other States and in Great Britain. Upon no subject is it more important that the law should be beyond doubt as to its construction, and simple and precise in its provisions. And it may well merit legislative consideration, whether the Statutes of Registration should not be thoroughly revised, so as to secure uniform and certain rules for the disposition and protection of real estate in the future.

It is not necessary to review the various decisions of this Court. The questions we are considering turn upon the proper construction of the twenty-fourth and twenty-sixth sections of the Recordation Act 1850: This is the language of the twenty-fourth section, as amended in 1855: "Every conveyance of real estate, and every instrument of writing, setting forth an agreement to convey any real estate, or whereby any real estate may be affected, proved, acknowledged, and certified in the manner prescribed in this Act, to operate as notice to third persons, shall be recorded in the office of the Recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto, without such record."

The twenty-sixth section is as follows: "Every conveyance of real estate within this State, hereafter made, which shall not be recorded as provided in this Act, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded."

It would seem that the Legislature designed, in the twenty-fourth section, to hold that the recording of the deed was necessary to give notice of it to third persons, and supposed that the want of such notice

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invalidated the deed as to them; but that afterwards the twenty-sixth section was inserted, which was intended to qualify and limit the effect of this provision. The twenty-sixth section is taken from the legislation of New York on that subject, and is in the words of a section of a statute of that State. Taking both sections together, it seems evident that the true construction is, that the failure of a grantee to record a deed, does not absolutely and without exception avoid the deed as to third persons; for, if it did, it is impossible to give effect to the words "*bona fide* purchaser for a valuable consideration." The failure to register only protects this class of persons. Under the registration laws of England and the American States, (which did not contain this limitation) Courts of Equity engrafted this exception, and held, in numerous cases, that the purchaser of lands, knowing them to have been before sold by the vendor, though the deed was not recorded, was not within the protection of the statute. (See 10 John. 457.) The Irish Registry Act makes no exception or qualification but the record is the only notice; and, in some of the States—Massachusetts, Maine, and perhaps others—*actual* notice is the only substitute for the notice by the registry.

The question arises, who is a *bona fide* purchaser, or what is a *bona fide* purchase? And this inquiry has been the fruitful source of difficulty, and contention, and conflicting decision. *A priori*, it might, perhaps, be considered not a little difficult to say that a party buying land in the possession of another, must *necessarily* be a fraudulent purchaser, especially when he buys with record proof before him of the ownership of his vendor. It could scarcely be held that such a purchaser must necessarily know that the vendor had no title, and that the possessor had. Some of the cases hold that mere possession is actual notice—and will not suffer any proof to be made to the contrary—other, and perhaps the greater number, hold that it is only a presumption of notice, which may be rebutted; and others again hold that the possession is not so much notice of the title of the holder, as a circumstance which should put the purchaser on inquiry, and if he fails to inquire, he is no more protected than if he had inquired and ascertained the fact.

In New York the cases are by no means harmonious—the earlier

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cases holding with more strictness to the doctrine of notice than those of later date. It must be conceded, however, that the authorities, not only in New York, but elsewhere, are overwhelmingly to the point that possession is proof of notice—whether *prima facie* or absolute, it is not necessary to inquire here — of the title of the possessor. This is the doctrine of the Supreme Court of the United States, and of every State in the Union, with the three or four exceptions.

It is urged against this array of authority, that this matter of possession is a *fact*, not a principle; that the fact must have its force in different States or places, according to circumstances; that this fact in England or Massachusetts, owing to local circumstances, has a significance which is denied by the circumstances prevailing here; that in the older States titles are settled and easily understood, but that the reverse of this stable condition of affairs characterizes our younger and unsettled State; and that besides this, we have a statute unknown to those States, allowing the purchase of land in adverse possession; that, in addition to this, much of the real estate of the country is held by disputed titles, and no inconsiderable portion by no pretense of it. The force of this argument is conceded; but something may be urged on the other side. Some latitude should probably be indulged in a new State, whose people, hastily gathered together, are, many of them, unfamiliar with their own laws; and it is not strange that, under the peculiar circumstances which surround them, great negligence and laxity in the transaction of business, both in individuals and public officers, prevailed; and hence much that may be attributed to ignorance, carelessness and accident, prevented the preservation and protection of land titles. But besides this, we do not see enough in these suggestions to induce us to disregard an array of authority so formidable.

We acknowledge the weight of the considerations of public policy which suggest that land titles should be made to depend upon written and record proof, with few exceptions, and to leave as little to parol proof as possible; and especially do we acknowledge the paramount importance of establishing clear, precise and definite rules in respect to contracts and property; such rules as furnish of themselves authen-

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tic guides to Courts and juries, and give to the citizen certain ideas of his rights, and leave as little as possible to litigation or the discretion of the Judge. But this policy addresses itself to the Legislature, and we cannot give effect to it in this case, in the face of a clear persuasion that the law, as it is written, is otherwise.

We must, therefore, hold, in obedience to this authority, that the open, notorious possession of real estate, by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser, of the first vendee's title. *To guard against misapprehension, we say that the possession must exist at the time of the acquisition of title or deed of the subsequent vendee, from the common vendor.*

It appears by the express finding of the Court, that Knox, the vendee of Glenn, entered into possession of the premises after his purchase in 1851, and made permanent and valuable improvements; that up to the time of his death, he was in possession, as was his administrator after his death, until after the purchase by Hunter. The finding is, that the administrator was in "the notorious possession of the property at the time of the plaintiff's purchase." But it is by no means clear, from the evidence, whether the Judge, in his finding, meant to assert that this was a personal possession, or possession by a tenant or tenants; for the finding is that defendants hold under a lease from Knox's administrator. When the lease commenced does not appear. The other evidence introduced to show knowledge by Hunter of the deed from Glenn to Knox, was, taken alone, clearly insufficient. *Wyatt v. Burnell*, 19 Vesey, 435; *Jolland v. Strainbridge*, 3 Vesey, Jr., 478; *Scott v. Gallagher*, 14 S. & R. 333.

The deed of 1856 may be laid out of the question. It was made after the death of Knox, and though made to him and "his heirs," the word "heir," is not a word of purchase, carrying title to the heirs, but only qualifying the title of the grantee. A deed to a dead man is a nullity.

The deed of 1851, at the instance of Forbes, is attacked. The deed was executed under a power from Glenn, very general in its terms and evidently intended to give to the attorney authority to act for the principal in respect to the latter's business in California; it

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authorized the attorney "to make and execute conveyances." The money was received by Forbes, and the execution of the deed seems to have been approved by Glenn. We think, therefore, that this deed cannot be assailed for want of authority to execute it. It was not recorded.

If Hunter had legal notice of this deed, we think it was enough to defeat his purchase.

The Statute of California already cited, only protects purchasers; creditors, as such, do not seem to be included within its provisions; but a judgment creditor, purchasing at his own sale, without notice, is a *bona fide* purchaser within the Act. The cases are not agreed upon this subject, but the weight of authority and the reason of the rule are as we have stated it. 4 Cowen, 599; 15 Wend. 588; 8 *Ib.* 620; 5 Mo. 387; 8 Ala. 866; 9 Ohio, 184; 1 Barr, 24.

Upon the trial, Mr. D. W. Welty, the attorney for the plaintiff, was examined as a witness for the defendant, to prove that while he was acting as agent for plaintiff, he ascertained the facts in relation to the title or claim of Knox to this property. Though this examination was not very regular, yet we are inclined to think the witness should have answered the general question, or protected himself by his privilege or that of his client. It is clear, that the knowledge of the agent in the course of the agency, is the knowledge of the principal; and while the attorney is not permitted to disclose the confidential communications of his client, yet if he acquires information apart from any such communications, he is not protected from disclosing it. We do not understand that the witness was required to state any facts derived from statements made to him by his client, or from the papers of his client, but merely to state facts coming to his knowledge from independent sources.

The judgment is reversed, and the cause remanded for a new trial.

I dissent, for reasons which I shall file hereafter.

TERRY, C. J.

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PEOPLE *ex rel.* ATTORNEY GENERAL v. BURBANK.

When a District Judge is elected by the people on the occasion of a vacancy in the office, he is, under the Constitution, elected for a full term of six years. And this though the proclamation of the Governor for the election is for the unexpired term of his predecessor.

The function of the proclamation is not to proclaim the law, but the fact of the vacancy. It cannot change either the law or the Constitution.

The Constitution, though it fixes the period of the tenure of the office of District Judge, does not fix any day for the commencement of the term; and if it did, it would not follow that it applies to Judges afterwards elected to new districts. Nor would it result, that the Judge elected in consequence of a vacancy, was necessarily elected to fill such vacancy.

All the Constitution means by the expression "during the term," as used in sections fifteen and sixteen of article sixth, is, during the time or period for which the officer is elected.

When the Constitution says the Judge shall hold his office for six years, it means that this period of six years is the term of his office; it is that quantum of time assigned to him by the Constitution as his period of the enjoyment of the office, and this quantum may not improperly be called a term.

The Legislature can direct the time and prescribe the mode of electing District Judges, but cannot change the tenure of the office; hence, so much of the Act as limited the period of incumbency, is void.

An Act may be void, in part, for its unconstitutionality, and good, so far as it is constitutional.

People *ex rel.* Brodie v. Weller, Governor, (11 Cal. Rep. 77) affirmed.

APPEAL from the Twelfth District, County of San Francisco.

This was an action to try the right to the office of District Judge of the Fourth Judicial District.

The facts as stated in the opinion of the Court, are as follows: In 1852, at the general election, Delos Lake was elected Judge of the Fourth District for six years from first of January, 1853. In June, 1855, he resigned, and the Governor appointed J. S. Hager to fill the vacancy until the election in 1855. In July, 1855, the Governor issued his proclamation, in pursuance of law, for the election in September; in which proclamation was included this office—styling the officer to be elected a District Judge for the unexpired term of Delos Lake, resigned. The Board of Supervisors also gave notice in the same way. At the election, Hager was elected — was commissioned in

this form — and entered on the office, and held it until the general election of 1858, when Caleb Burbank was voted for, and received a majority of the votes for this office. All the proceedings were regular in form, and he was commissioned by the Governor in due form — qualified, and entered upon the office. This proceeding is taken to oust him, upon the claim that Hager is entitled to the office.

The Court below held, that "Burbank is rightfully and legally in the possession of the office of Judge of the Fourth Judicial District of the State of California, and that he did not unlawfully usurp said office, as in the information alleged." Relator appealed to this Court.

Hall McAllister for Appellant.

Counsel reviewed at considerable length the history of the legislation in this State respecting the Judiciary, and then argued as follows:

II. Legislative exposition of constitutional provisions is never entitled to much weight.

The supineness, carelessness and ignorance of legislators, are matters of complaint, not only in this State, not only in other States of the Union, but also in England. We constantly find the English Judges bitterly complaining of the supineness and neglect of Parliament in the matter of legislation. Dwarria on Statutes, 551, 556, 708.

In England, Parliament are omnipotent, and are therefore only called upon to see that their statutes do not conflict with each other; whereas American Legislatures must look not only to this, but must also bring each Act they pass to the test of the Constitution.

When legislative exposition should be resorted to, and the weight which should be given to it. Smith's Statutory Law, *secs.* 289, 290, 291, 292; Dwarria on Statutes, 562.

III. In the construction of a constitutional provision *restrictive* of the power of the Legislature, legislative exposition should *never* be resorted to. Smith's Statutory Law, *secs.* 293, 295, 296; *Vide* also, *Ibid.*, *sec.* 290.

The present case is one where the constitutional provisions are *restrictive* of the power of the Legislature.

The Constitution substantially declares (*art.* 6, *sec.* 6; *art.* 11, *sec.*

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8) that the Legislature shall not interfere with "the duration of any office" which has by it been "fixed."

IV. Legislative exposition has not been regarded by this Court, heretofore, as a guide in construing the Constitution. *In re Heldforth*, 1 Cal. R. 438; *Cauldfield v. Hudson*, 3 Cal. R. 389; *Reed v. McCormick*, 4 Cal. R. 342; *Exline v. Smith*, 5 Cal. R. 112; *Burgoyne v. Supervisors of San Francisco*, 5 Cal. R. 1; *Guy v. Hermance*, 5 Cal. R. 73; *Dickey v. Hurlburt*, 5 Cal. R. 343; *Zander v. Coe*, 5 Cal. R. 230; *The People v. Applegate*, 5 Cal. R. 295; *The People v. Nevada*, 6 Cal. R. 143; *The People v. Johnson*, 6 Cal. R. 500.

V. The only true exposition of the Constitution is a judicial one.

The judicial attribute has been lodged by the Constitution, not in the hands of the Legislature, but with the Judiciary — a distinct coördinate department of Government.

The idea has no force, that the Judiciary must, in any degree, yield to the crude opinion of the Legislature concerning the Constitution, when that Legislature is deciding as to its own powers.

It will not do for the Legislature to sit as Judge in their own case.

VI. The Constitution fixes the judicial tenure of appellants at six years.

The District Judgeship is a constitutional office; hence, (in considering its nature, character, jurisdiction, duration, and the like) we must disembarass our ideas of all statutory regulations, and look solely to the organic law — the Constitution. Constitution, art. 6, sec. 5. Here we have a constitutional office, and a constitutional tenure affixed to its incumbent.

The office itself, and the tenure of its incumbent, are beyond the reach of legislative enactment.

Upon the subject of tenure, the framers of our Constitution need not have added a single word additional to the expression "for the term of six years."

That provision alone would have been fully sufficient for appellant's case.

But article 11, sec. 7, is perhaps even more explicit; for it substantially forbids all legislative interference with "the duration of any office fixed" by this Constitution.

But is the system marked out in the Constitution for this office of District Judge, complete? Are contingencies provided for — death or resignation?

Constitution, art. 5, sec. 8: When, therefore, a vacancy occurs for any reason, in the office of District Judge, the Governor has constitutional power to fill the office until the "next election by the people."

Our argument is plain, and nothing can be more simple than the operation of the system appointed (fully and completely) for the office of District Judge.

Resignation or death occurring, the office becomes vacant; the Governor appoints for the interim until the next general election by the people. The people elect at the constitutional time (to wit, the next general election after the vacancy in the office occurs, which is always a time uncertain, the period of the general election being entirely under control of the Legislature) to a constitutional office for the constitutional tenure.

Is there any possible defect in this system? Is there any contingency unprovided for? Is there any reason why this plain, simple and complete plan, marked out in the organic law, should not be enforced?

Neither can a single argument be adduced against the policy of this system, while there are many obvious suggestions in its favor.

By always making the tenure of elected District Judges six years, the value, dignity, independence and utility of the office are preserved; while to split up the constitutional tenure into one, two, three, four years, as may chance, greatly tends to impair, if not to entirely destroy, these important attributes.

These views are asserted by this Court in *People ex rel. Brodie v. Weller*, 11 Cal. Rep. 77.

The idea of fixed terms identical for the whole State, having a certain commencement and fixed termination, appointed by the Constitution, was thoroughly and utterly denied by this Court in the *People ex rel. Brodie v. Weller*.

A Judge elected to fill the unexpired term of a previous incumbent who had died, is entitled to hold the full constitutional term. *Shelly v. Johnson*, Dallar, 597, cited in *Texas Digest*, p. 268; *Roman v.*

Moody, Dallam, 512, cited in Texas Digest, p. 386; Wammach v. Holloway, 2 Ala. R. 31.

Where the term of office is fixed by the Constitution, each succeeding incumbent, although elected to fill a vacancy, is entitled, unless it is otherwise provided in the Constitution, to hold the office for the full period. *Bunton v. Wilson*, 4 Texas R. 400; *Marshall v. Harwood*, 5 Maryland, 423; *Hughes v. Buckingham*, 5 Sm. & M. 632; *Powers v. Hunt*, 2 Humphrey's R. 24; *The People v. Green*, 2 Wend. R. 266; *The People v. Coutant*, 11 Wend. R. 511; *The People v. Garey*, 6 Cowen, 642.

The Constitution of the State of California does not fix the time of the commencement of the term of the District Judge. Constitution, Art. VI, sec. 5; *The People v. Weller*; *The State of Ohio v. Nebeling*, 41, 42, 43.

The respondent's counsel has pertinaciously argued that the Constitution appoints a certain commencement and termination for the term of the District Judges, and yet has even failed to show that the commencement of the term of the first original nine districts is appointed by the Constitution.

By the statute of 1850, nine Judicial Districts were established. By the Act of March 11, 1851, eleven Judicial Districts were made. By the Act of May 15, 1854, twelve Judicial Districts were created. By Act April 16, 1855, fifteen Judicial Districts were established. By a recent statute, the number of Judicial Districts has been increased to eighteen.

If these fixed terms, with certain constitutional commencement and termination, are non-existent whence does the respondent derive "unexpired term," "balance of term," etc., which form the burden of his argument?

If a District Judge dies, there is a vacancy in the office, not a vacancy in his term. There cannot be said to be a vacancy in his term, for the term has ceased to exist. There is no fixed term having a duration beyond the life of the judicial incumbent.

The Constitution attaches the term to the Judge, not to the office. Constitution, Art. VI, sec. 5.

The Constitution, speaking of District Judges, says: "Said Judges

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shall be elected by the qualified electors of their respective districts at the general election, and shall hold their office for the term of six years." That is—*all* District Judges shall hold their office for the term of six years.

There is no exception suggested; there is no language from which any can be implied. The constitutional clause applies generally to all District Judges.

Notice also the imperative character of the language used — "*shall hold.*" The expression is positive and emphatic.

The declaration of the Constitution — that District Judges shall hold their office for the term of six years — is an express contract with every Judge duly elected by the people, that he shall have that tenure. An open offer is made by the Constitution, and, when accepted by election and qualification as Judge, the compact is complete.

A reference to the Constitutions of the various States of the Union, clearly establishes, that when the framers of a Constitution have created a constitutional office, established the duration of the term for which it shall be held, and have desired, that in case of a vacancy by death or resignation, the office should be filled by a new incumbent only for the residue of the term during which his predecessor would have held, they have so distinctly expressed themselves in the Constitution.

Constitution of New York, Art. VI, sec. 13; Constitution of Mississippi, Art. IV, secs. 2, 5, 20, 21; Constitution of New Jersey, Art. VI, sec. 6, subd. 1 and 2; Art. VII, sec. 2, subd. 2; Constitution of Louisiana, Title IV, arts. 63, 67; Constitution of Kentucky, Art. IV, secs. 3, 6, 7, 11, 13, 23, 26; Constitution of Michigan, Art. VI, sec. 14; Constitution of Wisconsin, Art. VII, secs. 4, 9.

Hoge & Wilson for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

More in deference to the earnest and ingenious argument of the respondent's counsel, and the interest of the question, than from any sense of the intrinsic difficulties of the subject, we have thought it

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proper to go into a full discussion of the points presented by this record, and to a reconsideration of our former decisions upon this matter. The facts may be thus briefly stated: In 1852, at the general election, Delos Lake was elected Judge of the Fourth District, for six years from first of January, 1853. In June, 1855, he resigned, and the Governor appointed J. S. Hager to fill the vacancy until the election in 1855. In July, 1855, the Governor issued his proclamation, in pursuance of law, for the election in September, in which proclamation was included this office — styling the officer to be elected a District Judge for the unexpired term of Delos Lake, resigned. The Board of Supervisors also gave notice in the same way. At the election, Hager was elected — was commissioned in this form — and entered on the office, and held it until the general election of 1858, when Caleb Burbank was voted for, and received a majority of the votes for this office. All the proceedings were regular in form, and he was commissioned by the Governor in due form, qualified, and entered upon the office. This proceeding is taken to oust him, upon the claim that Hager is entitled to the office.

The question being as to the effect of Hager's election, we are called upon to construe the provisions of our Constitution, and to test by them the validity of the Acts of the Legislature under which the respondent claims. The preliminary propositions of the learned counsel for the respondent are not disputed; we yield to them our cordial sanction and entire approval. The delicate office of declaring an Act of the Legislature unconstitutional and void should never be exercised, unless there be a clear repugnancy between the inferior and the organic law. Courts have no legislative powers; they are merely the organs of laws already made; they can do no more than construe and give effect to them. But the power of declaring a particular statute unconstitutional, necessarily results from this very duty, since they could not declare the paramount law at all, if it were destroyed or nullified by the Legislature; they are bound to declare not only the law made by the Legislature, but that superior law to which the Legislature owes its existence. We concede, also, that a long and consistent recognition by the Legislative and Executive Departments of the Government, of the constitutionality of a system of laws, by reference to which the State Gov-

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ernment has been guided, furnishes a still further reason for extreme caution on the part of the Judges in the exercise of this power; but we do not concede, in this particular instance, the force which the learned counsel claims for the argument. Without reference to the circumstances of extraordinary difficulty and embarrassment which characterized the early history of California legislation something perhaps might be urged against the authority of usage and passive acquiescence, when the short and feverish period of our political and social experience is considered. Only a few years have elapsed since California was admitted as a State into the Union, and if, as the counsel suggests, many events have been crowded into that brief space, it must be remembered, too, that Legislatures and people have been diverted in no ordinary degree by that very cause, from the attention given in older States to matters of government. The legislation of the State has been a signal illustration of this want of care, and the statute book is replete with crude and unconstitutional legislation; and if full effect were given to the argument, it would be impossible to say to what extent the Constitution would be altered. It is certain that the same course of argument so much insisted on, would, if effect were given to it, validate the entire State debt, and affirm the power of the Legislature to incur any conceivable amount of indebtedness for the future. Moreover, we might urge that the constitutionality of the laws under review never was, in any way, recognized by the Judicial department; we say in no way, for the mere fact that judgments of Judges holding under the law have been brought into this Court and passed on, proves nothing; this Court could take no notice of the persons rendering the judgment — no point being made as to their authority — nor could there have been, as the Judges were in office with a color of right, and in undisputed exercise of judicial functions. Besides all this, the question is not of the nature calculated to challenge sharp criticism or much inquiry. The Judges being in office without dispute as to title, and elections occurring at unfrequent intervals until the periodical elections, few men thought or spoke on the subject, until the case was brought for judgment directly before this Court. We think it a mistake to suppose that there has been, at any rate of late years, no question in the mind of the profession upon this point; the reverse is the

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fact, from the time when the subject began to be discussed; so soon as the question was made in this Court, it was decided.

Nor is this a matter as seems to be intimated, like many of those which, being once declared or acted on by the Legislature for a series of years, is protected by public policy—that policy which turns a Court instinctively from a scrutiny into the foundations of laws long established, and which, when overturned, carry down with them vested interests and rights, or create general confusion. The question, in its immediate results, is turned into a mere question of personal right and interest between two men. Every act done by a Judge, acting as such under a commission, and in open possession of the office, whether rightfully in office or not, is to all intents and purposes as valid, so far as third persons are concerned, as if he were both Judge *de facto* and *de jure*. We suppose this principle cannot be disputed. There is but little difference between an old Act and a new Act, so far as this question of acquiescence is concerned, if nothing or little have been done under the Act, or if no rights are vested under it. We think upon this question, then, we can proceed to construe the law, without any very controlling obstacle to our consideration of it, arising from the past history of the Government. But as this argument has been very much pressed, it may not be out of place to inquire into the particular facts upon which it is based.

The first Act passed on the subject was that of March 16th, 1850. St. 1850, p. 95, sec. 23. Act of the same year, p. 101, does not make for the respondent: Act of 1850, April 11, 1850, p. 206, sec. 46, though loosely drawn and omitting any provision for supplying the vacancy of County Judges, does in sec. 46 support respondent's claim by providing for vacancies in office "for the unexpired term." By the Act of April, 1851, the forty-sixth section of the Act of 1850, April, was (in effect) amended so as to provide for County Judges. In the Act of 1853, vacancies are provided for, but nothing said as to the tenure. The other Legislatures have done nothing to indicate their views on the question. The various Acts of 1850 and 1851, except the sections noticed, seem rather to lean to the side of the appellant; but it can hardly be contended that two Acts of the earliest of California Legislatures, passed before the Judiciary were organized under the

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popular elective system, should possess the controlling weight of an authentic exposition of the Constitution.

We must, therefore, try this question by the Constitution, and here we find our chief difficulty; it is the difficulty of making clearer what the Constitution has made palpable. We might agree with the learned counsel, that the Constitution must generally be construed more by its own terms than by the aid of authorities from other States; but this is only true when there is something peculiar in the matter to be construed. If the same words, in the same or similar contexts, have elsewhere received a definite construction, the authority is entitled to the same weight in this as in other cases. The words, however, are plain enough of themselves. The first section of article sixth of the Constitution provides that the judicial power shall be vested in a Supreme Court, in District Courts, in County Courts, and in Justices of the Peace. Section five provides that the State shall be divided by the first Legislature into a convenient number of Districts, subject to such alteration, from time to time, as the public good may require; for each of which a District Judge shall be appointed by the joint vote of the Legislature at its first meeting, who shall hold his office for two years from the first day of January next after his election; after which said Judges shall be elected by the qualified electors of their respective Districts at the general election, and shall hold their office for the term of six years. If the question turned on the meaning of these words — "*the said Judges shall hold their offices for the term of six years,*" we apprehend no dispute would arise as to the meaning. That "six years" applied to *all* the Judges, do not mean one, two, three, or four, or five years, is plain enough. The language is general; it embraces *all* the Judges; it refers to the offices of all; declares how they shall be filled, and the duration of the enjoyment. If the Convention meant to say that certain terms should be assigned to the office of Judge, and those terms filled without reference to the number of incumbents, the apt words to express this idea would have been employed, just as in the Constitutions of New York, Louisiana, Kentucky, and other States, language was used to convey the idea. Thus, in New York, when speaking of Judges, "*if the office become vacant before the expiration*

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of the regular term for which he was elected, the vacancy may be filled by appointment by the Governor, until it shall be supplied at the next general election of Judges, when it shall be filled by election for the residue of the unexpired term." But this and like provisions in other Constitutions were wholly unnecessary, according to the adverse construction. If it were expedient that District Judges should be elected for a term of six years when first filling the office, what reason or sense is there in the fact that the new Judge is the successor of a Judge who had not filled out his term, which should alter the rule? But two answers can be given: that the Judges are classified, (but there is no classification provided for by our Constitution) or else, to secure conformity of elections; but this policy is not indicated, and is in fact impracticable.

We come now to see how these same words, or similar words, are construed in other States, and then we will examine whether there is anything in other provisions of the Constitution which affects the language quoted. In the *People v. Garey*, (6 Cowen, 646) it was held that the seventh section of the fourth article of the Constitution of New York, which declared that persons appointed to the office of Justices of the Peace, should hold office for four years, inhibited the Legislature from increasing or diminishing this term, and that this could not be done by the creation or division of the counties. The counsel did not pretend, in that case, that the Legislature had this power directly, but it was contended that they had the power to make new counties; and if the Justice was no longer a resident of the county for which he was elected, this removed him from office; but the Court held otherwise. This case was affirmed by the Court of Errors of New York, (9 Cowen, 640). In *People v. Green*, (2 Wend. 266) this same question came up in another form. The provision of the then Constitution of New York is strikingly analogous to the section of our own. The eighth section of the fourth article declares that Sheriffs, etc., shall be chosen by the electors of the respective counties once in every three years, and as often as vacancies shall happen; they shall hold no other office, and shall be ineligible, etc., and the Governor may remove them at any time within the three years for which they shall

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be elected, etc. Judge Marcy said, "there is no express designation of the term for which Sheriffs shall hold their office, but it is fixed at three years by the strongest implication."

We extract a portion of the opinion of Justice Marcy, for the aptness of its application to the case: "By the general provisions elections for Sheriffs are not to be held oftener than once in every three years, except in cases of vacancy. In what part of the Constitution is it declared, or from which of its provisions are we authorized to infer an exception, in the case of a person elected to an office, vacant by the death, resignation or removal of his predecessor? Why shall he not hold as long as he would have done if elected at the end of a full term? It is the designation of the stated period for the election that fixes the term of holding, and this designation is applied to every election. Apply the language of the Constitution to a single county, to that of Cayuga, for instance; it is, that the Sheriff of this county shall be elected once in every three years, and as often as a vacancy shall happen. A vacancy did happen by the death of Hughes, and without the latter clause of the foregoing sentence, no election could have been held until three years from the previous one; but I cannot infer from this clause any restriction upon the term of Green, the successor of Hughes. It does not express or imply that he is to serve out only the residue of Hughes' term. Green was elected, as I understand the provision, to fill the vacant office, and not merely to serve out the vacant term of his predecessor. I am inclined to think that a diversity of opinion on this subject has arisen from different applications of the term '*vacancies*' in the section of the Constitution which we are now considering. It has been sometimes applied to the office as contradistinguished from the term of service, and at others, to the term of office. I understand it as applicable to the office alone. When Green came into the office, he took it with all the rights, powers and incidents belonging to it under any circumstances, one of which was a term of three years. The case of Sheriffs has been assimilated to that of Senators, who are declared by the Constitution to be chosen for four years; but those chosen to fill vacancies, hold only for the residue of the unexpired term of their predecessors. This limitation to the holding does not result from the fact that they are elected to fill vacancies, but

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from other parts of the Constitution from which it is necessarily implied. The provision classifying the Senators, and vacating the seat of one from each District in every year, could not be carried into effect if a Senator elected to fill a vacancy were to hold a full term of four years. But permitting a Sheriff to hold for three years in case he is elected to fill a vacancy, is not, like the case of a Senator, incompatible with any other part of the Constitution." The same question again came up in 11th Wendell, 135, *People v. Coutand*, in the case of a Register, to whom the same words of the Constitution quoted in the last case applied. Chief Justice Savage took the same ground, re-affirming the decisions before cited. He says: "Taking the whole section together it is as if it read, 'Every person elected Sheriff, Register, etc., shall hold his office for three years, etc.' If such had been the phraseology, there would have been no reason for doubt; I think there is as little now." What is the difference "between persons elected as Judges," and "Judges shall hold their offices" for six years?

The Constitution of Tennessee is very similar to ours, providing that the people shall elect, etc., for the counties, one Sheriff, etc.; the Sheriff for two years, the Register for four. If a vacancy occur after the election, it is to be filled by the Justices until the election, when the office shall be filled by the qualified voters: Held by the Supreme Court, that the election of the Register, after the vacancy, was for the full four years. (*Powers v. Hurst*, 2 Hump. 24.) The Texas Constitution provides: "There shall be a Clerk of the District Court for each county, who shall be elected by the qualified voters for members of the Legislature, and who shall hold his office for four years. In case of a vacancy, the Judge of the District shall have the power to appoint a Clerk until a regular election can be held: Held that the person elected, though during the term which, if a vacancy had not happened, would have been that of the predecessor, holds for the period of four years. (*Bunton v. Wilson*, 4 Texas, 410.) Several other decisions have been made in the same State to this effect. The same principle is held in *Marshall v. Howard*, 5 Md. 423; *Hughes v. Buckingham*, 5 Smedes & M. 649, holds the same general doctrine. That case is distinguished from *Smith v. Halfacre*, in 6 How. (Miss.) 391, by the fact that by the Constitution of Mississippi, biennial elec-

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tions were fixed on first Monday in November, and that day was fixed as the commencement of the term of officers elected at that election. But, as we have said in *Brodie v. Weller*, the Constitution of this State, though it fixes the period of tenure, does not fix any day for the commencement of the terms of the Judges. This position was vigorously assailed by the learned counsel, but, we think, without success. Nor, if we are mistaken in this view, does it at all follow, because a day of the commencement of the terms of judicial officers is given by the Constitution, that it applies to Judges to be afterwards elected for new Districts; nor, if it did, would it result that the Judges elected in consequence of a vacancy, so to speak, must necessarily be elected only to fill that vacancy. We are unable to perceive the logical connection between the fixing of a particular day for an incumbent to take his office, and the extent of the period for which he is to hold it.

Other authorities might be added; but in the absence of any opposing case — for *Smith v. Halfacre* turns upon matters peculiar to the Constitution of Mississippi — it is wholly unnecessary to adduce more authority to aid a construction which, really, needs no extrinsic support.

If we look from the words to the policy they were employed to declare, the result is the same. The Constitution of California shows a wise and peculiar solicitude to secure the independence of the Judiciary. For that purpose, it provides that the Supreme and District Judges shall not be eligible to any other office during the terms for which they shall have been elected; and further, that their compensation shall not be increased or diminished during that term. When we see, in connection with these provisions, the unqualified declaration that the District Judges shall hold their office for the term of six years, and an express provision that the duration of offices fixed by the Constitution shall not be altered by the Legislature, we are constrained to the conclusion that the words fixing the period of tenure — by far the most essential means to the same end — were designed to be so construed as to be most effectual for its accomplishment. It is just and right that this should be so. A lawyer who abandons his business and clients, and surrenders all claims to other official promotion, should have some guarantee of the continuance of his office; but this consid-

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eration is nothing compared to the paramount policy of securing the impartiality and independence of Judges, which can be most safely assured by a tenure of respectable duration.

It is urged that the fifteenth and sixteenth sections of the sixth article of the Constitution control and limit, or show a different construction of the third section. Those sections simply provide that the Judges shall be ineligible, as before observed, and that their compensation shall not be increased or diminished during the term for which they shall have been elected. It is inferred, from this, that the Constitution has divided the office into fixed terms, to which the incumbents are appurtenant. But we think this is not true. All the Constitution means by the expression "during the term," is *during the time* or period for which the officer is elected. When the Constitution says the Judge shall hold his office for six years, it means that this period of six years is the term of his office; it is that quantum of time assigned to him by the Constitution as his period of the enjoyment of the office; and this quantum may not improperly be called a term. If A is elected District Judge, and enters upon the office, or accepts it for a day, he is disqualified for other office during the whole period of six years; and so, after his election, it would not be competent for the Legislature to change the compensation. These observations we apply to the District Judges alone; as we said in *Brodie v. Weller*, the provisions of the Constitution in respect to Justices of the Supreme Court are different in respect to terms.

The remaining question is as to the validity of Hager's election. It is said that the Act under which the election of 1855 was held, provided for the election of District Judges to succeed those who had not served for the full time for which they were elected, only "to fill an unexpired term;" that the proclamation of the Governor was to the same effect; and so the commission; and hence, it is contended, that Hager was not legally elected. But we think this position is not well taken. The law required an election to fill this office. The Legislature could direct the time and prescribe the mode of the election, but could not change the tenure; it could no more prescribe that the Judge elected should hold office for a part of a constitutional period than for double the time; the function for the proclamation was not to proclaim

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the law, but the fact of a vacancy; the proclamation cannot change the law, much less the Constitution. So much of the Act as limited the period of incumbency is void; but it is well settled that though an Act may be void, in part, for unconstitutionality, it is good so far as constitutional. This has been often held. The observations of Mr. Justice Huger, of the Constitutional Court of South Carolina, state very clearly the rule on this subject: "If a commission, issued by the Governor, cannot control the provisions of an Act of the Legislature, neither can an Act of the Legislature control a provision of the Constitution; and for the same reason, neither possess original power; in both it is derivative; each, therefore, must be governed by the authority under which it acts. Supreme power exists in the people alone. They have, by the Constitution, declared what portion of that power shall be used by the different departments — neither has a right to encroach upon the other.

"If the people declare and ordain in their Constitution, that an office shall be held by a particular tenure, or that the obligation of a contract shall not be violated, it would be as much usurpation in the Legislature to alter that tenure, or violate the obligation of the contract, as it would be in the Governor to commission for a longer period than directed by the Legislature.

"It is made the duty of the Judiciary to enforce the paramount law; and it is unworthy of consideration, whether it be an Act of the Legislature conflicting with the commission of a Governor, or a provision of the Constitution with an Act of the Legislature, or two Acts with each other. In every case, the Judges are bound to use their utmost discretion." And the same Court said in another case: "The Governor, in granting a commission, acts ministerially, and therefore ought to make it conform to the law and to the Constitution. The commission does not confer the office; it is only evidence of it, and cannot change the tenure by which the Constitution declares that it shall be held. As soon as an ordinary is elected, he is in office under the Constitution, and entitled to all the rights and immunities conferred by that instrument."

We have thus, more at length than the difficulties of the case warranted, given our views upon this subject. It is important that the law

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upon the question should be settled, so that it may be understood for the future; and to that end we have reconsidered the case of *Brodie v. Weller*, 11 Cal. 77, and re-affirm it. The principles there laid down are conclusive of the merits of this action.

The judgment of the Court below is reversed, and judgment ordered to be entered in the District Court for the appellants.

PEOPLE *ex rel.* FOX v. TEMPLETON.

F. was elected, in the month of May, 1857, County Judge of San Mateo county, in pursuance of the provisions of an Act "To Organize and Establish the County of San Mateo." No proclamation of the Governor was issued calling this election. At the general election in 1858, in pursuance of the proclamation of the Governor, an election was held for the same office, and T. was elected: *Held*, That F. was entitled to the office.

By the Constitution, Judges of the County Court hold their offices, when elected, for four years. It is in the power of the Legislature, in organizing, or after organizing, a new county, to prescribe the time of elections for county officers, and also the period of the commencement of their terms; but it is not competent for the Legislature to change the period of the tenure of the office of Judge of County Courts, any more than to change those of Supreme and District Judges. It is evident, from the terms of this Act, that it was contemplated that these officers — the Judge among them — should enter upon their offices as soon as the election was announced, or within a reasonable time thereafter.

From the time of the assumption of the office, the term of the Judge elected would legally commence, and terminate at the expiration of four years from that time.

APPEAL from the Twelfth District, County of San Francisco.

This was an action brought to try the right to the office of County Judge of San Mateo county.

On the twelfth day of May, 1856, in pursuance of the provisions of "An Act to Repeal the several Charters of the City of San Francisco, and to Establish the Boundaries of the City and County of San Francisco, and to Consolidate the Government thereof," an election was held for the various county officers, including that of County Judge for the County of San Mateo, and at such election, the relator, Ben-

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jamin F. Fox, was elected County Judge, and soon after qualified and entered upon the discharge of the duties of such office. The law under which this election was held, did not go into effect until after the day of the election.

On the eighteenth of April, 1857, an Act was passed "To Reorganize and establish the County of San Mateo." This Act provided for the election of all the county officers on the second Monday in May, 1857. Under the provisions of this Act, another election for the office of County Judge was held, and the relator was again elected, and soon thereafter was duly commissioned and entered upon the duties of the office. No proclamation of the Governor, calling either of the elections, was issued. At the general election in the year 1858, in pursuance of the proclamation of the Governor, and notice of the Board of Supervisors of that county, an election was held for the office of County Judge of San Mateo county, and the defendant, Templeton, was elected to that office, and soon after was commissioned, qualified and entered upon the duties thereof, ousting the relator, Fox, who now brings this action to try the right to said office.

By the judgment of the Court below, the defendant, Templeton, was excluded from the office, and Fox was held to be entitled to it. Defendant appealed to this Court.

W. T. Gough for Appellant.

Three elections are relied upon by the respondent.

1st. The election in May, 1856, is absolutely void. *People ex rel. McDougall v. Johnston*, 6 Cal. Rep. 673.

2d. The election of September, 1856, was held without a proclamation; over six hundred votes were cast in the county at that election, and of these only thirty-eight for County Judge.

a. Such an election is void and fraudulent, and confers no rights. *The People v. Benham*, 3 Cal. Rep. 477; *The People ex rel. McKune v. Gov. Weller*, 11 Cal. Rep. 49.

b. That the present County of San Mateo is a different county from that in existence at the time of that election, both as to the extent and organization. See Acts of April 19th, 1856, and Statutes of 1857, page 223.

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c. The Statute of 1857 is to "Reorganize and Establish the County of San Mateo." As to titles of statutes, see *Cohen et als. v. Barrett & Sherwood*, 5 Cal. Rep. 209.

d. The Special Act of 1857, (Stat. p. 65) was passed for the purpose of legalizing the acts of the officers of San Mateo county, but, by its provisions, before any officers were entitled to its benefits, they were required to conform to its provisions, one of which was, that no officer claiming its benefits should continue in office longer than the special election for officers of that county, which took place in May, 1857.

The respondent voluntarily complied with the requisitions of that Act; took the oath of office required by it, relied upon it, held himself out to the community as acting under it, and finally ran for office at the election of May, 1857, specified by its provisions, was elected thereat, qualified and entered upon the discharge of the duties of the office, under the election in May, 1857.

e. He is estopped from setting up the election in September, 1856, by his subsequent acts. 1 *Zabriskie's N. Jersey Rep.* 403; 4 *Kent*, 268-9, notes c and 1; *Carpenter v. Stellwood*, 12 *Barb.* 128.

f. That by his said acts, appellant was induced to act. *Duel v. Bear River Co.*, 5 *Cal. Rep.* 85.

Having thus disposed of these preliminary questions, we come now to consider what is deemed to be the real issue in this case.

3d. The respondent and relator was elected in May, 1857, at a special election, County Judge of San Mateo county, for a term — if any term under the said election ever existed — which has long expired. See Act to Reorganize and Establish the County of San Mateo, Statutes of 1857, pp. 222-3, sec. 6.

It is conceded in this argument, that the Legislature has the power to shorten or lengthen the terms of all offices, except those fixed by the Constitution, and except, in this case, the County Judge. See *Const.*, art. 6, sec. 7.

It is taken for granted, that in construing statutes force and effect must be given to all their parts, agreeably to the intention of the Legislature. But for these we refer to *Gore v. Brazier*, 3 *Mass.* 523-40; *Kelly Bank Petitioners*, 23 *Pick.* 93, and to other cases there cited.

The intention of the Legislature must govern in construing statutes, when it can be ascertained. *Smith v. Randall*, 6 Cal. Rep. 50.

a. What, then, was the intent of the Legislature in this case?

1. It seems, indeed, so evident, that he who runs may read and understand — that it was their intention to extend the terms of all the officers of the County of San Mateo, six months longer than the ordinary terms; or, to speak more correctly, to allow them to hold — 1st. For six months; 2d. For the terms fixed by laws; i. e., other laws. See Stat. 1857, p. 223, cited above.

2. This would make the tenure of the office of County Judge by the relator, *four years and six months*, an unconstitutional term. Const., art. 6, sec. 8.

b. Now, what we contend for is, that force and effect must be given to the term expressed by the law: "Shall hold their respective offices until the next general election" — that is, from May, 1857, to September, 1857 — for the intention of the Legislature is manifest, that they intended the ordinary term to commence at the general election in September, 1857, for they say that their holding "after the next general election, the same, in all respects, as if elected at the next general election"; and that the primary intent of the Legislature was to fill the offices of the county up until the succeeding general election.

1. It is conceded that the Legislature has not the power to shorten the term of an office, the length of which is fixed by the Constitution; but have they not the power to establish the commencement of that term at the general election, and in the meantime fill the office till that election? Take case of the office of District Judge, the term of which is fixed by the Constitution to commence at the general election. Suppose a new District is formed in February, would not the Legislature have power to fill that office, by special enactment, until the time when the constitutional term would commence?

2. The Act of May, 1857, above referred to, is a special election. It is also specially defined to be a special election by the Statute of 1857, page 65.

Special elections are defined to be such as are held to fill vacancies. Art. 7, Act concerning Offices, 1851; Compiled Laws, 245, and Act to Regulate Elections, 1850.

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c. If the relator and respondent was elected to fill the vacancy until the general election in September, 1857, his term of office has long since expired; for surely it will not be seriously contended that by virtue of a special election in May, 1857, to fill a vacancy, the relator was elected to fill that, and also a constitutional term which commenced at the general election in September, 1857; for it is not pretended that he was elected in any manner at the last aforesaid election.

d. If the relator and respondent was not elected to fill a vacancy at the special election in May, 1857, then the Statute of May, 1857, calling for a special election to fill the offices of the County of San Mateo, so far as it relates to the election of the County Judge, it is urged, is void.

C. N. Fox for Respondent.

I. The first point made by appellant is, that the election set up by relator, which took place in May, 1856, is absolutely void, and for this he relies on the case of the *People v. Johnson*, 6 Cal. 673.

a. But it is respectfully submitted, with all due deference to the opinion of the learned Judges who then occupied the bench, that that decision is erroneous. It was evidently founded upon the last section of the schedule annexed to the Consolidation Bill; and in order to give that section a liberal construction, the Court has overridden the express will of the Legislature as found in other portions of that schedule. See Stat. 1856, p. 176.

b. Even if that decision be correct, the subsequent Act of the Legislature (Stat. 1857, p. 65) so far cured the defect in the former election as to confirm the relator in office until his successor was elected and qualified, and entitled to enter upon the duties of the office according to law.

II. The relator was again elected in May, 1857, under the "Act to Reorganize and Establish the County of San Mateo." The term of office prescribed by that Act was "until the next general election," and for the term fixed by law from and after the next general election, the same in all respects as if elected at the next general election. Stat. 1857, p. 223.

a. The term of office of County Judge is fixed, not only by statute,

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but by the Constitution, at four years. (Art. 6, sec. 8 of the Constitution; Wood's Digest, p. 151, art. 652, and p. 558, art. 2860.) And under these statutes the term begins and ends, and the elections take place at specified terms, "except in cases otherwise provided by special enactment." In this case, the election and term of the relator was "otherwise provided for by special enactment," and that same special Act provided that future elections and terms should be governed by the general law above referred to. See Stat. 1857, p. 223, above cited.

b. Where the Act organizing a county prescribes the term of the officers first elected, and no provision is made for the election of their successors, the election of successors must be governed by the general law. *People v. Church*, 6 Cal. R. 76; *People v. Colton*, 6 Cal. Rep. 84.

III. The construction sought to be put upon the Statute of April, 1857, by appellant, cannot be maintained. He asks the Court, in effect, to put what he deems a literal construction (so far as the office of County Judge is concerned) upon that part of the Act which provides for the term "until the next general election," and to wholly disregard the remainder of that sentence. If any part of that Act is nugatory, as applied to the case of the relator, it is that part to which appellant asks the Court now to give force and effect, and nugatory, for the reason that it was unnecessary. The relator was already in office under the election of 1856, and the Act of March, 1857, confirming him in office; and under that title was entitled to continue in office, whatever may have been the result of the election in May, 1857, until the first Monday in April, 1858, the time when the Court below very properly intimates his term began under the election of May, 1857.

a. But suppose his term, under the election of 1857, did commence immediately after the election, as appellant claims it did, his construction cannot then hold good, for the Legislature had no power, even if they so intended, to provide for the election of a County Judge for a term of six months only; they cannot abridge the constitutional term of four years. With reference to the office of County Judge, the Constitution fixes no time when the term shall begin, or when the officer

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shall be elected. The term *must* be four years; it *may* begin on the day fixed by the general law, or on any other day, according to contingent circumstances. *People v. Langdon*, 8 Cal. R. 1; *People v. Whitman*, 10 Cal. R. 38; *Brodie v. Weller*, 11 Cal. R. 77.

b. The Legislature in that Act has assumed to specify the effect of its provisions; and if the term did commence in May, 1857, the Court has no power to say it was a six months' term, but must give the full term prescribed by the Act, or, at least, so much of it as can be given under the Constitution — four years — and declare the Act void as to the residue.

When the statute assumes to specify the effects of a certain provision, we must presume that all the effects intended by the law makers are stated. *Perkins v. Thornbury*, 10 Cal. R. 189; *People v. Whitman*, *Ib.* 38; *Lee v. Evans*, 8 Cal. R. 424; *Bird v. Dennison*, 7 Cal. R. 307.

IV. Appellant tells us this was a special election. We deny the proposition. It was an election held under a special enactment, but it was not a special election, in the legal sense of that phrase. A special election is one held to fill a vacancy in an office already existing. This was an election to fill offices created by the Act which provided for the election.

a. To give this Act the construction asked by appellant, would be equivalent to overturning the organic act of almost every new county in the State. Nearly every Act organizing a new county, makes the first election come in the spring, and, in the same manner that this does, extends the terms of the officers first elected; in some of them, that extension is made in express words as to the office of County Judge. See Act to Organize the County of Merced, Stat. 1855, p. 125; Act to Organize the County of Del Norte, Stat. 1857, p. 35, and others.

V. This case differs from the case of the *People ex rel. McKune v. Weller*, 11 Cal. 49, cited by appellant, in this: In that case the party claiming the office against his predecessor was relator; here the case is reversed. He who claims the office against his predecessor, has seized upon that office, and compelled the predecessor to bring his action. The rule must then be reversed; defendant's title must first be examined, and if he has none, that alone will be decisive of the

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case. *Doane v. Scannell*, 7 Cal. R. 393; *People v. Scannell*, 7 Cal. R. 432.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

Leaving out some facts which are immaterial in the view we have taken of this question, the case may be thus stated: Fox, the relator, was elected Judge of San Mateo County, in May, 1857, that being the day fixed by the Act of April 18, 1857, for an election for officers of that county. The defendant was elected at the general election of 1858. The Act of April, 1857, (Session Acts, 222) is rather ambiguous in the section authorizing the election; it is as follows: "There shall be an election held for all the county officers of said county, and to ascertain the place preferred by its electors, for their county seat, to be hereafter fixed by Act of Legislature, on the second Monday of May next; and the officers elected at such election shall hold their respective offices until the next general election, and for the terms fixed by law, from and after the next general election, the same in all respects as if elected at the next general election, and until their successors are respectively elected and qualified, as provided by law."

By the Constitution, Judges of the County Courts hold their offices, when elected, for four years. It is in the power of the Legislature, in organizing, or after organizing a new county, to prescribe the time of elections for county officers, and also the period of the commencement of their terms; but it is not competent for the Legislature to change the period of the tenure of the office of Judges of County Courts, any more than to change those of Supreme and District Judges. It is evident, from the terms of this Act — "the officers elected shall hold their respective offices until the next general election, and for the terms fixed by law" — that it was contemplated that these officers — the Judge among them — should enter upon their offices as soon as the election was announced, or within a reasonable time thereafter. From the time of the assumption of the office, the term of the Judge elected would legally commence, and terminate, of course, at the expiration of four years from that time. If the Act is to be construed as extending the term beyond this, as probably is the literal construction, the Act

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so far is void, leaving in force only so much as is constitutional. (See *People ex rel. v. Burbank*, *ante* 378.) The other points have been already decided by this Court.

The judgment is affirmed.

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Where the evidence produced on trial in the Court below, is conflicting, and the question is one of fact, this Court will not disturb the verdict of the jury, on the ground that the case is an equity proceeding.

A jury who have heard the evidence and observed the manner of the witnesses produced before them, have a better opportunity of forming a correct judgment, than an Appellate Court from merely reading the statement of the evidence.

APPEAL from the Twelfth District, County of San Francisco.

Shafter, Heydenfeldt & Park and J. B. Hart for Appellant.

H. S. Love for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

The questions presented by the record, are purely questions of fact.

The case was submitted to the jury on special issues, which were found in favor of defendant.

The evidence on the questions submitted was conflicting, and the verdict depended upon the weight which the jury attached to the testimony of each witness. Upon this point, the jury, having heard the testimony and observed the manner of the various witnesses produced before them, had better opportunities of forming a correct judgment than the Appellate Court from merely reading the statement of the evidence; and we are not disposed — although this is an equity case, and the verdict of the jury is not binding on the Court — to interfere with the verdict and ruling of the Judge who tried the cause.

Judgment affirmed.

Burke v. Table Mountain Water Co. & Laforge.

BURKE *et al.* v. THE TABLE MOUNTAIN WATER CO. & LAFORGE.

In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had the possession," etc. This denial might be true, and yet the defendant be in possession. The defendant was called on to answer, not only the character of the possession, but the fact of possession.

The failure to deny a material averment, is an admission of the facts contained in such averment, and such admission is conclusive against the pleader.

The sufficiency of a notice to the adverse party, to produce on trial a certain paper in his possession, is a question of discretion in the Court trying the case.

Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear.

Literal accuracy cannot be expected in the description given in the notice of a paper in the possession of the adverse party. Such description as will apprise a man of ordinary intelligence, of the document desired, is sufficient.

In an action of ejectment against two persons, where one of the defendants had previously surrendered the possession of the premises to his co-defendant, this fact is sufficient to support the finding of the Court, that the possession was in one and not in the other.

On re-hearing: The reasons given by a Judge in his findings are no part of the judgment. The point decided is the thing fixed by the judgment.

In an action of ejectment against a company and one L, where the Court found that the company was in possession, and that L was not, and gave judgment against the company only, L is not precluded from showing his possession in any future proceedings; his right to the possession, if he has any, is not concluded by the judgment and finding. Such judgment determines only the fact that L was not in the actual possession.

An agreement of cancellation of the lease of a ditch, and the surrender of the possession to the lessor, is sufficient evidence of the surrender of such possession, although it does not appear that there was a consideration expressed in such instrument of cancellation and surrender.

APPEAL from the Fifth District, County of Calaveras.

This was an action of ejectment to recover the possession of a certain ditch for the conveyance of water for mining purposes.

The complaint sets out the title of plaintiffs, and avers "that the defendants, the Table Mountain Water Company and A. B. Laforge, well knowing the premises, and well knowing the plaintiffs were the owners of such property, and entitled to the possession and use there-

of as aforesaid, have unlawfully, wrongfully, and in violation of the rights of the plaintiffs herein, at all times since the said fifteenth day of March, A. D. 1858, had the possession thereof, and ever since said day wrongfully and unlawfully detained possession of the same from these plaintiffs; and that said defendants do now wrongfully and unlawfully detain the possession," etc.

This allegation is attempted to be traversed in the answer of the Table Mountain Water Company by the following:

"The said defendants, the Table Mountain Water Company, for answer to the plaintiffs' complaint denies that the said Company has unlawfully, wrongfully, and in violation of plaintiffs' rights, had the possession of the certain ditch, canal or flume described in said plaintiffs' complaint, and denies that they unlawfully and wrongfully detain the possession of the same."

The cause was tried in the Court below without a jury, and by the findings of the Court it appears that on the twelfth day of February, 1857, a judgment of foreclosure of mortgage of the premises, in favor of E. A. Rowe v. The Table Mountain Water Company, was duly rendered in the District Court of Calveras county, and that subsequent the property was sold under the decree; that at such sale, Bowman and plaintiff Hughes became the purchasers, and a deed was duly made by the Sheriff conveying to them the premises; that subsequently Bowman sold and conveyed his interest to the plaintiff Burke.

On the thirty-first of October, 1856, the Table Mountain Water Company leased the premises to the defendant Laforge for the term of five years, and under this lease he entered into possession. On the sixteenth of March, 1858, and before the commencement of this suit, Laforge, by a written contract with the Company, surrendered to them the possession of the ditch. This action was commenced on the twelfth of April, 1858, and the Court finds that plaintiffs were then the owners, and entitled to the possession of the ditch.

On the day of trial, plaintiffs served upon the defendants notice to produce on trial "the written agreement canceling the lease alleged to have been made between A. B. Laforge and the Table Mountain Water Company—said agreement having been made by A. B. Laforge and the Table Mountain Water Company — or parol evidence will be

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given of its contents." The lease was signed by the individual members of the company, and the agreement surrendering possession is alleged was made to them. The defendants did not produce the agreement, and parol evidence was admitted on trial of its contents. Plaintiffs had judgment against the Table Mountain Water Company only, no judgment being taken against Laforge. All of the defendants appealed to this Court.

Robinson & Beatty and Hardy & Vaughn for Appellants.

I. The Court below erred in overruling the motion for a nonsuit, because at the time said motion was overruled, there was no evidence showing the Table Mountain Water Company was, or had been, in the possession of the property sued for, and had shown as facts entitling them to a recovery against A. B. Laforge.

II. The Court below erred in admitting parol evidence as to the contents of a certain written paper in relation to the surrender or transfer of a certain lease, because the notice to produce the paper did not describe the paper, the contents of which were proved, but a paper signed by other and different parties.

III. The Court below erred in refusing to strike out and exclude the evidence of James Brady in relation to the contents of the within instrument, in regard to which he testified, for the following reasons: *First.* The instrument about which he testified did not express any consideration on its face, and was therefore void under the Statute of Frauds; hence no sufficient foundation had been laid for the introduction of secondary evidence.

IV. The evidence does not justify the finding of facts by the Court.

Latham & Sunderland for Respondent.

The only questions are: *First.* Does the finding of the Court support the judgment? And, *Second.* Was there error in admitting parol evidence of the contents of the transfer or surrender of the lease?

1. The finding is complete upon all points — that the corporation was the owner of the property in dispute; mortgaged it; that the mortgage was foreclosed, sold and deeded by the Sheriff; that plaintiffs succeeded to the right of the purchaser at Sheriff's sale, and that the

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company, at the time of bringing suit and at the trial, was in possession. The defendant, the Table Mountain Water Company, being defendant in the foreclosure suit, and in possession of the property at the commencement of the ejectment suit, the proceedings being regular, there could be no defense by the company.

2. There was no error in admitting the parol evidence.

I. The evidence was against the corporation, and they do not now complain.

II. Laforge cannot complain, because there is no judgment against him.

III. The notice in writing was sufficient; and if not, the verbal notice on the trial was. Defendants made no showing why they could not produce the papers.

It is said, however, that the paper is shown to have been void for want of a consideration expressed therein. The witness does not pretend to say there was no consideration expressed in the agreement; he says Laforge was to be paid for his improvements, but that was not in the paper. This answer was not in response to a question as to the contents of the paper, nor does it purport to be.

Again: the construction of the paper must be taken most strongly against the defendants, they having refused to produce the paper. Defendants' counsel had it in the morning of the day of trial; the presumption is, it was still in his possession in the Court-house. Such presumption becomes conclusive when the same attorney refuses or declines to show that it has passed from his possession, or is then at his office, or at a distance. The statute, as also the rules of evidence prior to the passage of the law, require only reasonable notice. What is reasonable notice, the Judge who tries the case below can better determine than this Court.

IV. The answer of the company does not deny that they are in possession; and as between plaintiffs and the company, there was no issue to which Brady's testimony could be pertinent. The Court found the company in possession, from the pleadings themselves, and not from the evidence of the contents of the paper.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., and FIELD, J., concurring.

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This action of ejectment was brought to recover a certain ditch. One Laforge was a defendant, but no judgment was recovered against him. The complaint charges that the defendant — the Table Mountain Water Company — was in possession. The answer of the company does not deny this averment in any such manner as to put it in issue. The answer denies that this defendant has “unlawfully, wrongfully, and in violation of plaintiffs’ rights, had the possession,” etc. But this might be perfectly true, and yet the defendant be in the possession. What the complaint called the defendant to answer, was not only the character of the possession, but the fact of possession by it, and a failure to deny this averment is an admission of it. This admission is conclusive evidence of the fact admitted. It is, therefore, immaterial, so far as the company are concerned, whether the Court erred or not in its admission or rejection of evidence in respect to an admitted fact — though we are not satisfied, as will be seen hereafter, that any substantial error was committed, to the injury of the defendants. Laforge was discharged from the suit. The Court found he was not in possession, hence he could not be sued in this action, and was properly discharged; if he *was* in possession, the Table Mountain Water Company, having confessed their possession, and not having set up Laforge’s title, or shown any connection with it, judgment was properly rendered against it. But it is argued that error has been committed to the prejudice of Laforge; that though the judgment was for him, yet the predicate of that judgment was the finding that he was not in possession, and had surrendered all his right to the Table Mountain Water Company, or the members of it, and the control of the property; and that this finding was improperly made in this — that parol evidence was admitted of a certain paper purporting to be an agreement of cancellation of a lease from the company to Laforge. Notice was served on the defendants’ attorneys, on the day of the trial, to produce this paper. It was shown that this paper was that day in the possession of one of the attorneys of defendant. The sufficiency of notice to produce a paper shown to be in the possession of a party is a question of discretion; and if it were possible to procure it between the time of giving notice and the trial, that fact should be made to appear. In this instance, it does appear that the paper was

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present, or in the hands or within the control of the defendant. There is nothing in the technical point that the agreement was between the members of the company and Laforge, and not between Laforge and the company. Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is enough. Nor is there anything in the point that the witness Brady testified that no consideration was expressed in this instrument. We understand him only to say that Laforge was to be paid for some improvements, and *this* was not expressed in the writing. The fact that the agreement was executed and carried into effect, and the further fact that the defendants refused to produce the paper, go far to show that it was a valid agreement; but whether it was or was not, if Laforge surrendered the possession to the company, it was enough to support the finding that the company was, and Laforge was not, in possession. The company did not set up this agreement — indeed, could not — and Laforge by it parted with any possession he had before.

The judgment is affirmed.

On re-hearing in this case, the following opinion was rendered by BALDWIN, J. — TERRY, C. J., and FIELD, J., concurring.

On petition for a re-hearing.

The finding which is objected to is that Laforge was not in possession. To prove that he was not, parol evidence of the contents of a paper purporting to be an agreement of a cancellation of a lease was offered and admitted. It was objected that no consideration was shown for this agreement. But as a verdict could not be found against Laforge, unless he was in possession, we do not see that this proof was inadmissible, for the agreement was evidence of a surrender of a former possession, whether there was a consideration for it or not. The finding was, therefore, right. At least, Laforge cannot complain. Judgment is for him. The reason given for the conclusion is not *res judicata* as to him, so as to bind him in any future proceeding. Though the Court decided he had no title and no possession, and therefore he was improperly joined as a defendant, yet it also decided that the plaintiff had no claim on him, and could recover nothing. We do not

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understand that the reasons given for a finding are judgments. The point decided is the thing fixed by the judgment, but the reasons are not. The only point adjudged is the fact that Laforge is not in possession, and that result was reached by testimony proper for that purpose. His *right* to the possession, if he has any, is not concluded by this judgment and finding. But there was evidence enough for the Court below to base its action on — that he was not, *in fact*, in possession; and this is the only *fact* really decided. See *Garner v. Marshall*, 9 Cal. 270.

Laforge's right is just as good, therefore, now, as it was before the trial; the effect of the judgment being to determine the fact that he was not in actual possession; and, according to the case just cited, actual possession was necessary in order to sustain an action of ejectment against him.

We think, therefore, that conceding everything to the argument of the counsel — which seems to us to be more plausible than sound -- there is no substantial error in the opinion which the petition reviews.

The petition is denied.

PEOPLE *ex rel.* ATTORNEY GENERAL v. MARTIN.

People v. Porter, 6 Cal. Rep. 26, and the *People ex rel. McKune v. Weller*, 11 Cal. Rep. 49, affirmed.

The office of County Judge is not a "county office" within the meaning of the Act entitled "An Act to amend 'An Act to Regulate Elections,' passed March 23d, 1850;" consequently the Board of Supervisors cannot order a special election to fill a vacancy in that office.

The appointee of the Governor to the office of County Judge will hold, over a person elected to the same office at a special election ordered by the Board of Supervisors of the County.

APPEAL from the Fifth District, County of Tuolumne.

This was an action brought on the relation of the Attorney General, to try the right to the office of County Judge of Tuolumne county.

The facts, as stated in the opinion of the Court, are as follows: On

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the twelfth day of August, 1858, the Board of Supervisors of Tuolumne county ordered an election for County Judge of that County, an office made vacant by the death of T. J. Jones, former incumbent, who died on the fourth day of the same month. The notice was given for ten days, by publication in a newspaper of the county. No proclamation, of course, was made by the Governor for filling the office, as the vacancy occurred after the time for making the proclamation. The election was had on the first Monday of September, 1858, at which relator claims to have been elected. The defendant was in office by appointment from the Governor, dated August 7, 1858, and still holds it; this proceeding is taken to oust him. The defendant had judgment in the Court below, and the relator appealed to this Court.

L. Quint, for Appellant, contended that the office of County Judge is a county office, and as such, the Board of Supervisors of the county had a right to order a special election to fill the vacancy; and the relator, having received a majority of votes at such election, was entitled to hold the office. Counsel referred to *People v. Marsh*, 1 Cal. Rep. 406; *Wood's Digest*, p. 559, sec. 30; *Ib.* 561, sec. 43; Constitution, art. 6, sec. 1; *Ib.*, art. 6, sec. 8; *Wood's Digest*, p. 375, secs. 3, 8, 9.

The case of the *People v. Porter*, 6 Cal. R. 26, is relied upon as authority, but the Court will perceive that the two cases are entirely dissimilar. In that case there was no vacancy in the office at the time the Supervisors made the order, and, as a matter of course, an order for an election to fill a vacancy which did not, and indeed might not exist at all, was a nullity, and was absolutely void.

W. P. Barber, for Respondent, contended that sec. 4 of the Act of 1855, did not apply to the office of County Judge, and consequently, the Board of Supervisors could not order an election. Counsel referred to the statutes, and also to *Ex parte Ellis*, 11 Cal. Rep. 222; *People v. Porter*, 6 Cal. Rep. 26.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This question has been, in effect, decided in the cases of *People v.*

Porter, 6 Cal. 26, and People *ex rel.* McKune v. Weller, 11 Cal. Rep. 49. Some plausibility is given to the appellant's argument that this is a county office, and that by the Act of 1855, (Sessions Acts, p. 160) the Board of Supervisors has power to order an election to fill a vacancy in the office; but the whole legislation on this subject contradicts this idea. The terms of the Act of 1855 are, it is true, general, but they must be construed in connection with and as part of the body of the legislation upon the general subject. The Act of 1855 is an amendment of the Act of 1850, (C. L. 775) which gave to the *County Judge* this power, in the same words as the Act of 1855 gives it to the Supervisors; but this first Act evidently did not mean to apply to the office of County Judge, of course, and the amendment was only made to throw the same duty imposed on the Judge, upon the Board — because of the objection that the Judge could only discharge judicial functions. Other Acts show that the County Judge was not considered a county officer, in the sense of the Act of 1850 or 1855; he is to tender his resignation, when he resigns, to the Governor; in case of vacancy, the County Clerk is to certify it to the Governor, who is to appoint; the Governor is to issue a commission, which fills the office *until the next general election*; and the Act (C. L. 774) requires the Governor "to give notice of the offices to be filled." As the law requires the notification to be made to the Governor of the vacancies in this office, and the governor has the power of appointment under this general law requiring his proclamation for a special election in such cases, we do not feel authorized to overthrow the express decision made in the case of People v. Porter, which declares the Governor's proclamation in such a case a condition precedent to the validity of the election.

The judgment is affirmed.

Hehn v. Stansbury — Krum v. King.

HEHN v. STANSBURY *et al.*

A statement on appeal must be filed within the time prescribed by law. A statement filed a year after judgment was rendered, is not in time.

APPEAL from the Sixth District, County of Sacramento.

In this case the judgment was rendered May 18th, 1857. Notice of appeal was filed and served May 12, 1858. On the nineteenth of May, 1858, the parties stipulated that the statement used on motion for a new trial, should stand as the statement on appeal; respondent reserving his right to object to the appeal upon the ground that the same was not taken in time.

E. B. Crocker for Appellant.

Smith & Hardy and Sanders for Respondents.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

The appeal from the order denying a new trial was not taken within the time prescribed by law, and cannot be considered by the Court.

Upon the appeal from the judgment, no statement was filed until a year after judgment was rendered; therefore, we can only consider the judgment roll, which discloses no error.

Judgment affirmed.

KRUM v. KING.

A Deputy Sheriff who seizes property under an attachment, is not authorized, by virtue of his office, to bind the Sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown.

APPEAL from the Eleventh District, County of Placer.

Krum v. King.

This was an action brought by the plaintiff for services rendered the defendant, in taking charge of certain property seized by the defendant, as Sheriff of Placer county, under a writ of attachment.

One Stewart, a deputy of the defendant in the office of Sheriff of Placer county, had in his hands a writ of attachment issued by the District Court of Placer county, and, by virtue of its commands, he seized certain real and personal property, and then and there made a contract with the plaintiff to take charge of the property, and safely keep the same for the defendant. Plaintiff was to receive for such services, at the rate of four dollars per day. He kept the charge of the property for some time, and until discharged by defendant. Defendant declined to pay plaintiff for such service, and he brought this action to recover the amount. On the trial, there was no evidence produced on the part of the plaintiff, showing any authority on the part of Stewart, the deputy, to bind his principal in such contract. Plaintiff had judgment in the Court below, and defendant appealed to this Court.

Anderson & Hillyer for Appellant.

Tuttle & Hillyer for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., and FIELD, J., concurring.

The complaint alleges a contract made with defendant, through his agent or deputy. In support of this allegation evidence was introduced, showing that defendant was Sheriff of the county, and that the contract was made by Stewart, one of his deputies.

This evidence was not sufficient to warrant the judgment. No special authority to make the contract is shown, and the mere fact of his being Deputy Sheriff, did not authorize Stewart to bind his principal in this manner.

Judgment reversed.

Pico v. Columbet.

PICO v. COLUMBET.

In an action by a tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate; a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to \$84,000, is insufficient to support the action.

In such complaint, there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and, viewed in this light, the complaint is fatally defective in not averring that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged.

At common law, one tenant in common has no remedy against the other, who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession, when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. The occupation by him, so long as he does not exclude his co-tenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he cannot call upon his co-tenant for contribution; and if they produce a profit his co-tenant is not entitled to a share in them. The co-tenant can at any moment enter into equal enjoyment of his possession; his neglect to do so may be regarded as an assent to the sole occupation of the other.

There is no equity in the claim asserted by the tenant to share in profits resulting from the labor and money of his co-tenant, when he has expended neither, and has never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to a tenant, who would neither work himself or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks.

The statute of 4 and 5 Anne, 16, is not in force in this State.

APPEAL from the Third District, County of Alameda.

This was an action by one tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate.

In the Court below, the defendant demurred to the complaint of the plaintiff upon the ground that "it does not state facts sufficient to constitute a cause of action." The demurrer was overruled. Defendant excepted, and subsequently answered. This Court has considered the

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question of the sufficiency of the complaint, the substance of which is set out in the opinion of the Court. The judgment of the Court below is, that the bill be dismissed, and defendant have judgment for his costs. Plaintiff appealed to this Court.

Stowe & Brown for Appellant.

Plaintiff contends that this decision was erroneous, and that Courts of Equity always gave relief, and compel one tenant in common who had been in the exclusive possession, and received the entire rents and profits, to account, for the reason that there was no remedy at law, and it will not be inappropriate to keep in view the distinction between common law and equity. "Common Law"—that system of law which is administered in the Common Law Courts, as distinguished from the rules prevailing in Courts of Equity and Admiralty. Wood's Lectures, Introduction, 81; 6 Peters' R. 102, 110.

"There can be no ouster between tenants in common in possession, and therefore, if one takes more than his share of the rents, the only remedy is account, either by action under the Statutes of Anne, or by bill in equity." 4 Young & Collier, English Exchequer R. 4; Chitty's Eq. Digest, 6; Parrott v. Palmer, 3 Mylne & Keene's R. 632.

"A, being at the time abroad, became a tenant in common with B, and died fifteen years afterwards, without having, during that period, been in England, and being all the time ignorant of her rights as tenant in common. B continued all along in possession and receipt of the rents and profits of the premises. Held, that B's possession did not amount to an ouster, and that A's representative could sustain a bill for an account against B, without recovering previously the possession." 1 Chitty's Eq. Digest, 10, subdivision 13, title Account, citing 2 Law Journal Rep. in Ch'y.

It cannot be pretended in this case that B could be charged as bailiff, or that he agreed to account for the rents and profits, or to pay for his exclusive possession. Pultney v. Warren, (decided in 1801) 6 Vesey, 76.

This mischief was not remedied until the Act for the amendment of the law (Stat. 4 Anne) gave an action of account by one tenant in common against the other. Before that period, the habit of the Court

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of Chancery was to grant relief upon the legal title, in respect to the want of a legal remedy. *Drury v. Drury*, 1 Rep. in Ch'y, 26; *Dean v. Wade*, 2 Rep. in Ch'y; *The Duke of Leeds v. Powell*, 1 Vesey, 171; *The Duke of Leeds v. The Corporation of New Radnor*, 2 Brown C. C. 338, 518; 13 Vesey, 276; and the same principle is laid down by Lord Hardwicke in *Benson v. Baldwin*, 1 Atkins, 598 (May 19, 1739); *Turner v. Morgan*, 8 Vesey, 143; *Strelly v. Wilson*, 1 Vernon Ch. R. 296; *Story's Eq. J.*, sec. 446, the last paragraph of that section: "So that it will be at once perceived, from these cases, that the remedy at the common law was very narrow; and although it was afterwards enlarged, (the author having before referred to accounting between tenants in common, and the Statute of 4 Anne, ch. 16) that would not of itself displace the jurisdiction originally vested in Courts of Equity. *Ib.*, sec. 466; *Thompson v. Bostwick*, 1 McMullen Ch.; *Hancock v. Day*, *Ib.* 298; *Pope v. Haskins*, 16 Ala. 324.

"If one of the parties has been in possession, or received the rents, an account will be decreed, or he will be charged with an occupation rent." 2 Hoffman Ch. Practice, 199.

The original bill in this cause was filed for a partition of certain real estate, and an account of her share of the rents and profits, (p. 28). "The defendant having been in possession of the premises for the whole period, must be charged with an occupation rent." (*Turner v. Morgan*, 8 Vesey, 145.) See the decree in the case, p. 29. 1 Hoffman's Ch. Rep. 28.

Harman v. Osborne, 4 Paige, 336. Bill for partition and for an account of the rents and profits. *Ib.* 343.

"It is charged in the bill that C. R. has occupied the premises since the first of May, 1820; but to do complete justice between all the parties interested in the premises, an account should be taken of the rents and profits from the death of M. L. in 1812."

Again, *Ib.*: "The master is to take an account of the rent and profits of the premises received by any of the parties to this suit," etc.

Having thus, as we think, established that in equity plaintiff is entitled to the relief demanded, it cannot, we suppose, be disputed that this Court will administer well-settled equity as well as common law principles. *Smith v. Rowe*, 4 Cal. 6; *Minturn v. Hays*, 2 Cal. 593.

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Holladay & Cary for Respondent.

If this is a common law action of account, as we maintain, then "the complaint does not state facts sufficient to constitute a cause of action;" which defect might be taken advantage of by demurrer, which was done.

The complaint does not charge the defendant as bailiff, or receiver, nor with having received more than his just share of the profits. See 3 Hill's Rep., pp. 59-70, *McMurray v. Rawson*, which case reviews all the authorities new and old upon the subject, and results in conclusions of law adverse to the plaintiff. Also, 18 Barbour, p. 265, *Woolver v. Knapp*, literally in point. See the reasoning of the Court in that case, on page 267.

The authorities cited in this case in 18 Barbour, as well as the reasoning of the Court in its opinion, seem conclusive of the present controversy in favor of defendant.

See, also, 9 Eng. Law and Equity Reports, p. 337. First see the argument of counsel (Watson) on page 338, which is adopted and sustained in the opinion and judgment of the Court in that case, showing that at common law the action of account will not lie upon the facts stated in this complaint; nor under the statute of Anne should the Court hold that it (the statute) had become a part of the common law.

That case covers the present controversy.

"The Common Law of England, etc., shall be the rule of decision in all the Courts of this State." See Stat. of 1850, p. 219. See, also, 12 Mass. Rep. 149, *Sargent v. Parsons*, which also decides this case. See, also, 9 Mass. Rep. 539, which was decided on the authority of *Jones v. Harnden*, which is also found on page 539, 9 Mass.

The complaint avers but four things:

- 1st. The co-tenancy of the parties.
- 2d. The "sole and exclusive possession and occupation" of the defendant.
- 3d. The net sum of the rents, issues and profits.
- 4th. A demand for one-half thereof, and an account of the same.

By the complaint it does not appear that defendant was receiver or bailiff of and for the plaintiff, nor that defendant has received more

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than his just share of the profits; hence we may infer that such was not the case.

The complaint does not allege an ouster or dispossession of the plaintiff—allege that he ever demanded or desired to enter, occupy and enjoy the premises with the defendant.

The complaint does not allege a partnership in the business between the parties, whereby the plaintiff either contributed anything, or was liable to contribute anything, for expenses, losses or repairs.

The defendant could not have compelled the plaintiff to pay one dollar for the expenses of the business, nor to contribute a dollar to any losses which might have been incurred. One tenant in common in possession cannot repair at the expense of himself and co-tenant, much less can he charge them for improvements. 10 Barb. Sup. Court of N. York, *Taylor v. Baldwin*; on page 590 of that case, and authorities there cited.

The plaintiff's counsel has not shown one single case at common law in support of the complaint in this case. But he calls this an equity suit; then the complaint must be a bill in equity.

That fact can only be determined from an inspection of its contents, and by ascertaining its nature and the functions it is designed to perform.

In this view of the case, the complaint or bill is equally infirm and impotent, in an equitable light, as we have shown it to be, for any other legal purpose.

If this is an equity proceeding, then it should either appear by the specific allegations in the complaint to that effect, or, at least, we should be able to gather from the whole case that the plaintiff has no adequate remedy at law. "In the ordinary cases of mesne profits, where a clear remedy exists at law, equity will not interfere, but will leave the party to his remedy at law. Some special circumstances are necessary to draw into activity the remedial interference of a Court of Equity." See 1 Story Eq. Juris., secs. 508 to 519, cited in the note appended to the case of *Pultney v. Warren*, 6 Vesey, Jr., Rep., p. 73. which case see on various points applicable to this case.

This latter named case is cited also by plaintiff's counsel in his brief. We cannot exactly see how it requires the exercise of the equity

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powers of a Court to enable the plaintiff to collect forty-two thousand dollars of the defendant, for this is the whole purpose of the suit.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

This action is brought by one tenant in common against his co-tenant, who is in the sole possession of the entire premises, to recover a share of the profits received from the estate. The case was argued upon the demurrer to the complaint, which, by stipulation of the parties, was admitted to have been taken on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to \$84,000. These averments, and not the form in which the prayer for judgment is couched, must determine the character of the pleading. The complaint is designated a bill in equity, but the designation does not make it such. There are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account, and, viewed in this light, the complaint is fatally defective. It does not aver that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged. By the common law, one tenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. The reason of the doctrine is obvious. Each tenant is entitled to the occupation of the premises; neither can exclude the other; and if the sole occupation by one co-tenant could render him liable to the other, it would be in the power of the latter, by voluntarily remaining out of possession, to keep out his companion also,

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except upon the condition of the payment of rent. The enjoyment of the absolute legal right of one co-tenant would thus often be dependent upon the caprice or indolence of the other. 1 Co. Lit. 200; 5 Bacon's Abrid. 367; Willes, 209.

The statutes of 4 and 5 Anne, 16, gave a right of action to one joint tenant, or tenant in common, against the other as bailiff, who received more than his proportional share of the profits. At common law the bailiff was answerable, not only for his actual receipts, but for what he might have made from the property without willful neglect, (Co. Lit. 172, *a.* Willes, 210) but as bailiff under the statute of Anne, he was responsible only for what he received beyond his proportionate share. That statute only applied to cases where one tenant in common received from a third person money, or something else, to which both co-tenants were entitled by reason of their co-tenancy, and retained more than his just share according to the proportion of his interest. This was held in *Henderson v. Eason* in the Exchequer Chamber, 9 Eng. Law and Eq. 387. In that case it was decided, that if one of two tenants in common solely occupies land, farms it at his own cost, and takes the produce for his own benefit, his co-tenant cannot maintain an action of account against him as bailiff for having received more than his share and proportion.

The statute of Anne has never been adopted in this State, nor have we any similar statute. The case at bar must therefore be determined upon the principles of the common law. By them, as we have observed, the action cannot be maintained against the occupying tenant unless he is by agreement a manager or agent of his co-tenant. The occupation by him, so long as he does not exclude his co-tenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he cannot call upon his co-tenant for contribution, and if they produce a profit his co-tenant is not entitled to share in them. The co-tenant can at any moment enter into equal enjoyment of his possession; his neglect to do so may be regarded as an assent to the sole occupation of the other. On this point, the observations of Baron Parke in *Henderson v. Eason* are pertinent, although that case arose under the statute of Anne: "There are obviously many cases," says the Justice, "in which a tenant in com-

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mon may occupy and enjoy the land or other subject of tenancy in common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling-house or room is solely occupied by one tenant in common without ousting the other, or a chattel is used by one tenant in common, and nothing is received, it would be most inequitable to hold that by a simple act of occupation or user, without any agreement, he should be liable to pay a rent, or anything in the nature of a compensation, to his co-tenant for that occupation, to which, to the full extent to which he enjoyed, he had a perfect right. It appears impossible to hold such a case to be within the statute, and an opinion to that effect was expressed by Lord Cottenham in *McMahon v. Burchell*. Such cases are clearly out of the operation of the statute. Again, there are many cases where profits are made and are actually taken by one co-tenant, yet it is impossible to say that he has received more than comes to his just share. For instance, if one tenant employs his capital and industry in cultivating the whole of the piece of land, the subject of the tenancy, in a mode in which the money and labor expended greatly exceeds the value of the rent or compensation for the mere occupation of the land, in raising hops, for example, which is a very hazardous adventure, and he takes the whole of the crops, is he to be accountable for any of the profits in such a case, where it is clear, if the speculation had been a losing one altogether, he could not have called for a moiety of the loss, as he would have been enabled to do had it been so cultivated by the mutual agreement of the co-tenants? The risk of the cultivation, and the profits and the loss, are his own, and what is just with respect to the very uncertain and expensive crop of hops, is also just with respect to all the produce of the land, the *fructus industriales* which are raised by the capital and industry of the occupier, and cannot exist without it. In taking all the produce, he cannot be said to receive more than his just share and proportion to which he is entitled as tenant in common, as he receives in truth the remuneration for his own labor and capital, to which a tenant has no right."

The American cases are to the same effect. In *Sargent v. Parsons*, (12 Mass. 149) the Court said: "The action of account is maintainable only against a bailiff; and a bailiff can only be one who is ap-

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pointed such, or who is made such by the law; which latter instance applies only to a guardian, who is bailiff of his ward, and who is liable, not only for rents and profits actually received, but also for those which he might have received by a proper management of the estate.

"One tenant in common may, by contract, make another his bailiff or receiver; and, if he does, he may bring him to account in this form of action; and probably, also, to avoid a process considered in some degree troublesome, might sue him in *indebitatus assumpsit* as on a promise to account. But this must be for rents and profits actually received beyond his share; for, by the common law no remedy is given for a mere sole use and occupation by one of the tenants; for it is in the power of each tenant at any time to occupy; and the not doing it by one would look like an assent that the other should occupy the whole."

In *Woolver v. Knapp*, (18 Barb. 265) the defendant had enjoyed the sole possession of a farm for five years, the rent and occupation of which was worth two hundred dollars a year. The plaintiffs were his co-tenants, and brought their action of account. The Court decided that the action could not be sustained, holding that one tenant in common who possesses the entire premises, without any agreement with his co-tenants as to his possession, or any demand on their part to be allowed to enjoy the same with him, is not liable to account in an action for their use and occupation. See, also, *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. 139.

We have treated this case as an action of account at law, but to the same result we should come if the proceeding were in equity. There is no equity in the claim asserted by the plaintiff to share in profits resulting from the labor and money of the defendant, when he has expended neither, and has never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to the plaintiff, who would neither work himself, or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks.

The cases to which our attention has been called, in which equity has sustained an account in favor of one tenant in common, out of possession, against his co-tenant in possession, for the rents and profits,

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are, with some exceptions in the Court of Appeals of South Carolina, those in which the account was a collateral incident to a claim for partition, and the rents and profits claimed were due from the defendant as a tenant of the plaintiff's interest, or were received by him when they belonged to both parties, or were the proceeds of their joint labor and expenditures. Thus, in *Pope v. Haskins*, (16 Ala. 321) the defendant had leased of the complainant his undivided one-third interest in a lot belonging to the parties as tenants in common, and upon the expiration of the lease had rented out the lot to a third party, and received the entire profits, and the bill was filed to obtain an account of the rents and profits, and for a partition of the property.

In *Hoffman v. Osborne*, (4 Paige, 336) the bill was filed for the partition and sale of a lot of land, and an account of the rents and profits, and the account directed was of the rents and profits *received* by any of the parties, not of the profits made in the use and occupation of the premises.

In *Turner v. Morgan*, (8 Vesey, 143) the bill prayed partition of a house at Portsmouth, and an account of the rent, under the following circumstances: The house was decreed to three persons, equally to be divided. The plaintiff purchased two-thirds. The defendant was tenant of the house under a lease of (£22) twenty-two pounds a year, and refusing to raise the rent, the plaintiff brought ejectment for his two-thirds. The ejectment was defeated, the defendant purchasing the remaining third. Upon this, the bill was filed. The Chancellor allowed a partition. No question appears to have been made upon the right of the plaintiff to an account, the defendant having been tenant under the lease; and the Chancellor observed, in relation to the account, that there was a *possible* distinction between the time during which the defendant was tenant, and the time since he became owner, but that justice would be answered by inquiring what would have been a reasonable rent in each year the account was sought.

The doctrine laid down by the Court of Appeals of South Carolina, as to the liability of one co-tenant to another, is believed to be peculiar to that Court. In *Hancock v. Day*, *Thompson v. Bostic*, and *Holt v. Robinson*, (1 McMullen Eq. Rep. 69, 75 and 475) it was held, that as between tenants in common, the occupying tenant is liable for rent

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of so much of the premises as was capable of producing rent at the time he took possession, but not liable for that which was rendered capable by his labor. The reasons upon which these decisions rest do not commend themselves to our judgment, and are insufficient to overcome the force of the English, Massachusetts, New York and Kentucky authorities.

The demurrer should have been sustained; but as the same result was obtained by a judgment rendered for the defendant on the merits of the case, it will be sufficient to direct the affirmance of the judgment.

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No appeal lies to the Supreme Court from an order of the Court below overruling a demurrer to an indictment.

The statute authorizing an appeal from an order granting or refusing a new trial, or which affects a substantial right, does not apply to interlocutory orders made in the progress of the trial.

APPEAL from the Court of Sessions of the County of San Francisco.

Tingley & Merritt for Appellant.

H. S. Brown for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J., concurring.

Defendant was indicted for a violation of the provisions of the statute to prohibit gaming. A demurrer was interposed to the indictment, and this appeal is taken from the Court below overruling the demurrer.

No appeal lies from such an order. The statute authorizing an appeal from an order granting or refusing a new trial, or which affects a substantial right, does not apply to interlocutory orders made in the progress of the trial. If such a construction were given to the statute, the whole scheme of criminal justice would be defeated. To procure the continuance of a cause, it would be only necessary to demur to the

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indictment on any ground, however frivolous, and upon the overruling of the demurrer, appeal. This, under our present system, would insure a delay of at least six months. Then, upon filing the *remittitur* from the Appellate Court, the same course might be pursued in regard to a multitude of questions which arise in the progress of every criminal trial, the decision of which necessarily affects the substantial rights of the party defendant. Such a result, annulling in effect the Criminal Statutes, was never contemplated by the Legislature.

Appeal dismissed.

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A statement which was filed in the Court below, on motion for a new trial, and is neither agreed to by counsel or settled by the Judge trying the case, has not sufficient authentication to constitute any portion of the record which this Court can notice.

APPEAL from the County Court of Napa County.

Edgerton & Hopkins for Appellant.

J. Horrell for Respondent.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

This case comes before us on appeal from the final judgment, and from the order denying a new trial. The statement upon which the appellant rests, is the one used upon the motion, and this is not agreed to by the parties or their counsel, or settled by the Judges who tried the case. It has not, therefore, sufficient authentication to constitute any portion of the record which we can notice. The appeal is based upon errors which the statement discloses, and as these cannot be considered, the judgment must be affirmed.

Ordered accordingly.

 McGarrity v. Byington.

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The grounds of a motion for a nonsuit must appear in the record, otherwise this Court will not consider such motion.

Where a subscribing witness to a bill of sale is out of the State, and the proof is, that witness saw subscribing witness put his name to it, and saw grantor sign it, and recognizes the paper from hearing it read—not being able to read himself—and another witness testifies that the signature of the subscribing witness is in his handwriting, this is sufficient evidence to identify the paper and authorize it to be read in evidence.

A subscribing witness, who is called to prove the execution of the instrument, who testifies that it was signed in his presence, “to the best of his recollection,” is sufficient to allow it to be read in evidence.

Before reversing the judgment of the Court below, on the ground that a certain paper was admitted in evidence, which was irrelevant to the issue joined, this Court will require the irrelevancy clearly to appear. Some facts should be adduced showing that the admission of the paper had an undue influence upon the verdict of the jury.

Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be re-recorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining claim, to show that the rules of vicinage had been complied with.

A Constable's deed under an execution sale of the premises in controversy, where the execution was against a third party, cannot be read in evidence in an ejectment suit unless title is shown in the defendant in execution at the time of the levy and sale, or the counsel offering it connects it in some way with the issue between the parties to the suit. Where a paper is *prima facie* irrelevant, counsel offering it must show how it is admissible.

The right in a mining claim vests by the taking in accordance with local rules.

In the absence of any custom or local regulation, the right of property, once attached in a mining claim, does not depend upon mere diligence in working such claim. The failure to comply with *any one* mining regulation, is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a noncompliance with *such* of them as make a noncompliance a cause of forfeiture.

It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property as against the owner, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief that he is the owner of the property.

Work done outside of a mining claim, with intent to work the claim, to be considered by intentment as work done on the claim, must have direct relation and be in reasonable proximity to it.

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Where the evidence is conflicting, this Court will not reverse an order of the Court below refusing a new trial.

The mere fact that a verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. It need not be entitled at all.

APPEAL from the Fourteenth District, County of Sierra.

This was an action of ejectment for the recovery of mining claims. The complaint alleges that plaintiff was seized, possessed, etc., of the premises in controversy, and that on the first day of June, 1857, defendants entered, etc., and ejected him (plaintiff), and continue to withhold possession of said premises from plaintiff, and prays restitution.

The answer admits the possession of defendants, but justifies under a claim of prior possession. The cause was tried by a jury.

On the trial, Samuel Thomas, a witness for the plaintiff, was shown a certain bill of sale from Day to the witness, Thomas, for an undivided interest in the premises in dispute; Thomas testified as follows: "I recognize Day's signature. Clark, who witnessed the bill of sale, has gone to the States. I saw Clark witness it; saw Day sign it. I can't read writing. * * * I can identify the bill of sale only by its reading the same as the one given to me."

E. S. Lester was then called by the plaintiff, and testified that the signature of Clark to the bill of sale "is his true signature, to the best of my knowledge."

Plaintiff then offered the bill of sale in evidence, and it was admitted, under the objection of defendants.

J. C. Lester, a witness for plaintiff, was shown a deed of conveyance of the premises in dispute from Irwin, Thomas and McGarrity to E. S. Lester, and testified as follows: "I signed my name to this paper as subscribing witness. I don't know who signed the name of Thomas or McGarrity; think Irwin wrote them; don't know whether Irwin signed it in my presence, or not; don't know that Thomas or McGarrity made their marks in my presence; but to the best of my recollection they did."

Plaintiff then offered the deed of conveyance in evidence, which was admitted under the objection of defendants.

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The paper mentioned in the opinion of the Court as Exhibit E, is a contract between the Meredith Mining Company, of the first part, and McGarrity, (plaintiff) of the second part, for the privilege and right of way by plaintiff through a tunnel of the Meredith Mining Company, near the plaintiff's claims, for the purpose of draining the claims in dispute. This paper bore date June 8th, 1858. For what purpose it was offered in evidence does not appear from the record, but probably for the purpose of showing, on the part of the plaintiff, that he had worked the claims in dispute. Defendants' counsel objected to the introduction of the paper in evidence upon the ground of irrelevancy. The Court overruled the objection, and the instrument was read in evidence.

Plaintiff then proved, for the purpose of laying the foundation for the introduction in evidence the record book of mining claims, that the original record of mining claims in that district was destroyed by fire; that plaintiff's claims were recorded in it; that after the destruction of the original records, the miners by a resolution required claims to be re-recorded; that one Clark was Recorder, and the record book in Court was in his handwriting. The plaintiff then offered the book in evidence. Defendants objected, upon the ground that it was not the original record, and was not proven to be a true copy. The objection was overruled, and the book admitted in evidence. At the close of the plaintiff's testimony, the defendant moved the Court to nonsuit plaintiff; motion was denied by the Court.

Counsel for the defendants offered in evidence a deed executed by one Ray, as Constable, to the defendant Byington, conveying the premises to Byington by virtue of a levy and sale under an execution against James M. Cobb & Co. There are no facts stated in the record showing the relevancy of this deed to the question at issue. No title was shown in Cobb & Co. at the time of levy, nor was there any offer to show title in them at any time. The plaintiff asked the Court to give to the jury, among others, the following written instruction:

"5th. If the jury believe from the evidence, that plaintiffs have a better title to the ground in dispute than defendants have, they must find for plaintiffs." This instruction was given under the objection of the defendants.

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The defendants asked the Court to give to the jury, among others, the following written instructions:

"7th. If the jury believe, from the evidence, that the mining ground in dispute could have been worked by running a drain tunnel from a point below the same, and that the plaintiff, or those under whom he claims, failed to use due diligence in commencing or prosecuting such work, or if the plaintiff, or those under whom he claims, has failed to comply with any usage or custom of said mining district, in locating or working said claims, then they must find for the defendants."

"11th. If McGarrity, or his grantors, knowingly though silently, by looking on, suffered the defendants, or those under whom they claim, under a mistaken claim of title, to expend money and perform labor for the purpose of opening or working the claims in dispute, then he or they are estopped from setting up any claim against the defendants, and in such case the jury must find for the defendants."

"13th. That all efforts made and work done outside of the limits of the claims in dispute, with a *bona fide* intent to work the claims are justly considered as work done upon the claims, by relation and intentment."

The Court refused to give these instructions, and defendants excepted. Plaintiff had verdict and judgment, and defendants appealed to this Court.

R. H. Taylor for Appellants.

Vanclief & Stewart for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Ejectment for mining claims.

Many points are made by the appellants. We shall consider them very briefly: 1st. That the Court improperly refused to nonsuit plaintiff. The answer is, the grounds of the motion do not appear: therefore we cannot consider it. (10 Cal. 267.) 2d. Error in the admission of bill of sale from Day to Thomas. Clark, the witness to the bill, was out of the State. Thomas swears he saw Clark witness it, and saw Day, the grantor, sign it; true, he says, on cross-examina-

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tion, that he cannot read, but recognized the paper from the contents read to him: but Lester swears, that the signature of Clark, the subscribing witness, is in his handwriting. The proof, then, identifies the paper as that which Thomas saw the grantor and subscribing witness sign. This was enough to admit it to be read. Exhibit B is proved by Lester sufficiently. It is true the witness says it was signed in his presence, "to the best of his recollection;" but this is enough. The other objection to admission of papers need not be stated. It suffices to say that the points made against their introduction are not well founded.

We do not see that Exhibit E was irrelevant; nor, if it were, that the error in admitting it was calculated to mislead the jury. Before reversing a judgment for this cause, the point should be clearly made out, even if any objection on this score be good, which does not show that the proof improperly admitted tended to or might probably unduly influence the jury. Many things are admitted in the course of a long trial which have no relation to the merits of the case, and yet it might not be proper to reverse a case because they were suffered to go in. The agreement shows an attempt by plaintiff to get possession of and work the premises in dispute on the day defendant got his title, and though not sufficient of itself to show actual possession, or a right of possession, yet shows a fact, which, in connection with other proof, tended to prove the *bona fides* of plaintiff's claim, or notice of it by defendant.

The record of the claim, made after the old records had been burned, was admissible, if for no other purpose, as showing that the regulations in that respect had been complied with. It may not have been competent, in this way, to prove the claim, but it was competent to prove that the claim of plaintiff had been recorded according to the rules of the vicinage.

The Court did not err in refusing to admit the deed from Ray to Byington. Ray was not shown to have anything to do with the premises or the controversy. *Prima facie* the deed was irrelevant. The rule in such cases is, that the counsel must explain *how* the testimony is admissible, or offer to connect it; otherwise there would be no limit to testimony as to quantity or kind. Not having done this, the Court had a right to reject it.

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As to the instructions, the record does not show all the instructions; and it is very questionable whether we could, in such a case, consider the particular ones brought before us in review, as they may depend in a very great degree upon the rest. But we proceed to consider them. The fifth is, that if the jury believe the plaintiff has better title to the ground in dispute than the defendants, they must find for the plaintiff. It is true, in ejectment the plaintiff must recover on the strength of his own title, but here the charge must be taken in connection with the case. There was no outstanding title, and only a question of prior possession. The charge did not amount to much, but what there was of it was very harmless. It amounted to telling the jury to find for the plaintiff if they thought they ought to.

The seventh instruction was properly refused. Especially in the absence of any custom or local regulation, a right of property, once attached in a mining claim, does not depend upon *mere* diligence in working it. Not to work it may be a circumstance of some weight, tending to show abandonment, and this abandonment of a claim resting for validity only on possession, may be sufficient to defeat the title. But this principle is wholly different from that invoked. This is not inconsistent with the doctrine in *Kimball v. Gearhart*, which was the case of a ditch; in which case we held the right to depend upon the prosecution of a purpose to appropriate. The right of a mining claim vests by the taking in accordance with local rules. Nor is the other portion of the requested charge better sustained. The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a noncompliance with *such* of them as make noncompliance a cause of forfeiture.

The rule of estoppel invoked by the eleventh instruction, requested to be given, is too broadly stated. It is not the making of improvements, or expending of money on another's property, which entitles the person so expending to hold the property, or even the improvements; but it is the fraud of the owner, who silently, or otherwise, encourages the expenditure. But this fraud only exists, at the very most, where the owner knows that the other person is making the expenditures, and also knows that he makes them under the *bona fide* reasonable belief

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that he is the owner of the property. Several of these important elements of this doctrine are left out of the charge.

The thirteenth instruction asked "that all efforts made and work done outside of the limits of the claim in dispute, with a *bona fide* intent to work the claims, are justly considered as work done upon the claims by relation and intendment." This charge is not very clearly expressed; but the proposition cannot be maintained as stated. To have the effect attributed, the work done *outside* must have some direct relation to the claim, or be in reasonable proximity to it. Besides, the phrase "all efforts made outside of the claim" would include many things, such as negotiations, traveling, preparations for work, contracts and the like, which could in no sense be said to be work done *on* the claims. If the proposition can be maintained, that work done in the immediate neighborhood of the claims, with the intent to work them, is equivalent to working on the claims, (which we do not admit) yet it is impossible to hold that *all* work, of every sort, done at any distance from the claims, and efforts of every sort, so made, are equivalent to labor done on the claims, even if we could assign a definite meaning to the words "by relation and intendment," which qualify the principle.

We are asked to review the evidence, for the purpose of overruling the order refusing a new trial. We have looked at it, and find that it is conflicting. We do not interfere in such cases; and in no class of cases coming before us do we feel so much reluctance as we do in this class, to interfere with the verdict of the jury and the supervising discretion of the presiding Judge.

There is no substantial error in the verdict and judgment. The mere fact that the verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. It need not have been entitled at all.

The judgment is affirmed.

Elizabeth Deck v. Gerke.

ELIZABETH DECK *et al.* v. GERKE, ADMINISTRATOR, *et al.*

The jurisdiction of the Probate Court over testamentary and probate matters, is not exclusive. Most of its general powers belong peculiarly and originally to the Court of Chancery, which still retains its jurisdiction.

Under former decisions of this Court, the District Courts, as Courts of Chancery, have assumed jurisdiction over probate matters, and as, probably, rights have vested under their decrees, and the principle asserted is more convenient in practice, it is not permissible now to question the jurisdiction.

The District Court may take jurisdiction of the settlement of an estate, when there are peculiar circumstances of embarrassment to its administration, and when the assuming jurisdiction would prevent waste, delay and expense, and thus conclude, by one action and decree, a protracted and vexatious litigation.

APPEAL from the Twelfth District, County of San Francisco.

The facts, as stated in the opinion of the Court, are as follows:

The appellants filed this bill against the respondents in the District Court of the Twelfth District. They claim to be the heirs and distributees of one Auguste Deck, who died in this State, leaving a large real and personal estate. The defendant, Gerke, was the administrator of the estate, and took possession of the personal property and of the realty. It is charged that he has not settled his accounts, and that he is largely liable on account of his administration. One of the purposes of the bill is to obtain a settlement of this account, and a decree of distribution. The bill charges that Gerke was removed from the administration of the estate by the Probate Court, and that one Samuel Flower was appointed in his place; that Gerke appealed from the order to the Supreme Court, where the order was reversed in part, but not in respect to this subject of removal, and that Gerke claims to be in office; that Robert C. Rogers succeeded Flower as general administrator, and, without further authority, has seized upon a portion of the assets of the estate. The bill further charges that a certain woman, who claims to have been the wife of Deck, sets up a claim to the estate, and that her claim is unfounded; and that she also claims that her infant child is the child of Deck, and entitled, as heir, to the estate, but that the claim is unfounded. The bill prays a settlement of the estate, distribution, and the appointment of a re-

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ceiver. A general demurrer was interposed by Gerke, which assails the jurisdiction of the District Court; which demurrer was sustained. This appeal raises the question whether, upon these facts, the District Court has jurisdiction.

Heydenfeldt for Appellants.

It is insisted that the District Court, as a Court of Equity, has jurisdiction in this case.

1st. On the ground of fraud and implication in the administration of the estate.

2d. On the ground of the right to decree distribution.

3d. To make the various administrators account.

4th. For the security of the estate by appointing a receiver.

5th. In order to determine a disputed succession to the estate. *Mathews v. Newby*, 1 Vernon, 133; *Howard v. Howard*, *Ib.* 134; *Buel v. Adler*, 2 Vernon, 37; *Bissel v. Axtel*, *Ib.* 47; *Clarke v. Perry*, 5 Cal. 58; *Sanford v. Head*, *Ib.* 297; *Chevy et al. v. Belcher*, 5 Stew. 133; 1 Story's Equity, sec. 530.

Daniel Rogers for Respondent Robert C. Rogers.

1st. The District Court had no jurisdiction.

The jurisdiction of a Court of Equity in matters pertaining to the administration of estates, is essentially a concurrent jurisdiction, and is based upon the grounds of a constructive trust, and that the remedy at law is not plain, ample and complete.

By an examination of all the cases where the extraordinary powers of a Court of Equity have been invoked in matters pertaining to the administration of estates, it will be found that they proceed upon the ground that the proceedings are vitiated by fraud, or that the Spiritual or Probate Courts, by reason of their limited powers, could not afford the relief demanded.

In cases of distribution, involving as they did, the discovery and ascertainment of debts, the taking of accounts, the marshaling of assets, legal and equitable, and the compulsory payment of debts, it was found that the powers of the Spiritual Courts were defective and lame, and hence the necessity of the interposition of a Court of Equity.

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These Courts were better adapted to settle the various questions arising between creditors, legatees and the representatives of estates, on account of the general and unlimited powers which they possessed, and also by reason of the jurisdiction of the Spiritual Courts being so prescribed.

Because, 1st. The complainants have a complete remedy in another tribunal.

Courts of Equity will not assume jurisdiction, where the parties have in another tribunal a plain, ample, adequate and complete remedy.

By our judicial system, all matters pertaining to the administration of estates, are invested in the Probate Court.

It is not pretended that in all such matters, that this Court has original and exclusive jurisdiction, but a concurrent jurisdiction with the Courts of Equity.

The Probate Court is a creature of the Constitution, and is essentially a Court of Chancery. In its practice, forms, and general modes of relief, it is similar to that of the Courts of Equity.

The Probate Court has been designated as a Court of inferior and limited jurisdiction. This is true, by reason of its powers being derivative, for it exercises only those which are conferred upon it by express and implied legislation. It is also a Court of limited jurisdiction, on account of the subjects of its jurisdiction, because they are particularly defined by legislative enactment.

But within its peculiar orbit, the jurisdiction of the Probate Court is extensive, and its remedies plain, ample and complete, and to a certain extent, the jurisdiction is original.

By statutory enactment, the Probate Court is invested with extensive and peculiar powers, and the remedy which the complainants seek can be attained in this tribunal.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Apart from the previous decisions of this Court, it might be questioned whether the Probate Court, under our Constitution, did not possess an exclusive jurisdiction over testamentary and probate matters. (*Blanton v. King*, 2 How. Miss. 856; *Carmichel v. Browder*, 3 How.

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Miss. R. 252; Farves v. Graves, 4 S. & M. 707.) But this Court has recognized a different rule. In *Clark v. Perry*, (5 Cal. 60) it was held: "The Probate Court is a Court of special and limited jurisdiction. Most of its general powers belong peculiarly and originally to the Court of Chancery, which still retains all its jurisdiction. Where, therefore, a bill is filed in Chancery against an administrator, to compel him to account, by one who has not been an actual party to a proceeding or settlement in the Probate Court, he may totally disregard such proceeding or settlement; and although the settlement in the Probate Court is a final settlement, the complainant, who was no party to it, may treat it as a nullity, and proceed to invoke the equitable powers of the District Court, and compel the administrator to a full account." And in *Sanford v. Head*, (5 Cal. 298) the same doctrine was reaffirmed in emphatic terms. The ground upon which equity took jurisdiction in England in such cases was, that the Spiritual Courts were not able, from their Constitution, to afford adequate and complete relief. (1 Story's Eq. Jur., sec. 530 *et seq.*) Though much of the reason of this rule is removed in most of the States of the Union where Probate Courts exist, yet the power of the Chancery Court to interpose for the settlement of accounts, and the enforcement of trusts of this sort, is maintained. Under the decisions of this Court, Chancery has assumed jurisdiction over such subjects, and as, probably, rights have vested under their decrees, and the principle asserted is more convenient in practice, we think it is not permissible now to question the jurisdiction. This case is peculiarly fitted for the exercise of this equitable power; for the estate seems to be in confusion, and the matters connected with its settlement complicated, requiring from the Probate Court, and probably afterwards from other Courts, various expensive and tedious proceedings; whereas, all these questions may be determined in a single action, and this protracted and expensive litigation brought to a termination within a reasonable period. The Court can direct or decide the appropriate issues, refer the various accounts, and make the proper decree of settlement or distribution. The fact that there is a suit now pending between the alleged widow and the heirs, is no bar; for this proceeding, embracing the whole subject touching the estate, involves also, as a part of it,

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this litigation; besides, it does not appear by the bill, that the parties to this bill are the same as in that case. Nor is the objection well taken that these matters, being before the Probate Court, and that Court having concurrent jurisdiction, Chancery will not interpose. The *entire* controversy, and *all* these parties, are not charged to be before the Probate Court; and if they were, in different aspects and in several portions of the subject, yet this seems to us to be the best mode of solving and settling the whole controversy; and, perhaps, on this ground alone, and to prevent multiplicity of suits, Chancery, having control of the general subject, the jurisdiction of that forum could be maintained.

It is not necessary to hold, nor do we hold, that Chancery has jurisdiction to open an account or other matter settled by the Probate Court, except under peculiar equitable circumstances; nor do we decide that the District Court may withdraw from the Probate Court, under ordinary circumstances, the settlement of an account, or the power of distributing an estate; but, limiting ourselves to the case before us, we hold that the District Courts may take jurisdiction of the settlement of an estate, or of a trust of this sort, when there are peculiar circumstances of embarrassment to its administration, and when the assuming of jurisdiction would prevent great delay, expense, inconvenience and waste, and thus conclude, by one action and decree, a protracted and vexatious litigation. We see no necessity for the appointment of a receiver in such case as this, as, upon the facts stated in the bill, no difficulty should exist in determining which is the rightful administrator of several claiming the office, and no complaint is made as to the sufficiency of the bonds of any one.

Judgment reversed and cause remanded for further proceedings.

STODDART v. VAN DYKE *et al.*

Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note, to bind all, and one of the parties is non-suited and judgment taken against the other two; *Held*, That there is no error in such judgment.

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APPEAL from the Fourteenth District, County of Sierra.

H. B. Crossette and Vanclef & Stewart for Appellants.

Thornton, Jr., and Kirkpatrick for Respondent.

TERRY, C. J., delivered the opinion of the Court — **BALDWIN, J.**, concurring.

This was an action against defendants, as partners on a promissory note, signed Van Dyke, McDonald and Calderwood. Van Dyke and McDonald made default, and the defendant Calderwood answered, denying the partnership, and the execution of the note sued on by himself, or any person authorized for him.

A nonsuit was ordered as to Calderwood, and judgment given against the other defendants, and plaintiff appealed.

We can see no error in the judgment of nonsuit. The evidence entirely failed to show a partnership, or any authority in McDonald, by whom the note was given, to bind Calderwood by such a contract. Judgment affirmed.

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Where a demurrer to a complaint is overruled, and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the Court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the Court, must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice.

In such case, where no application was made to the Court for leave to answer, and no meritorious defense was asserted, this Court will not reverse the judgment and open the case for another trial.

The point decided in the case of *Gallagher v. Delaney*, (10 Cal. R. 410) only covers that particular case.

APPEAL from the Fifth District, County of San Joaquin.

The facts sufficiently appear in the opinion of the Court.

Thornton v. Borland.

Wallace & Rayle for Appellant.

L. Sanders, Jr., for Respondent.

FIELD, J., delivered the opinion of the Court — BALDWIN, J., concurring.

This action is for labor and services rendered by the plaintiff at the request of defendant. The complaint is in the usual form of complaints in such cases, averring distinctly and clearly, and without unnecessary repetition, every fact essential to a perfect statement of the cause of action; the labor and services performed; their rendition at the request of the defendant; his undertaking to pay their reasonable worth; what they were thus worth, and his neglect to pay upon demand; and concludes with the usual prayer for judgment. It would seem to have been copied from the most approved precedents. Yet to this complaint — as perfect as the science of pleading could make it — the defendant demurred on the ground that it did not state facts sufficient to constitute a cause of action; that it showed no sufficient consideration for the undertaking to pay; and made no demand for judgment. The Court, as a matter of course, regarded the demurrer as frivolous, and overruled it. Proof was then made of the claim of the plaintiff, and judgment rendered in his favor; and the objection made by the appellant is, that leave was not given to put in an answer. The reply to the objection is found in the statute, which provides that in overruling a demurrer to the complaint, "the Court may, upon such terms as shall be just, and upon payment of costs, allow the defendant to file an answer." (Practice Act, sec. 67, as amended in 1854.) The allowance rests in the discretion of the Court below, subject to review, of course, in case of its arbitrary or unreasonable exercise. The exercise of the power must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. The party whose demurrer is overruled, ought to be required to obtain leave to answer, to satisfy the Court that he has a substantial defense on the merits to the action. In the case at bar, nothing of the kind was done; no application for leave to answer was made, and no possession of any meritorious de-

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fense was asserted. Under these circumstances, the action of the Court below was proper, and must be affirmed.

The decision in *Gallagher v. Delaney*, (10 Cal. 410) does not help the appellant. That only covers the particular case; it lays down no general rule. It there appears that the complaint could be so amended as to prevent distinctly the claim of the plaintiff to the relief he sought, and we held that the Court should have granted leave to amend, upon sustaining the demurrer. Here the demurrer was overruled, and it did not appear that the defendant had any defense on the merits.

Judgment affirmed.

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An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action.

Where an action of assumpsit was instituted in the District Court of San Joaquin county, and after the service of the summons, the defendant transmitted it and a copy of the complaint to his counsel in the City of Sacramento, with instructions to defend the action, communicating at the same time such information as he thought proper to enable his counsel to file the proper answer, and counsel thought it advisable to see defendant before filing an answer, and to prevent judgment being taken by default filed a frivolous demurrer, and wrote to other counsel at San Joaquin county, in case the demurrer was overruled to obtain time to answer, which he neglected to do, and judgment was taken against the defendant, and no application was subsequently made to the Court to open the case and grant defendant leave to answer, etc.; and the defendant subsequently filed his bill setting up these facts, and also the fact that he did not owe the debt for which the judgment was obtained, and asked for an injunction restraining the collection of such judgment, etc.: *Held*, That such a bill is barren of any equitable interposition of a Court of Chancery, and that no injunction should be granted to stay the collection of the judgment.

If the neglect of the defendant in the action of assumpsit, and his counsel, were excusable, he should have applied to the Court, upon proper showing, to open the case, and allow him to answer.

Equity will not entertain jurisdiction of a suit of this nature, merely on the ground that the demand may be unconscionable, and that injustice may have been done, provided it was competent for the party to have placed the matter

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before the Court in the original action, either upon issue joined, or upon motion to set aside the verdict or judgment.

When the statute speaks of notice of a motion, it means written notice, or notice in open Court, of which a minute is made by the Clerk.

Where an order granting an injunction is made *ex parte*, the injunction may be dissolved without notice.

A County Judge, in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and is exercising a power auxiliary to the jurisdiction of the District Court. The effect of such an order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved, by the District Judge, the same as if issued by his order, in the first instance.

Section 334 of the Practice Act provides that an order made out of Court, without notice to the adverse party, may be vacated or modified without notice. The provision made in section 118, that if an injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice, to dissolve or modify the same, is not a substitution for the power conferred by section 334, but in addition to it.

APPEAL from the Fifth District, County of San Joaquin.

Wallace & Rayle for Appellant.

First. The Court erred in dissolving the injunction, irrespective of the merits of appellant's bill.

Section 118 of the Practice Act provides, that when an injunction has been granted without notice, the defendant may apply, upon reasonable notice, to the Judge who granted it, or the Court in which the action is brought.

In this case, the County Judge granted the injunction. The District Judge, not the Court, dissolved it, and without any legal notice. Section 118, Practice Act, provides that the defendant may, at any time before the trial, upon reasonable notice, etc., apply for the modification or dissolution of the injunction.

When notice of a motion is necessary, it shall be in writing, and given, if the Court be held in the same district, with both parties, five days before the time appointed for the hearing, otherwise ten days, with power of the Court or Judge to grant a shorter time, for good and sufficient reasons shown. See section 517, Practice Act.

An order granting a shorter time than provided by statute, is a special order, obtained upon special reasons given by the moving party.

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The statute, from its terms, cannot be construed to mean, that a party may give shorter notice than that fixed by statute, in the absence of a sufficient and satisfactory reason therefor.

Neither is it, upon motion of one party, the other objecting upon the grounds of insufficient notice, to dissolve an injunction, competent for the Court then to make a special order shortening the time, by which to evade the law and obviate the objections flowing from a want of legal notice.

If, then, the statute requires, in similar cases to the one at bar, that notice of at least five days must be given, notifying the opposing party of the hearing thereof, and that such notice, to be a notice in contemplation of the law, must be in writing, and that it is in this case disclosed by the record, that notice was not served five days prior to hearing the same; and that there is no notice contained in the record, nor any evidence whatever of written notice — how could the Court, without an infraction of the express provisions of the statute above referred to, dissolve the injunction? If the dissolution of the injunction by the Judge, in this case, is not in derogation of the express terms of the statute, it seems difficult for the appellant to imagine a case in which its terms could be infringed.

To contend that mere verbal notice has anything of force, legal or otherwise, is an error too apparent for serious argument.

Second. The Court erred in dissolving the injunction. The reasons adduced upon the first assignment of error, are equally applicable to this.

This is a case, it is true, in which the greatest degree of diligence was not used; still, ordinary diligence at least, was used by Borland, appellant, who was defendant in the suit of Thornton v. Borland.

The provisions of our Code seem to be expressly designed to impart relief, to parties similarly circumstanced to appellant, from judgments, orders, or other proceedings taken against them through mistake, inadvertence, surprise or excusable neglect. See sec. 68, p. 175, Wood's Digest.

The spirit and intent of the law bind not to so rigid accountability as to deprive parties of interposing, for slight negligence, their just demands. When a defendant sets forth the nature of his defense

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under oath, disclosing wherein it is a good and valid defense, no ordinary causes should disarm him of such defense. The statute imparts to appellant no rights, but prescribes the requisites by which to avail himself of them.

Can a slight deviation, then, in the matter of enforcing his rights, take away rights independent of, and existing independent from, the statute? The statute is only directory, and not peremptory.

The Court has ample discretion, under the provisions of the Code, to let in an answer after the time has elapsed for answering, in a case like this. See the case of *Allen v. Ackey et al.*, 4 Howard's Practice Reports, page 5; *Lynd v. Varity*, 3 Howard's Practice Reports, page 387; 1 Barbour's R., p. 68; 9 Barbour, p. 387.

L. Sanders, Jr., for Respondent.

In this case, the very judgment and order now sought to be reversed show affirmatively, that neither the appellant nor his counsel were present at the time; and it is not shown that the defendant ever asked the Court for leave to answer. I concede, a party has a right to bide his demurrer, but I think he may waive it by his conduct and acts, in this case. The bill sworn to by appellant shows that the object of the demurrer was to get time; that makes it frivolous.

I think it a maxim in law and in equity, that a party shall not be allowed to take advantage of his own wrong; and that a Court of Equity, under all circumstances, will treat his injunction bill as a waiver of his right to amend: he having at no time made application for it, and indeed it should be regarded as a release of errors, if there is one in the cause.

There is such a thing as a release by operation of law. See *Bouvier's Law Dictionary*, 439, under the above title, part 4, sec. 2.

FIELD, J., delivered the opinion of the Court — **BALDWIN, J.**, concurring.

This is a suit on the equity side of the Court, to set aside a judgment recovered against the plaintiff, and to allow him to interpose a defense to the action in which the judgment was rendered. The complaint alleges, that the defendant instituted an action against the

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plaintiff, in San Joaquin county, in July, 1858; that summons was duly served in that county, on the fifth of August following; that the plaintiff transmitted the summons and a copy of the complaint to his counsel at Sacramento, with instructions to defend the action, communicating at the time such information as he thought sufficient to enable them to file the proper answer; that they considered it advisable to see him before answering, and, to prevent judgment by default, interposed a demurrer, and wrote to attorneys at Stockton to obtain time to answer, if the demurrer was overruled; that they saw the plaintiff as soon thereafter as his business engagements would permit, which was not, however, until the time for answering had expired; that the demurrer was overruled, and judgment taken against him, no one appearing on his behalf; and that he never employed the defendant to perform work and labor, and is not indebted to him. The complaint refers to an accompanying affidavit of one of the attorneys of the plaintiff, and to the record of the action in which the judgment was rendered. The affidavit corroborates the averments of the complaint, and states further, that the information received from their client was, that he was not indebted as alleged in the complaint in that action, or otherwise, and that they relied upon the attorneys at Stockton to attend to the demurrer, and obtain time to answer if it were overruled. The record referred to has been recently before us, in considering the appeal from the judgment. It shows that the complaint in the action was in the usual form of complaints for labor and services, drawn after the established precedents, and containing every essential averment to constitute a statement of a perfect cause of action; that a frivolous demurrer was interposed and overruled, and judgment rendered for the amount claimed, and that no application to file an answer was made, and no possession of a meritorious defense asserted by the defendant therein.

Upon the complaint in the present suit, and the affidavit and record referred to, an injunction was granted by the County Judge, on the *ex parte* application of the plaintiff. This injunction the District Judge dissolved upon a verbal notice to the plaintiff, given the same day, against his objection of a want of due notice. From the order dissolving the injunction, the appeal is taken. A demurrer to the complaint was interposed, on the ground that the facts it states are

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insufficient in law or equity, to constitute a cause of action; or in other words, to the equity of the complaint. What disposition has been made of the demurrer, does not appear from the record. It is but reasonable to suppose that it has been sustained and the complaint dismissed; for a case more barren of all claim to the equitable interposition of the Court, can scarcely be conceived. We refer to this, not for the purpose of passing upon the sufficiency of the demurrer, for that is not before us, but to show that the injunction was improvidently granted, and in its dissolution no error was committed.

In the first place, the complaint does not set forth any valid reason for the failure of the plaintiff to plead to the merits of the original action, in the first instance. That he was prevented by business engagements from an interview with his counsel, is without avail. That the counsel thought it advisable to see their client before answering, is equally so. He gave them information which he thought sufficient to enable them to prepare an answer, and it does not appear that he was in any respect mistaken. What that information was, the complaint does not disclose. The affidavit states it to have been that he was not indebted to the plaintiff. This was sufficient to authorize the filing of a general denial. The complaint avers that the plaintiff never employed the defendant, and the defense resting upon this position, was available under such general denial. It does not appear that he had any defense which required a special answer. The affidavit, it is true, states that it was impossible for the counsel, from the general character of the information received from their client, to interpose a proper and full defense, but it does not show how, or in what respect; and so far, therefore, as the case is presented, the impossibility asserted must be regarded as resting only in averment.

In the second place, the complaint does not set forth any reason for failing to apply to the District Court to open the judgment, and to allow the plaintiff to file an answer. If the neglect of the party and his counsel were excusable, full relief was attainable, by motion in the original action. The sixty-eighth section of the Practice Act expressly provides for relief from judgments, orders and other proceedings taken against a party through his mistake, inadvertence, surprise or excusable neglect. Equity will not entertain jurisdiction of a suit of

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this nature, merely on the ground that the demand may be unconscientious, and that injustice may have been done, provided it was competent for the party to have placed the matter before the Court in the original action, either upon issue joined, or upon motion to set aside the verdict or judgment.

In *Bateman v. Willoe*, (1 Sch. & Lef. 201) the party against whom a verdict had been obtained, conceiving that he had good grounds to impeach the same, directed a motion to be made to set it aside, and filed an affidavit for that purpose, but by some mistake, notice of the motion was not given within the time required by the rules of the Court, and on that ground, without inquiring into its merits, the motion was denied. Thereupon, he filed a bill to restrain proceedings upon the verdict, showing that some of the charges upon which it was founded, were performed by the opposite party without any employment by him; that some were unreasonable, and that some had been waived in consideration of a balance paid upon an award of arbitrators, and that he was entitled to credit for several sums which had not been allowed. But Lord Redesdale, in dismissing the bill, observed that it was not sufficient to show that injustice had been done the party, but it must appear that it was done under such circumstances as to authorize the interference of equity, and said: "The inattention of parties in a Court of law, can scarcely be made a subject for the interference of a Court of Equity; there may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party had not made defense, because it was impossible for him to do it effectually at law; so, where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but, without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter which has already been discussed in a Court of law, a *matter capable of being discussed there*, and over which the Court of law had full jurisdiction."

In *Smith et al. v. Lowry*, (1 John. Ch. 320) the complainant was sued in action at law upon a contract to deliver a quantity of salt at a

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place called Portland, on the first of September, 1812, and was engaged, at the time of the trial of the action, in June, 1814, in transporting public stores from Oswego Falls to Sackett's Harbor, and could not be allowed to quit the public service to prepare for the same, and in consequence, due preparation was not made. On the trial, a verdict was recovered against him for a much larger sum than the adverse party was entitled to, but the Supreme Court refused to grant a new trial to enable him to diminish the damages. Subsequently, it was discovered that the witness produced was procured by subornation and perjury, and thereupon the complainant filed his bill for an injunction to stay proceedings on the judgment; but Chancellor Kent refused the injunction, stating, in his opinion, that the plaintiff had employed an attorney and counsel to attend to the cause, and it did not appear that any application was made on his part to the Circuit Court, to postpone the trial, and that the fraud alleged in procuring the testimony of the witness could have been sufficiently repelled and defeated by the testimony of the witnesses who resided at the time in Portland, and whose affidavits were subsequently obtained and used on the motion for the new trial.

In *Barker v. Elkins et al.*, (1 John. Ch. 465) the complainant filed a bill for an injunction to stay proceedings on a verdict recovered by the defendants in a suit at law against him, in which he set forth that he had paid a portion of the bills upon which the verdict was obtained, and that the defendants had received the proceeds of cotton assigned to them, sufficient to pay the balance, and averred that he had been deprived of the means of obtaining legal testimony to defend the suit; but Kent, the Chancellor, said: "The plaintiff should have made his defense at law, by way of payment or set-off; and he might, perhaps, have called for a discovery in aid of his defense at law. No reason is assigned why he did not call for a discovery, or prepare and defend himself in due season. He has not stated what were the obstacles to a defense at law. A defendant cannot come here for a new trial, when no special ground of fraud or surprise is suggested, and when he neglects or omits due diligence, and without due excuse, to defend himself in his proper place. This is a fundamental doctrine in this Court. The principle has been so often declared, that it is useless to enlarge;

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and without resting on minor objections, the injunction cannot be retained on the merits of the case."

In *Dodge et al. v. Strong*, (2 Johns. Ch. 231) the same Chancellor reasserted what he had on previous occasions frequently declared, that relief could not be granted in a Court of Equity, for the purpose of a new trial at law, when the party had lost his opportunity at law by his own negligence.

The cases cited exhibit much more cogent reasons for the interposition of equity than the case at bar. In all the actions, the proceedings in which were sought to be stayed, issues of fact had been joined, and meritorious defenses to the demands claimed, in whole or in part existed. Here no issue of fact was joined; a frivolous demurrer was filed, and when that was overruled, no permission to answer was requested. No one appeared for the plaintiff before the Court. The counsel engaged relied upon attorneys at a distance, who never accepted a retainer in the case, and who, from anything which appears, were not in a position to accept one. To have maintained the injunction upon the case presented, would have been against both principle and precedent.

The objection of want of due notice of the motion to dissolve, is not tenable. Verbal notice, it is true, is not such notice as the statute requires. When the statute speaks of notice, it means written notice, or notice in open Court, of which a minute is made by the Clerk. We shall consider, therefore, the order dissolving the injunction as made without notice. The order granting the injunction was made *ex parte*. The County Judge, in granting it, was acting as an injunction master, exercising a power auxiliary to the jurisdiction of the District Court. The effect of the order was the same as if it had been made by the District Judge. The injunction was subject to be controlled, modified or dissolved, by the District Judge, in all respects, as if issued by his order in the first instance; and section 334 of the Practice Act provides, that an order made out of Court, without notice to the adverse party, may be vacated or modified without notice. The provision made in section 118, that if an injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice, to dissolve or modify the same, is not a substitution for

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the power conferred by section 334, but in addition to it. The two sections are taken substantially from the Code of New York, and a similar construction was given to them by the Supreme Court of that State, in *Bruce v. The Delaware and Hudson Canal Company*, (8 How. Prac. R. 440). In that case it was held competent for the Judge to vacate or modify an injunction order without notice, but that it was not the better practice, and should never be done, except when, from the urgency of the case, it was necessary to guard against serious loss, which sometimes might be occasioned by the delay incident to serving notice, and except, we may add, where the injunction has been improvidently granted upon a complaint disclosing no ground whatever for equitable relief, as in the present case.

Order affirmed.

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Where the questions raised by the record, on appeal to this Court, have been repeatedly settled by this Court, or are decided by reference to plain elementary principles of law, the judgment of the Court below will be affirmed, with damages.

APPEAL from the Tenth District, County of Yuba.

Henry K. Mitchell for Appellant.

Rowe & Mott for Respondent.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The various questions made by the record have either been repeatedly settled by this Court, or are decided by reference to plain elementary principles. There is no single point taken, which, in our judgment, justifies this appeal, and it would be a waste of time to notice the points in detail.

The judgment is affirmed, with five per cent. damages.

Farrell v. Enright.

FARRELL AND WIFE v. ENRIGHT.

At common law, an alien cannot acquire title to real estate by descent or other mere operation of law.

The seventeenth section of the first article of the Constitution of this State only removes the disability of alienage to such foreigners as are *bona fide* residents of the State; it leaves the right of non-resident foreigners, in respect to real property, as it exists at common law.

On the sixteenth of April, 1850, E., a resident of this State, died seised of certain real estate in the City of San Francisco. At the time of his death he left surviving him a brother, resident in the State, and a sister residing in Canada. In 1853 the sister moved to and became a resident of this State: *Held*, That the sister, being an alien at the time of her brother's death, did not inherit any portion of his real property. The estate vested immediately upon the death of the intestate in the resident brother, and the subsequent removal of the sister to, and residence in the State, did not change the descent of the property.

APPEAL from the Twelfth District, County of San Francisco.

This was an action brought by the plaintiffs to establish the right of the plaintiff, Bridget Farrell, as heir to a portion of the estate of Thomas Enright, deceased, and to recover the rents and profits thereof. The facts appear in the opinion of the Court.

Francis J. Lippitt for Appellant.

I. Art. I, sec. 17 of the Constitution does not prohibit non-resident foreigners from inheriting property in this State.

1. There is a legal *prima facie* presumption in regard to any provision in the Constitution, that it is a limitation on the power of the Legislature, rather than a restriction upon individual rights; i. e., that it is a *constitutional*, rather than a legislative provision. The People *ex rel.* Finley v. Jewett, 6 Cal. R. 291.

2. When the Constitution was framed, all aliens could inherit property here, and the policy of the new State in respect to foreigners forbade any narrowing of their privileges. The People *ex rel.* the Attorney General v. The Executors of Folsom, 5 Cal. R. 373.

3. An affirmative statute takes away no prior privileges. The King v. Pugh, Doug. 188.

4. The Act of April 19th, 1856, declares that all aliens shall

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inherit. If section 17 prohibits non-resident aliens from inheriting, this Act is unconstitutional.

II. Sec. 17 of Art. I of the Constitution enabled foreigners who were or should become *bona fide* residents, to transmit by descent to their natural heirs whether residents or not; at least, so that they might take on becoming residents themselves.

1. The provision was intended to hold out an inducement to foreigners to settle in the State.

2. If their property could never go by descent to their nearest heirs, unless these heirs were residents of the State at the time of their death, the inducement held out would be substantially either *illusory* or *inoperative*, according to the sense in which the provision should be understood. *Goodell v. Jackson*, 20 J. R. 707, 708; *Jackson v. Adams*, 7 Wend. 369, 370.

III. An interpretation of a law which would effectually carry out its intent, will be adopted in preference to one which would virtually defeat it, where this can be done without infringing any rule of legal construction. *Smith's Comm.*, secs. 491, 496, 497.

IV. By force of the provision in Art. I, sec. 17 of the Constitution, under the rules of the common law, the appellant, Bridget Farrell, on becoming a *bona fide* resident of the State, was *ipso facto* naturalized *quoad* the rights of property, and thereby enabled to inherit to her brother retrospectively.

1. The section must receive a common law interpretation. *Smith's Comm. Stat. Law*, sec. 534.

2. Naturalization may be either by constitutional or legislative enactment. Whole classes may be so naturalized. One may be naturalized *ipso facto*, by complying with a condition specified in a statute. The statute 7 Anne, naturalized *all foreign protestants*, (though repealed some years afterwards).

3. Whether a particular enactment confers naturalization must be determined by its language, construed in accordance with its known policy and intent.

4. The words in sec. 17, which define the rights of resident foreigners as to property, are substantially the same as the operative words which effect naturalization at common law. They therefore

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confer naturalization *quoad* the rights of property. *Priest v. Cummings*, 20 Wend. 353, 354.

5. Naturalization is a *status known* to the common law, and having certain incidents belonging to it. Not one of these can be disannexed from it by a Court.

6. One of these incidents is the curing of past disabilities, thus enabling the alien to inherit as if born in a country; that is, retrospectively.

An alien cannot take by descent; he may take by devise or purchase, but he holds only at the pleasure of the crown, which may at any time divest him of an office found. 1 Cranch, 603; 7 Wend. 368; 3 Wheat. 588, 599.

Denization is by letters patent from the crown; it enables the alien not only to *take* by devise or purchase, but to *hold* what he may thus acquire, which before he could do only till office found. He may also now transmit by descent to his heirs. But denization takes effect only from the date of the patent; therefore, property acquired before that date may be taken by the office found, for denization cures no past disabilities; it has no relation back. 1 Bl. Comm. 374.

Naturalization is only by act of Parliament. 1 Bl. 374.

Naturalization takes effect from birth; therein differing from denization. Vin. Abr. Alien D.

A naturalized subject inherits as if native born. 1 Bac. Abr. 198, Alien (b.); 2 Bl. 249; 1 Bl. 374, note 21.

Though the descent were cast before the naturalization, one may inherit, for the naturalization relates back to birth; it is retrospective, curing all defects. 2 Bl. 249.

A naturalized alien inherits as if born in this country. Naturalization relates back to confirm the title of a purchaser acquired during alienage. *Jackson v. Beach*, 1 J. Cas. 401.

7. The retrospective effect of acts of naturalization is not produced by any special words, but is deduced by the common law from the operative words, which are the same in substance with those in sec. 17, Art. I, of the Constitution. *Priest v. Cummings*, 20 Wend. 353, 354.

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8. It follows that the appellant, Bridget Farrell, on becoming a *bona fide* resident of the State, was *ipso facto* naturalized *quoad* the rights of property, and enabled to inherit to her brother.

V. The decision in *Siemssen et al. v. Bofer*, 6 Cal. R. 350, will not control this case.

1. The plaintiffs in that case had never become residents of the State; it therefore decided only that the Constitution prohibited property from descending to one who was still a non-resident alien.

2. The Court cannot adhere even to this decision without pronouncing the Act of April, 1856, unconstitutional.

3. So far as the language of the Court in that case may be construed as declaring that the Constitution intended to debar alien heirs from taking, even after becoming residents, it was not necessary to the decision of the case, and is therefore extrajudicial and not binding.

Crockett & Crittenden for Respondents.

The right of inheritance given by sec. 17, Art. I, Constitution, to aliens, is restricted to such as "are or may hereafter become *bona fide* residents of this State."

The plaintiff, Bridget, was not a resident of this State when her brother died, but on the contrary, was an alien residing in a foreign country. It is evident, therefore, that on the sixteenth of April, 1850, if she was otherwise incapable of inheriting, this clause of the Constitution did not relieve her from the disability, for the simple reason that she was not within its terms, not then being a resident of this State. If she never had removed to California, but had continued up to this present time to reside in Canada, will any one maintain that she could have inherited this estate, either at common law or by virtue of the above cited clause of the Constitution?

The common law was adopted in this State on the 13th of April, 1850, three days before Thomas Enright died; and we will not insult the intelligence of the Court by citing authorities to prove that under that system an alien cannot inherit.

We have already shown, that if she had continued to be a non-resident alien, the constitutional provision would not and could not by any possible construction, have embraced her case. But she removed

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into this State in October, 1853, about three and one-half years after the death of the intestate; and we propose to inquire what effect, if any, this produced upon her rights.

We think it manifest that it produced none whatever. When the death occurred, the estate is *instantly* vested in the defendant, who was then a resident of this State, and was next of kin to the deceased; or, if the defendant was not capable of inheriting the property escheated, the title rested in some one, or escheated to the State, and did not remain in abeyance and without an owner. Having once vested and become perfect, it could not be divested and the course of the descent changed by the subsequent removal of the plaintiffs into this State.

The right to inherit depends upon the existing state of the allegiance at the time of descent cast. 3 Hill, 79.

"If the issue of a person dying intestate are aliens, they are not his heirs, and the estate goes to the next of kin who are citizens." Hardy v. De Lion, 5 Texas R. 211; 3 Hill, 79.

In analogy to this principle, it has been decided, that the naturalization of a *femme covert* does not retroact so as to entitle her to dower in lands acquired by her husband and conveyed by him before she was naturalized. Priest v. Cumming, 16 Wend. 616; 20 Ib. 338.

Naturalization does not retrospectively confirm a title claimed by descent. Vaux v. Nesbit, McCord R. 370.

In Kentucky, by a statute passed in 1800, it was provided that "any alien other than alien enemies, who shall have actually resided in this commonwealth two years, shall, during the continuance of his residence therein, after the said period, be enabled to hold, receive and pass any right, title or interest to any lands or other estate, in the same manner, and under the same regulations as the citizens of this State may lawfully do." Under this statute it was held that an alien heir cannot take, unless he had resided in the State two years prior to the death of the intestate. Trustees, &c. v. Gray, 1 Little's R. 149.

This case is strongly in point, and we think in fact is decisive of the case at bar. A *subsequent* residence could not retroact, so as to bring the party within the statute. It required a residence prior to

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the death, so that *at the time of descent cast*, the party was capable of inheriting.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The determination of the appeal in this case turns upon the construction of the seventeenth section of the first article of the Constitution, which provides that, "foreigners who are, or may hereafter become *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens." The material facts, as admitted by the demurrer, are briefly these: On the sixteenth of April, 1850, Thomas Enright died at San José, intestate, being at the time seized of certain real estate situated in the City of San Francisco. The deceased was a resident of California at the time of his death, and had been for some years previously. He left surviving him a brother, the defendant, and a sister, Bridget, one of the plaintiffs. The brother was a resident of the State, but the sister and her husband, the plaintiffs in this action, were both aliens, residing in Canada. The deceased left surviving him neither wife, or descendant, or parent, and no brother but the defendant, and no sister but the plaintiff, Bridget. Letters of administration were taken out upon the estate of the deceased, and by proceedings had in the Probate Court, the real estate was sold and conveyed in June, 1851, to one Duncan, who, in July following, conveyed the same to the defendant. Of this real estate the property in controversy is a part, and ever since the death of the intestate the defendant has been in its possession and in the enjoyment of its rents and profits. The plaintiffs removed to and became residents of California in October, 1853, and brought the present action to establish the right of the sister to one undivided half of the property and of its rents, as co-heir with her resident brother. The Court gave judgment on the demurrer for the defendant, and the plaintiffs appealed. It is unnecessary to notice the proceedings in the Probate Court, alleged to be illegal, as from the construction we give to the provision of the Constitution, the plaintiff Bridget did not take any interest in the property as heir of the intestate.

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At the time of her brother's death, the common law had been adopted, and by its settled doctrine she could not, being an alien, acquire title to real property by descent or other mere operation of law. 2 Kent, 54; *Jackson v. Lunn*, 3 John. Cas. 109. There was then no statute changing this doctrine. The clause of the Constitution cited only removes the disability of alienage to such foreigners as are *bona fide* residents; it leaves the right of non-resident foreigners, in respect to real property, as it exists at the common law. It does not apply to the plaintiff, Bridget, as she was not, at the time of the descent cast, within its terms. Her subsequent removal to, and residence in the State, cannot avail her. The estate vested immediately upon the death of the intestate in the resident brother, the defendant. It did not remain in abeyance for the possible future residence in the State of alien relatives of the deceased. It would be impossible to estimate the degree of confusion into which numerous titles would be thrown, if alien relatives of an intestate, years after descent cast, could successfully assert claims to the real property of the deceased by simply becoming residents of the country. The language of the clause in the Constitution does not require a construction leading to this result, and it would be imputing little wisdom to its framers to ascribe to them any such intention in its adoption. We think it is too clear for argument that the subsequent residence of the plaintiff, Bridget, did not retroact so as to confer upon her any right, under the seventeenth section of article one of the Constitution, to inherit any portion of the real estate of which her deceased brother died possessed. See *Orser v. Hoag*, 3 Hill, 79; *Priest v. Cummings*, 16 Wend. 617, and 20 Wend. 338; *Trustees of Louisville v. Grey*, 1 Litt. 147.

Judgment affirmed.

Butler v. Collins.

BUTLER *et al.* v. COLLINS.

The ownership of goods is not changed when the claim to such ownership is based on a fraudulent contract.

Where the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods under the representation that it was only to serve as a temporary security for the compliance by the plaintiff to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security, or give plaintiff the advantage of such new contract, the possession of such goods thus obtained was fraudulent, and the bill of sale is void.

It is as much a trespass to take possession of goods under such circumstances, as it is to take possession of goods without color of contract. It is the using the form of a contract as a covering for the wrongful taking of another's property, and it divests such possession of every attribute of a sale.

In cases of fraud, subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. Fraud being proven, in reference to the transaction under question, the criminal intent is necessarily a matter of inference for the jury. The dealing with property to-day by the vendor, as his property, is evidence to show the fraud committed in a sale a month ago. The subsequent acts are illustrative of the intent and character of the first.

In such case, the plaintiff cannot recover the value of the goods and also the profits which might have been made on their sale; hence, the testimony of a witness who, after examining the sale books of the plaintiff, based his calculation of the loss sustained upon an estimate of the profits (according to the previous rates) which might have been made but for the trespass, is improper, and should not have been allowed.

APPEAL from the Sixth District, County of Sacramento.

The facts appear in the opinion of the Court.

J. H. McKune for Appellant.

1st. The action brought sounds in tort, the complaint charging a wrongful and unlawful taking, when the case proved shows that if any wrong was done the remedy can only be sought in an action for a breach of contract. *Andrews v. Bond*, 16 Barber, 633.

2d. The Court erred in overruling a motion for nonsuit, because the case made by plaintiff showed a taking with and by the written consent of plaintiff. 1st *Greenleaf's Evidence*, sec. 51; *Bristow v. Wright*, 1st *Smith's Leading Cases*, 324 and notes.

3d. The Court erred in allowing witness Bradford to testify, from books shown him, as to what he thought a business capital of \$7,000

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would enable plaintiffs to clear. 1st Greenleaf's Evidence, sec. 441; Sedgwick on Damages, 64, 65, 69, 2d edition; *Flureau v. Thornhill*, 2d W. Blackstone, 1078; *In re Schooner Lively*, 1st Gallison, 314, 325; *The Anna Maria*, 2d Wheaton, 327; *Delcol v. Arnold*, 3 Dallas, 333; *Boyd v. Brown*, 17 Pick. 543; *Smith v. Condry*, 1st Howard, 28; *Blanchard v. Ely*, 21st Wend. 342; *Freeman v. Clute*, 3d Barb. S. C. R. 424; *Thompson v. Shattuck*, 2d Metcalf, 615; *Donnel v. Jones*, 17 Alabama, 689; *Muldrow v. Norris*, 2d Cal. Rep. 74.

4th. The Court erred in refusing to give the instructions asked by defendant. Revised Statutes, p. 201, sec. 15.

5th. The Court erred in giving the instructions. *Hayden v. Cabot*, 17 Mass. 169; *Bishop v. Williamson*, 2d Fairfield, 504; *Doe v. Wagner*, 19 J. R. 241; *Dorwin v. Potter*, 5 Denio, 306; *Hargous v. Ablon*, 5 Hill, 493.

The damages restricted in this case as in contract. Sedgwick, 82.

Witness not to give his opinion. Sedgwick, 589; *Doolittle v. Eddy*, 7th Barb. S. C. R. 256; *Giles v. O'Toole*, 4 Barb. S. C. R. 261; *Fish v. Dodge*, 4 Denio, 311; *Norman v. Wells*, 17 Wendell, 137, 161; *Fish v. Dodge*, 4 Denio, 311, 318; *Shepherd v. Willis*, 19 Ohio, 142; 23 Wend. 431; 17 Wend. 161; 24 Wend. 668; 21 Wend. 342; *Page v. Hazan*, 5 Hill, 603; *Lincoln v. S. & C. R. R. Co.*, 23 Wend. 425.

Long, Robinson, Beatty & Heacock for Respondents.

1st. The question of fraud was submitted to the jury on a charge which is clearly right; it is lucid and concise, and clearly directs the jury to the points to be by them considered. In such a case, the Court ought not to disturb the verdict, if there is any reasonable amount of evidence to sustain the finding of the jury. See the following authorities: *Payne v. Jacobs*, 1st Cal. Rep. 39; *Perry v. Cochran*, 1st Cal. Rep. 180; 3d Graham on New Trials, pp. 1218 and 1260.

If the bill of sale were obtained by a preconcerted fraud, it was no more than a piece of blank paper. It was void for two reasons: 1st. A bill of sale without an actual delivery, or before the delivery is completed, if obtained by fraud, may be repudiated. The party having

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the bill would not have had the actual possession, because of the want of complete delivery. The law would not find a constructive possession on a fraud. Nay, even if the delivery had been perfect, the fraud would avoid the whole transaction, and trespass would lie the same as though the goods had been taken by force. See the following authorities: *Ash et al. v. Putnam*, 1st Hill, 302; *Cary et al. v. Hotailing et al.*, 1st Hill, 311; *Olmstead et al. v. Hotailing et al.*, 1st Hill, 317.

If a man were to hire a horse, declaring his intention to go to Marysville, but afterwards should start directly for Stockton, and there sell the horse, surely the hirer of the horse might show the declarations of the party at the time he hired the horse — that he was going to Marysville — that he did not go there, or even start for there, but immediately went to Stockton, and there sold the horse, etc., etc.

The hiring of the horse was an innocent act, if done with the intention to ride to Marysville, but the subsequent conduct could be introduced in evidence to show his original intent. If that subsequent conduct should convince a jury that the hiring was a mere pretext, and that the intent to steal the horse existed, they would be compelled, under such a state of facts, to find the pretended bailee guilty of larceny, and no Court would set the verdict aside. See Wharton's Amer. Crim. Law (4th ed.) page 1845.

How much less testimony is required in a civil case. We refer to the following cases, in which the Courts of Chancery have decided transactions to be fraudulent on circumstantial evidence, where all the direct evidence showed the transaction to be honest: *Enders and Hynes v. John and Joshua Swayne*, 8th Dana, 103; *Doss et al. v. Tyack et al.*, 14th Howard, 297.

We maintain that these cases are not stronger than the one at bar. But we have the verdict of a jury. That verdict was approved by the Judge in the Court below, who heard all the testimony, and had an opportunity of seeing the witnesses confronted with the parties in open Court. Where the question of fraud is fairly submitted to a jury, the facts are, by the Judge below, clearly submitted, which must constitute fraud. Where the jury under such circumstances finds the fraud, the Court below approves — and the examination of the witnesses has been oral and not by deposition — it appears to us that the case ought

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to be extremely barren of testimony tending to prove fraud, before this Court would overrule it.

2d. The next most serious question in the case is, as to whether Bradford's testimony, as to the probable profits of such a business as the plaintiffs were engaged in.

This is a case which comes within the rule as to the allowance of the opinion of experts. Bradford was a hat merchant, and an expert. That his testimony as such was properly admissible, we refer to the rule as laid down in 1st Greenleaf on Evidence, sec. 440. See, also, in regard to the evidence and rule of damages, the case of *Suydam et al. v. Jenkins*, 3d Sandford's Rep., pages 614 and 622.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

The suit was brought by the plaintiff to recover damages of the defendant as for a trespass and conversion of goods.

In July, 1856, the defendant, Collins, sold a stock of goods for \$8,000 and upwards. Butler & Co. were to pay fifty dollars per week until the price should be paid, and one per cent. per month interest. Some time afterwards, Collins made an arrangement with the Butlers, whereby they agreed to give him their notes, with sureties on a part of them, payable in instalments, from five to eleven months after date, with interest at two per cent. per month. The particulars and the explanation of this arrangement changing the terms of the original agreement, which seems to have been more favorable to the plaintiffs than the substituted agreement, are not disclosed. Before the execution of the new notes, E. J. Butler executed and delivered to Collins a bill of sale of the goods; and the respondents contend that this was done, and the paper was to serve merely as security that the Butlers would complete this arrangement by the execution of the notes with the sureties. After the execution of the bill of sale by E. J. Butler, one J. H. Monell was put in possession as receiver or as agent for Collins; the respondents remaining in the store, and selling the goods, and keeping the key — Monell keeping the key of the money drawer. This state of things continued from the twelfth of December to the eighteenth, when Collins expelled the Butlers from the store, against

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their will, assumed the entire ownership and dominion of the goods, and afterwards sold and delivered them to one Lamott.

The case was tried by a jury, who found for the plaintiffs.

On the trial, the main matter of fact in debate seems to have been whether this arrangement in respect to the execution of the bill of sale and the qualified possession of Collins, was or was not procured by fraud; the plaintiffs contending that if this were the case, then that the defendant was in the condition of an original trespasser.

The legal proposition above asserted is correct. The ownership of goods is not changed when the claim to such ownership is based upon a fraudulent contract. If Collins, intending to deceive Butler, got from him a bill of sale under the representation that it was only to serve as a temporary security for the compliance by the Butlers with their engagement to give him certain sureties on the previous indebtedness, and *at this time* intended to refuse to receive or give him the benefit of this new contract; in other words, if the possession of the goods and the bill for them were procured by falsehood and deceit, such bill of sale was void and such possession was unlawful. It would be really a procuring of the goods and bill of sale upon false pretenses. In such cases it is well settled that the party can take no benefit from his fraud. It is as much a trespass to take possession under such circumstances as without color of contract. The question is not, when the possession is fairly obtained, whether a fraudulent failure to comply with the contract — which is the consideration of such possession — avoids the sale or makes the original taking tortious; but the point is, that an original fraudulent design, characterizing and entering into the contract at its inception — which fraudulent design in this case is alleged to be to use the form of a contract as a covering for a wrongful taking of another's property — is sufficient to divest such possession of every attribute of a sale, and to put the pretended vendee in the same condition as if he had taken the goods without the pretense of sale. On reason and authority we think this proposition is law. *Cary v. Hotaling* (1 Hill, 311) is in point. The learned judgment of Mr. Justice Cowen in this case, relieves us of the necessity of doing more than quoting a portion of his opinion to show that the principle, as we have stated, is sustained by the highest authority: "The general doc-

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trine is perfectly settled that fraud avoids a contract of sale." (Bristol v. Wilsmore, 1 Barn. & Cress. 514; Kelly v. Wilson, 1 Ryan & Moody, 178; Root v. French, 13 Wendell, 570.) These were all cases of buying goods with a preconceived design of not paying for them. In the first, Abbott, Ch. J., said: "It prevented the property passing." In the second, he said the same thing. And in Root v. French, Savage, Ch. J., states the same rule, but suggests a distinction as to the remedy, which was not in the case, and which, on more reflection, I am sure he would have repudiated. McCarty v. Vickery (12 John. R. 348) on *certiorari* from a Justice's Court, decides that trespass will not lie in such a case, and even adds that the property is changed. But no case is cited, nor any principle or analogy mentioned on which to rest either proposition. And there are numerous cases to the contrary. That the property does not pass, I add to the cases already cited the following: Allison v. Mathieu, 3 John. R. 235, 8; Van Klief v. Fleet, 15 Ib. 147, 151; Buffington v. Gerrish, 15 Mass. R. 156; Abbotts v. Barry, 5 Moore, 98, 102; Lupin v. Marie, 2 Paige, 169; Andrew v. Dieterich, 14 Wendell, 31; Mowrey v. Walsh, 8 Cowen, 238; Tamplin v. Addy, Ib. 239, note; Putnam, J., in Badger v. Phinney, 15 Mass. R. 364; Irving v. Motley, 7 Bing. 543; 5 Moore & P. 380, S. C. All these cases hold, in terms, what was asserted by Dallas, Ch. J., in Abbotts v. Barry, viz.: "The sale being effected by fraud, it is clear that a sale of this description works no change of property. The wares must be considered as remaining in the plaintiffs as the original owners." This being so, the civil remedies of the party defrauded are clear, viz., trover or replevin in the *detinet* or trespass, or replevin in the *cepit*, at his election. Trover will lie without demand and refusal, because the original taking is tortious. (Thurston v. Blanchard, 22 Pick. 18, 20.) I admit that Buffington v. Gerrish speaks nothing in favor of the remedy, as for a trespass; because, although the action was replevin, this has long since been holden in Massachusetts to lie for a mere unlawful detention. (Badger v. Phinney, 15 Mass. R. 359; Baker v. Fales, 16 Ib. 149, 150, and cases cited at the last page; Marston v. Baldwin, 17 Ib. 606.) But for the purposes of the civil remedy, however it may be with the criminal, on the distinction between bailment and sale, the cases, with the exception

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of *McCarty v. Vickery* are all one way, if we take the point as established, that neither works any change in the property of the goods. The general and absolute ownership still remains in the vendor or bailor; and not only the original interference with the property, on the part of the vendee or bailee, but any subsequent acts of ownership on his part, may be considered as an unlawful or tortious taking. (*Putnam, J.*, in *Badger v. Phinney*, 15 Mass. R. 359, 364, and in *Baker v. Fales*, 16 *Ib.* 147, 150.) The general owner holds the constructive possession of personal property; and this is sufficient to maintain trespass, though the actual possession be in another. (*Putnam, J.*, *ut supra*; *Putnam v. Wiley*, 8 John. R. 432; *Thorpe v. Borling*, 11 *Ib.* 285; *Aiken v. Buck*, 1 Wend. 466; *Root v. Chandler*, 10 *Ib.* 110.) It is said that the owner consented to the taking; and, were that so, it would undoubtedly be a sufficient answer. But consent, in law, is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake. *Putnam, J.*, *ut supra*, 15 Mass. R. 364; *Poth. Obl. pt. 1, ch. 1, sec. 1, pl. 19.*

This being the rule, it only remains to inquire whether the facts of this case have any application to it. We have already indicated the general history of the case. But it is necessary to show the facts more in detail.

The Court below refused to charge the jury "that the evidence does not show any such fraud as will entitle the plaintiff to recover in this action."

It seems that both parties requested the Court to charge the jury what would be fraud and the Court accordingly did instruct the jury in this respect, as follows: "That if they believed the defendant Collins had practiced fraud and deceit in getting into the store; that he had deceived plaintiffs in inducing them to execute the bill of sale, telling them it was a mere matter of form; that he had promised to take the promissory note as alleged by the plaintiffs, yet, at the time he so promised, he did not intend to keep the same, but was fraudulently intending to deceive the plaintiffs, so as to enable him to obtain the possession of the goods, and then forcibly keep possession of the same — that these acts were fraudulent." This instruction, upon the hypothesis of fact assumed, was strictly correct with the doctrine above

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laid down, and so amply supported by authority. If such acts as these are not in law fraudulent, then the law has a system very widely different from any code of ethics ever before promulgated among civilized men.

The only objection which could be urged against this instruction, and the denial of the one refused, is, that there was *no* evidence *tending to prove the fraud*; and the objection involves the questions on the motion for a new trial. In passing upon such questions, as we have had occasion so often to say, we do not sit as a jury. We do not profess to try questions of fact on appeal, after verdicts or findings. We only interfere to prevent obvious and palpable injustice arising from a glaring abuse of the discretion of the Court below in refusing to set aside a verdict when it is without any, or has a clearly insufficient foundation in the evidence. Was there, then, *any* evidence conducing to show that this fraud had been committed? or, if any, was that evidence so slight as to create no serious doubt of the innocence of the parties inculpated?

The proofs in cases of fraud are usually circumstantial. Frauds are a species of the *crimen falsi*, which, like larceny, are not done openly. They are usually shown as inferences from facts established, rather than as facts expressly proven. We will look to the character of the transaction, not for the purpose of proving this imputed fraud, but for the purpose of ascertaining whether there was any proof worth weighing of its existence.

Looking to the nature of this transaction, it is scarcely to be supposed that the Butlers would be willing to exchange the contract they had made for one greatly less advantageous to them in its terms, without some corresponding benefits or protection. The facts of the transaction forbid the idea that this was a sale of the goods in payment of the old debt; the qualified possession — the arrangements as to the times and sums in payment — the agreement as to the sureties — all show with certainty what was understood. These terms were settled on the eleventh or twelfth of December. Butler had no attorney — Collins had. One of the attorneys of Collins was to go on the note for the deferred payments. No time was reserved or limited for the giving of the note. The partial possession and bill of sale was meant to be a security with the arrangement was consummated. On the evening

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of the seventeenth the notes were signed. No exception to the sureties before agreed on seems to have been made or communicated to the Butlers. On that day a telegraphic dispatch is sent to Lamott at San Francisco, to come to Sacramento, and he comes, in answer to it, and buys the goods. When the notes are presented to Collins, he refuses, or declines, to look at the notes, and said, on the demand of Butler to take the notes and give up the bill of sale and store, "he would not take them." Butler then said, as the witness swears: "You agreed to take these notes and give me back the bill of sale." Collins replied, that he did not care — he had succeeded in getting the store back into his possession, and he did not intend to give it up again; and that he wanted Mr. Butler to leave the house, and not stay there any longer. Mr. Butler then went out of the store, and Mr. Lamott commenced taking down the hats, for the purpose of taking an account of stock. Mr. Collins then went over to the counter, where A. J. Butler was engaged in brushing a hat, and told him he had no business there, and ordered him to leave the house forthwith. Mr. Collins and Mr. Lamott then took possession of the whole store, and have held it ever since. This all took place about the middle of the day on the eighteenth of December.

The only objection to all this testimony, as conducing to prove the original fraud, is, that it is matter *ex post facto*, and though it may be proof of fraud or bad faith, yet it is not proof that the fraud was in the contract itself. In cases of fraud, the rule which admits testimony to impeach it is liberal, both in civil and criminal cases, and subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. So far does the rule extend, that distinct frauds, contemporaneous in their perpetration, are admissible to prove the fraud of the transaction under investigation. But in this case, the fraud being proven in reference to this very transaction, the date of the criminal intent must necessarily be a matter of inference for the jury. Thus, the dealing with property to-day as his property, by the vendor, is evidence to show the fraud committed in a sale a month ago. The subsequent acts are illustrative of the intent and character of the first. We cannot well understand why, when a man openly violates his engagements, so as to give a false and fraudulent effect to something

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which he has done before, a jury may not as well date the fraudulent intent from one period as another of the transaction, or what rule of charity requires us to date his fraud at a period which would be most advantageous to the perpetrator of the fraud. If a man goes to a livery stable, and pretends to hire a horse to go to one point, and starts off to a different place, in a different direction, and there sells him, we do not see that Courts would be bound to presume that his original motive was honest, but that he changed it afterwards.

But, apart from this, the declaration of Collins already quoted, on the eighteenth, gives color to the transaction. It shows, if believed, a purpose reckless of moral obligation, and is a clear intimation that the only or main purpose of the arrangement with the Butlers was to get possession of the store; and certainly the other circumstances are not inconsistent with this hypothesis. But all that it is necessary to show is, that there was evidence tending to this result; and upon that question we have no sort of doubt.

The other point of appellant is better sustained. The judgment is as well for the value of the goods as for damages sustained by the taking. To prove these last, the plaintiffs introduced a witness, who, after examining the books of the plaintiffs, based his calculation of the loss they sustained upon an estimate of the profits (according to their previous rate) which might have been made but for the trespass. We think this evidence inadmissible. The plaintiff could not recover the value of the goods and also the profits *which might have been made* on their sale. Although the plaintiff may not have been confined to the exact value of the goods, yet the standard of recovery sought by the testimony and ruling admitted is not the correct one. There was a separate finding on the question of value, and also of the other damages. This error could not have influenced the first and general finding. The plaintiff has announced his willingness to remit these damages improperly allowed. The judgment of the Court below, therefore, will be affirmed, at the cost of the respondents, upon their filing a *remittitur* of all damages assessed by the jury, except the value of the goods as found.

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MCMILLAN v. RICHARDS *et al.*

Where a case is appealed from the District Court to the Supreme Court, and the Supreme Court reverses the judgment of the District Court, and directs the entry of a final judgment, such judgment can be entered by the Clerk of the District Court in vacation.

The act of the Clerk in entering the judgment, is a mere ministerial act.

The Court below cannot refuse to give effect to the judgment of this Court; and a judgment entered by the Clerk, in such case, is just as binding as if entered in the Supreme Court itself.

APPEAL from the Seventh District, County of Marin.

The facts appear in the opinion of the Court.

J. A. McDougall for Appellant.

O. L. Shafter for Respondents.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

An appeal was taken to this Court from the District Court of Marin. The Court rendered a judgment of reversal, and directed the Court to enter for the respondent a final judgment. The precise judgment was declared in specific terms, leaving no discretion in the Court below. It was in substance and effect a final judgment and disposition of the whole subject matter by this Court: "The Court only directing the lower Court to perform a specific ministerial duty of registering the decree ordered and directed by this Court." The Clerk of the Marin Court entered the judgment in vacation. A motion was made in the Court below to vacate this judgment and supersede the execution; also, for a motion for a new trial, on sundry grounds. This motion to vacate being overruled, the defendant appeals.

The grounds of appeal are: The judgment entered by the Clerk is a nullity, the Clerk having no power to make this entry in vacation. Unquestionably, if powers judicial in their nature are involved, the Court, and not the Clerk, must exercise them. But if the acts enjoined by the Court be merely ministerial in their nature, it is not

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perceived why the Clerk of the lower Court might not as well exercise them as the Clerk of this Court.

The Practice Act (section 144) provides that a judgment may be entered in vacation; and section 358 seems to contemplate that a judgment by the Supreme Court may be in like manner entered by the Clerk of the District Court. This question has been expressly decided by this Court in *Marysville v. Buchanan*, (3 Cal. 214). In that case the Court said: "When the plaintiffs filed the remittitur from this Court, they applied to the Clerk and obtained an execution for their costs. The District Court, in quashing the execution, held that the Clerk of the District Court had no power to issue an execution for costs, until by order of that Court; and further, that it was the duty of the Clerk of the Supreme Court to issue all executions and costs accruing in this Court. Both of these positions are erroneous. By statute, (Practice Act, section 358) the remittitur from this Court is transmitted to the Clerk of the Court below; by him it is attached to the judgment roll, and a minute of the judgment of this Court is entered on the docket against the original entry.

"The judgment of the Court then stands as the judgment of the District Court. If the judgment of this Court orders a new trial, the Clerk of the District Court will proceed to place the cause on the calendar; if it awards costs, he will, on application of the party in whose favor it is given, issue execution for the same. In either case he acts, not by the authority of the District Court, but of this Court. Neither the District Court nor the District Judge have any authority to prevent the immediate execution of the judgment of this Court. So far as the appeal is concerned, and the costs consequent thereon, the judgment of this Court is final. It is unnecessary to wait until term time. The rule in force in some States, that judgment cannot be entered and execution issued in vacation, has not existed in this State." See Practice Act, sections 144, 209.

This being so, the judgment ordered by this Court was just as effectual, and as conclusive of all the matters involved in the controversy, as if, instead of directing the Court below, or its Clerk, to enter the judgment directed, it had been entered by the Clerk of this Court.

We do not think that, upon the showing made by the defendants,

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the judgment below ought to have been set aside, if rendered by that Court. But even if it should, and this Court passed upon the whole subject, and gave its judgment, it cannot be held that the Court below could refuse to give effect to the judgment of the Supreme Court. The matter was *res adjudicata*, not only as to the matters of averment and proof actually in the record, but as to those matters which might have been introduced. It is precisely as if, instead of ordering the Court below to enter the judgment, this Court had itself entered it on its records.

The judgment of the Court below is affirmed.

WELLINGTON v. SEDGWICK.

To constitute an assignment within the insolvent law, there must be a trust in favor of the assignor or third person.

If A sells his property to B, in consideration of so much money to be paid by B to C, though the money is to be paid by or out of a sale of the goods, the contract is not void. There is no difference in such a case between paying to A, and paying to A's order or creditor.

Where the vendee of goods is to pay part of the purchase money to the creditors of his vendor, this creates no trust in the goods sold in favor of such creditors; therefore, in an action to recover such goods, the following instruction to the jury is improper: "If the jury believe from the testimony, that the agreement between Stevens & Markley, the vendors of the plaintiff, was that the plaintiff was to pay certain of the debts of his vendors out of said goods, then that such sale as against the other creditors of the vendors, is fraudulent."

Where a Sheriff, having an execution against S. & M., levied it upon certain goods, the property of S. & M., and placed them in the hands of W. as keeper, and subsequently the execution was quashed, and between that time and the issue and levy of a new execution, W., who still remained in possession of the goods, purchased the goods of S. & M. : *Held*, That such purchase is valid, and vested the property in W.

Upon the levy of the execution, the property vested in the Sheriff for certain purposes; his title was only a qualified title, which was defeated by the quashing of the execution; the title then returned to S. & M.; they could discharge the Sheriff from the duty of returning the property to them, which they did by the sale to W. The possession was changed by the levy of the first execution,

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by the Sheriff, and his taking and keeping the goods; so that the subsequent sale by the defendants in execution to W., was not void by force of the statute requiring possession to accompany and follow sale.

Where, at the time of the levy of the second execution, the goods first levied upon were mixed with others which W. had also bought of S. & M., which last goods were alleged to be liable to the execution: *Held*, That if they were so mixed or confounded with other goods, as that they could not be identified or distinguished, and W. failed to point out to the Sheriff, or designate the goods which were not subject to execution, the Sheriff could not be liable for levying on the whole. But the Sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of, and designating, the particular goods improperly seized, and must be given previously to suit brought.

Such a question is one of fraudulent intent, to be left to the jury upon the facts, and is not one of those cases which the Court is authorized to pronounce to be fraudulent as matters of law.

APPEAL from the Fifth District, County of Tuolumne.

The facts sufficiently appear in the opinion of the Court.

H. P. Barber for Appellant.

There are two fatal errors in the charge of the Court.

I. This was an action of replevin brought against defendant by the vendee of certain goods and chattels, the sale being alleged fraudulent. It was proven that after the transfer the vendee had taken possession of the premises, and had purchased goods in his own name and on his own account, in San Francisco, to the amount of \$5,000, which were levied on by the defendant, under an execution against the vendors of plaintiff, and in regard to which plaintiff contended that the execution could afford no possible justification, inasmuch as those goods were undoubtedly the property of plaintiff, and the execution was against one Markley. The Court charged:

"That if plaintiff did not notify and point out to the Sheriff, at the time of levy, such goods, then they were the same as any other portion of the goods sold by Markley to Wellington, the plaintiff, and plaintiff could not recover for them."

Now, in the first place, the Sheriff was directed by the execution to levy on the goods of Markley, and if he levied on the goods of Wellington, he did it at his peril, and must take the risk.

Secondly. It was immaterial whether a demand were made at the time of levy, or at any other time before suit brought.

Thirdly. The Court entirely usurped the province of the jury, in stating that such goods "were the same as any other portion of the goods sold by Markley to Wellington, and plaintiff could not recover for them."

"A peremptory direction to the jury to find in a given way, is a clear usurpation on the part of the Court, depriving them of all power and discretion. It is, in effect, deciding the issue, and finding the verdict for them." 3 Graham & W. on New Tr., p. 738 *et seq.*; 11 Wendell, 83; 19 Wendell, 402.

The reason applicable to such a case is very lucidly laid down in *N. Y. Fire Ins. Co. v. Walden*, 12 Johns. R. 512. See, also, *Daniel v. Gorham*, 6 Cal. R. 43.

II. The Court also charged, "That if the jury believed from the evidence that the agreement between Stevens & Markley, the vendors of the plaintiff, was, that the plaintiff was to pay certain of the debts of his vendors out of said goods, then that such sale, as against the other creditors of the vendors, is fraudulent."

Here is a charge, if possible, more erroneous than the other:

First. This charge does not include plaintiff at all, but instructs the jury that if his vendors agreed, etc. His vendors might well have so agreed, without any agreement or even knowledge on his part. We apprehend their agreement could not affect his rights.

Secondly. The charge was erroneous in point of law; it was a direct charge to the jury, that if a debtor prefer one creditor to another, the transaction is fraudulent — a doctrine opposed to all authority, and specially denied in a late case decided by this Court — *Dana v. Stanford*, 10 Cal. R. 269 — where the Court says that it is no part of the policy of the law to inhibit the application of property "to the payment of one debt rather than another."

It was charged as absolutely fraudulent of itself; or, in other words, was a positive direction of the jury to find for defendant because the sale was fraudulent.

Even had such a sale been evidence of fraud in law, the charge would have been altogether too broad. *Williams v. Cheesebrough*, 4 Conn. R. 356.

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Our statute contains but one conclusive evidence of fraud *per se* — the possession of the vendor after sale. All other circumstances must be left to the jury as evidences of fraud, but not as rendering a sale fraudulent *per se*.

Where the charge of the Court has a tendency to make an erroneous impression upon a jury, and mislead them in their views of the case, a new trial will be granted. *Benham v. Cary*, 11 Wendell, 83.

Heydenfeldt for respondent.

The first point of error assigned is clearly answered by the case of *Daumier v. Gorham*, 6 Cal. R. 43, and cases there cited in appellant's brief. It is there held, that the Sheriff is not a trespasser *ab initio* where the goods of the plaintiff are mingled with those of the defendant in execution; but that to constitute him a trespasser, the goods claimed must be specified, and a demand made for them, followed by a refusal to deliver.

This principle is the same as that applied to private persons where there is a mixture of goods by one, so that the ownership of separate parcels cannot be distinguished. It is founded upon solid reason and sound common sense.

In looking at the facts of this case in reference to this point, it will be seen, that — 1st. The goods bought in San Francisco by Wellington were not specified or pointed out to the Sheriff at the time of the levy, or at any time afterwards.

2. That they were not demanded at any time.

3. It was not shown or proved what they consisted of on the trial of this case.

4. Not even their value or approximate value was attempted to be shown.

Now, the charge asked of the Court by the plaintiff is equivalent to an admission of the fraudulent purpose of the transfer from Markley & Stevens to plaintiff. That being the case, the plaintiff could not recover the goods so transferred; and, therefore, if he could recover at all for other goods which had been mingled with them, he must have shown what they were, and their value.

2. The last remark may be very abundantly applied to the instruc-

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tion given, which is relied upon as the second and only other point of error. The very instruction asked by the plaintiff, which is considered in the first point, admits the fraud of the plaintiff.

The record substantiates this fraud beyond any question. Not only does the evidence disclose the fraud, but it shows a state of facts which rendered the sale absolutely void *per se*, and left no question open for discussion. It seems that after the Sheriff levied on the goods the first time, Wellington, the plaintiff, became, in the language of the statement, his receptor for the goods; in other words, he was the Sheriff's officer to take charge and custody of the goods: thus standing in relation to them in the Sheriff's place, and being the trustee or agent of both creditor and debtor. This was on the twentieth November. Six days afterwards, to wit, the twenty-seventh of November, the plaintiff, still holding the capacity of custodian of the goods, and being in possession of them, obtains a bill of sale of them from the defendants in execution. At the next term of the Court the execution is set aside for want of a seal, and a new execution issued and placed in the hands of the Sheriff.

During all this time the goods are in Wellington's possession as Sheriff's officer; that position of trust has never been surrendered, and could not be except by a delivery back to the Sheriff. The possession of Wellington was therefore the possession of the Sheriff, and there could not be a trespass in the Sheriff in taking back what he had not parted with.

Nor could Wellington avail himself of his position as trustee to derive any benefit or advantage to himself, to the detriment of his *cestuis que trust*, and more especially to the detriment of the Sheriff, who had never parted with the possession of the goods, and was therefore liable to the plaintiff in execution to the extent of their value.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

Trespass for taking certain goods.

The defendant justified as Sheriff, claiming that he had executed against Stevens and Markley, and that these goods were, at the time of the levy, their property, or subject to the levy. The case was tried

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by a jury, and the errors assigned were instruction given and refused by the Court. There was proof of execution at the suit of one Rand against Stevens and Markley, levied on these goods, and that the execution was afterward set aside by the Court for irregularity. The goods on this levy were put in the hands of a receptor (or keeper). After the writ was set aside, another issued which was levied on these goods. But before the issuance of this last execution — on the twenty-seventh November — these defendants executed a bill of sale of the goods levied on, to plaintiffs. The last execution issued on the twenty-eighth of June, 1858, and was levied on the goods sold to plaintiff, and also upon certain other goods bought subsequent to the sale by the plaintiff.

A demand by the plaintiff was made on the Sheriff, January 2, 1858, and refused. Wellington was the receptor, and had the possession, or claimed to have the possession of the goods, at the time of his purchase, and of the levy of the last execution; and these goods were with other goods in the former place of business of Stevens and Markley — these last having been brought, as it was claimed by Wellington, of other persons since the levy of the first execution. No notice or description of these last goods, nor any designation of them, was given by Wellington at the time of the levy or before the bringing of the suit.

The first execution was set aside on the ground that there was no seal. No appeal was taken from that decision, but it appears to have been acquiesced in, and a new execution issued and levied.

The Court instructed the jury, "if the jury believe, from the testimony, that the agreement between Stevens and Markley, the vendors of the plaintiff, was, that the plaintiff was to pay certain of the debts of his vendors *out of* said goods, then that such sale as against the other creditors of the vendors is fraudulent." This is not the law, as was held in *Stanford v. Dana*, 10 Cal. 269. To constitute an assignment within the insolvent law, there must be a trust in favor of the assignor or third persons.

If A sells his property to B, in consideration of so much money to be paid by B to C, though the money is to be paid by or out of a sale of the goods, the contract is not void. There is no difference in such a case between paying to A and paying to A's order or creditor.

We do not understand the evidence to go further than that the con-

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sideration of the sale by Markley and Stevens to Wellington was that Wellington was to pay part of the purchase price to the creditors of this firm; but this created no trust in the goods assigned in favor of those creditors. Therefore this agreement, even if proved—as the instruction supposes—did not invalidate the contract. We cannot say what influence this instruction had on the verdict.

It is argued, that if Wellington was in possession of the goods levied on by the first execution, as receiptor for the Sheriff, he could set up no title by purchase of the defendants in execution against the Sheriff; that his possession was on a mere bailment from the Sheriff, whose title he could not dispute. Upon the quashing of the execution, he was bound to return the property to the Sheriff, that the Sheriff might deal with it according to law. That the property in the keeping of the receiptor was, in contemplation of law, in the actual hands of the Sheriff, who, on receiving the last execution, might at once have levied on it, and that there was no such change of possession as protected it within the statute from the creditors of the defendant.

We think differently. However suspicious the purchase of the receiptor under the circumstances, and however strong its tendency to prove fraud and collusion, yet the sale was not *necessarily* void. After and by the levy of the first execution, the property became changed; it vested in the Sheriff for certain purposes; but this was only a qualified title of the Sheriff. The defendants might sell the property subject to the process. When the execution was quashed the levy fell with it. The title would then have returned to the defendants in execution, but for their sale to Wellington. The Sheriff would have been bound to return the goods to the defendants. But this duty of the Sheriff was due to the defendants, and they could discharge the Sheriff from it. If they had been the receiptors, unquestionably they would not have been bound to return the goods to the Sheriff in order that the Sheriff might hand them back to them. Neither would their vendee. The possession was changed by the levy of the first execution by the Sheriff, and his taking and keeping the goods; so that the subsequent sale by the defendants in execution to Wellington was not void by force of the statute requiring possession to accompany and follow a sale.

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It seems that these goods so sold were mixed with other goods subsequently bought by Wellington; and the Sheriff, by virtue of the last execution, levied on these subsequently acquired goods as well as those first seized.

If the goods first bought were fraudulently sold to Wellington, they were, of course, subject to the execution; and if they were so mixed or confounded with other goods, as that they could not be identified or distinguished, and Wellington failed to point out to the Sheriff, or designate the goods which were not subject to execution, the Sheriff could not be liable for levying on the whole. But the Sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of and designating the particular goods improperly seized, and must be given previously to suit brought. We do not understand that the case of *Daumiel v. Gorham*, 6 Cal. 43, goes any farther than this.

The whole question is one of fraudulent intent, to be left to the jury upon the facts, and is not one of those cases which the Court is authorized to pronounce to be fraudulent as matters of law.

The rulings of the Court below are not in accordance with these views; and the judgment is reversed and cause remanded, that it may be retried on the principles indicated in this opinion.

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The Legislature had the right to provide, in the Act known as the Consolidation Act for the Government of the City and County of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. Where the owner of a lot neglects for three days, after notice from the Superintendent of Public Streets of said city, to repair the street in front of his lot, the Superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount.

APPEAL from the County Court of the City and County of San Francisco.

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This was an action by the plaintiff, who was employed by the Superintendent of Public Streets of the City and County of San Francisco, to repair the street in front of the lot of defendant — he (the defendant) having neglected to do so, after notice from the Superintendent to that effect.

The action was originally commenced in a Justice's Court, and was appealed to the County Court, where the cause was tried without a jury, and a judgment rendered for plaintiff; from which the defendant appealed to this Court. The facts sufficiently appear in the opinion of the Court.

E. Cook for Appellant.

J. J. Papy & N. Holland for Respondent.

BALDWIN, J., delivered the opinion of the Court — *TERRY, C. J.*, concurring.

The fifty-sixth section of the Consolidation Act, applicable to the City of San Francisco, passed April 19th, 1858, provides that each owner of lots fronting on streets which have been planked and graded, shall keep the same in front of his lot in repair, at his own expense; and the Superintendent of Public Streets and Highways shall require of such owner, by verbal or written notice, to make the repairs. By section fifty-seven, if such repairs are not commenced within three days, (after notice given as aforesaid) and diligently and without any interruption prosecuted to completion, the Superintendent shall employ any suitable person applying, to do the work at the expense of the tenant and owner, or occupant, at a reasonable price, to be determined by the said Superintendent.

In this case, the defendant was the owner of the property, and had notice to repair, which he declined doing, and the Superintendent made the contract to repair with the plaintiff, who did the work; and the question is as to defendant's liability for the price. Section fifty-nine provides that an action may be instituted by the contractor under these circumstances.

Though no privity of contract exists between the plaintiff and defendant, yet if the Legislature had a right to require this duty, or to

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lay this burden upon the owner, we suppose that the power to provide for the collection of the sum in this way cannot be disputed. There is no difference between the power to authorize a suit in the name of the Tax Collector, or the State, or county, and in the name of the contractor; the mode of enforcing this obligation being mere matter of remedy following the right.

Some provision being necessary for repairing the streets, the mode by which this is done, if it be uniform and equal in its operation, must be left to legislative discretion. This duty of repairing the streets is in the nature of a public burden or tax, and we do not see that the rule adopted applying to all the streets of a municipality, is not as near an approximation to uniformity as could well be attained. Absolute justice in the operation of human laws is impossible; there is no rule, however just in its general working, which has not its exceptional instances of hardship; and especially in the results of the taxing power is this incurable infirmity of laws to secure exact and equal justice to all those upon whom they operate, apparent. No tax law could ever stand if subjected to a rigid test on the score of uniformity. All we can expect is a general equality of operation; and we think that this is secured by this Act.

Regarding this obligation as creating a tax to the extent of the needed repairs, which the Legislature had a right to impose, and the giving of the action to the contractor as merely the remedy to enforce it, we think that the judgment of the Court below on the facts was right.

If an unreasonable contract were made, or unreasonable repairs required, or advantage were taken by fraud or otherwise, the case might be different.

We decide here the precise case before us, and nothing more — the case of the liability of an owner for repairs in front of his lot on a graded and planked or paved street, in a proceeding to recover on a fair and just contract.

The cases in 9 Dana, 521, and in 19 Ohio, 418, cited by the respondent, fully sustain the principles of this case.

The judgment is affirmed.

Ziel, Bertheau & Co. v. Dukes.

ZIEL, BERTHEAU & CO. v. DUKES *et al.*

In an action upon a promissory note payable "on demand, after date," it is not necessary to show actual demand before bringing suit. The institution of suit is a demand.

A judgment will not be set aside, on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note.

APPEAL from the Fourth District, County of San Francisco.

This was a bill to set aside a judgment upon the ground of fraud, and for an injunction restraining the collection of the judgment.

The facts are thus stated by the Court:

"It appears that Dukes executed a note for \$3,000, in favor of Jacobs, on the twentieth of October, 1857, payable on 'demand, after date.'

"Suit was commenced on this note on the nineteenth of November, and judgment taken on the first of December.

"Plaintiffs, who are judgment creditors of Dukes, seek to set aside this judgment as fraudulent. No actual fraud is shown; the objections urged by the appellant being that the judgment is fraudulent in law; because — *First*. The suit by Jacobs was commenced before the note was due; and, *Second*. Judgment was taken for more than was actually due on the note."

The Court below decreed that the judgment of Jacobs be set aside as to all over the sum of \$3,000, and as to that amount the judgment stand; and the attachment issued and levied in the suit of Jacobs v. Dukes, have priority, as a lien upon the property seized, over that of the plaintiffs, as to the amount of \$3,000 and costs of suit. Plaintiffs appealed to this Court.

C. V. Grey for Appellants.

I. The note on which suit was brought was not due at the time suit was brought.

II. Judgment was taken for a larger amount than was owing at the time of taking said judgment.

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If either of these grounds be true, this Court has held it vitiates the judgment. See *Taaffe, McCahill & Co. v. Josephson et al.*, 7 Cal. Rep. 352.

The judgment is taken by default.

The proposition is well settled that a default confesses nothing but what is well pleaded.

Now, what is averred in Jacobs' complaint? This, and nothing more: That Dukes, on the twenty-eighth of October, made his promissory note, whereby he promised to pay on demand, after date, the sum of \$3,000, with interest.

The note mentioned is not, as will be seen, what is familiarly known as a demand note. It is payable on demand, after date.

The conclusion is, therefore, clear and irresistible, that before it could become due there must be a demand upon the maker after the day it was made and bore date. It was a note payable at a future day.

It is clear, that the parties had in contemplation at the time of making it, that it should become due in the future, and to every word of the contract between them effect must be given. *Dixon v. Nuttall*, 1 Crompton, Meeson & Roscoe, 307; 6 Carr. & Payne, 320.

But this Court has decided that the payee of a note has the whole of the day on which it falls due in which to pay it, and, therefore, that a suit commenced on that day is premature. *Welcombe v. Dodge et al.*, 3 Cal. 260; *McFarland et al. v. Pico et al.*, 8 Cal. R. 626.

But there is still another reason why this note cannot be considered as due. Were it a note by its terms payable simply on demand, it would be entitled to days of grace, for the Statute of this State passed April 2d, 1851, (Wood's Digest, p. 73) provided that days of grace shall be allowed on all except sight bills or drafts.

III. Was judgment taken by Jacobs against Dukes for a larger amount than was owing at the time of taking it?

The note produced promises to pay on demand, after date, without grace, \$3,000.

That would entitle the holder to \$3,000 when demanded after date; and interest, if payment was not then made, to run from the time payment was demanded: for the principle is well settled, and our law is,

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interest does not run on a note payable on demand, until after demand made and default of payment. The complaint was filed the nineteenth of November; it asks for, and the judgment gives, interest from the date of the note, to wit, twenty-eighth of October.

Harmon & Labatt for Respondents.

I. Notes "on demand" are due at once on the day of their date. These words are conceded to import simply that there is a subsisting debt then due. The idea that a formal demand of payment before suit is essential to complete plaintiff's right of action, and that then the maker has the whole day of demand to pay, is not sustained by any good modern authority. On the contrary, a suit is a demand, and the only demand necessary. "The demand is not parcel of the contract." Story Prom. N., sec. 29; *Wenman v. Mohawk Ins. Co.*, 13 Wend. 268, and cases cited; 1 Monroe, 207; 13 Mass., p. 136.

II. The note being due the day after its date, October 28th, was due October 29th, and drew interest from that time.

Appellant assumes it to be settled law that interest does not run on notes "on demand," until after demand. For this doctrine he relies upon general law.

Now, although the rule is so laid down in many authorities, particularly where nothing is said about interest on the face of the note, still it is also held differently by other authorities; and the effort has been to make the rule accord with the sense of the thing, to wit, that all notes or claims should bear interest from the time they are due.

But in this State the statute has settled the law. In Wood's Cal. Dig. 551, the Court will find that ten per cent. per annum interest is allowed "for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing * * * for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and for money received to the use of another."

Even under the English rule, a note promising to pay "£1,500 on demand, with lawful interest," drew interest from date. *Weston v. Tomilson*, cited in Chitty on Bills, (10 Am. ed.) 681, note (c); *Roffey v. Grunwell*, 2 Perry & Dav. 356.

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III. The judgment in *Jacobs v. Dukes* is not for more than was due.

This proposition follows necessarily from the preceding one. If the money was due on the twenty-ninth of October, 1857, a calculation of interest on \$3,000 from that day to December 1st, the day of entering the judgment, will give \$27.50, the exact amount computed by the Clerk.

TERRY, C. J., delivered the opinion of the Court — FIELD, J., and BALDWIN, J., concurring.

Neither of the points in this case are well taken.

The note was presently due, and it was not necessary to show any actual demand to enable *Jacobs* to recover.

"If a note be made payable at sight, or at ten days after sight, or in ten days after notice, or on request or on demand in all these and the like cases, the note will be held valid as a promissory note, and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without giving any notice to, or made any request or demand upon the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt, to be due to the payee, and payable absolutely at all events, whenever, or by whomsoever, the note is presented for payment, according to its purport. Nay, where a note is payable on demand, no other demand need be made, except by bringing a suit thereon. So, where a note does not specify any day or time of payment, it is by law deemed payable on demand, and, therefore, is construed as if it contained the words 'payable on demand' on its face." Story on Prom. Notes, sec. 29.

The second point is predicated on the fact, that by an error in computing interest, judgment was rendered for \$27.50 interest, when the interest due is, by appellant's calculation, only a fraction over \$26.

It does not appear whether this error was made by the Clerk, who entered the judgment, or by the plaintiff; at any rate, it is clear that it is the result of a mistake, and we presume no precedent can be found for annulling the judgment for such a cause.

Judgment affirmed.

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Instructions to the jury, which are not embodied in the statement on appeal or bill of exceptions, and are neither certified to by the Judge trying the cause, or signed by him, cannot be the subject of consideration by this Court.

A general challenge of a juror for cause, without specification of the particular grounds, is insufficient. The statute enumerates several different grounds for which such challenges may be taken, and a designation of the one upon which any particular challenge rests, is essential to its consideration by the Court. It is not sufficient to say, "I challenge the juror for cause," and then stop.

Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon the verdict, seal it up and give it to the officer in charge of them — the Clerk being absent — and request him to give it to the Clerk, which is done; and after the meeting of the Court the following morning, the verdict is opened, in the presence of the jury, and read by the Clerk, without exception: *Held*, That this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the Court itself as if it had been directly delivered to the Clerk.

Nor will it make any difference when the names of the jurors were not called and they were not asked, whether they had agreed upon their verdict? Where the parties were present and took no exception at the time; and where it is not pretended that the verdict entered differs from the one sealed up, or that the result is in any respect affected by the omission.

Errors which are immaterial, and do not affect the substantial rights of the parties, are unavailing on appeal, even when the subject of exception, much less so when they are permitted without objection.

No delivery by the vendor of personal property is necessary as against parties who are neither creditors or subsequent purchasers of such vendors.

The Statute of Frauds only requires an actual and continued change of possession as a protection against creditors and subsequent purchasers of the vendor.

Where the property seized by a Sheriff is in the possession of a stranger to the execution, it is not sufficient as a justification of the seizure, to prove the execution only; the judgment upon which it was issued should also be proved.

It is a general rule that when the possession of property is originally acquired by a tort, no demand previous to the institution of the suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required.

Where the vendee of a lot of wheat released his vendor from all damages by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness.

Nor would the non-payment of the consideration expressed in the release affect the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action.

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The declarations of such vendor, made after the sale of the wheat, are not admissible for the purpose of proving that the sale was not *bona fide*.

Where the vendor of personal property acquired his title to the property in fraud of the creditors of his vendor, his vendee, for a valuable consideration and without notice of the original fraud, is not affected by the taint of his title. The title, although originally fraudulent, is cured by the subsequent conveyance to an innocent party.

Conveyances of real and personal property, made to hinder, delay or defraud creditors, are subject to the same defect, liable to be avoided at the suit of the creditors, but valid as between the parties, and vest a title which can be transferred perfect to a *bona fide* purchaser for a valuable consideration.

APPEAL from the Fifth District, County of San Joaquin.

This was an action to recover a lot of wheat alleged to have been wrongfully taken by the defendant.

The complaint prays judgment for the possession of the wheat, and also judgment for special damages occasioned by the wrongful taking and subsequent detention.

The answer of the defendant justifies the taking by virtue of a judgment and execution in favor of Samuel Fisher and against E. C. Kelty and G. C. Reynolds. Kelty & Reynolds were the original owners of the wheat, and sold the same to Alonzo McCloud, who, previous to the levy, sold the same to the plaintiff Paige. The answer alleges that the wheat at the time of seizure by the defendant was the property of Kelty & Reynolds; that Kelty & Reynolds' sale to McCloud was fraudulent, and made with the intent to defraud, hinder and delay the creditors of Kelty & Reynolds; that execution was issued upon the judgment and placed in the hands of the defendant as Sheriff of San Joaquin county, and that he seized, as such Sheriff, the wheat, then in the possession of McCloud, as the property of Kelty & Reynolds. No delivery of the wheat at the time of sale, from McCloud to plaintiff, was made. Plaintiff paid, from time to time, nearly all of the purchase money, and occasionally took away small lots of the wheat, leaving the major part in the possession of McCloud. No knowledge was traced to the plaintiff of the fraud in the sale from Kelty & Reynolds to McCloud. The wheat had been in the undisturbed possession of McCloud months previous to plaintiff's purchase.

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The cause was tried by a jury. The plaintiff had verdict and judgment, and the defendant appealed.

The other facts of the case sufficiently appear in the opinion of the Court.

Gregory Yale for Appellant.

I. Irregularity of the proceedings of the Court and jury.

1st. The Court erred in overruling the defendant's challenge, for cause shown, to the jurors W. F. McKee, R. W. Stevenson and L. T. Smith.

A challenge of a juror may be reviewed on appeal. *People v. Vermilyea*, 7 Cowen, p. 108. This Court has reviewed challenges of jurors on appeal, thus recognizing the right so to do. *People v. Reyes*, 5 Cal. 347; *People v. Williams*, 6 Cal. 206.

A juror can be challenged for cause, for — "Having formed or expressed an unqualified opinion, or belief, as to the merits of the action." Practice Act, sec. 162, sub. 6.

A party to a civil action is entitled to but *four* peremptory challenges. Practice Act, sec. 161.

2nd. The Court erred in receiving the alleged verdict of the jury, without having their names called, and asked in open court, "whether they have agreed upon their verdict," and requiring them to declare the same.

"The Court may direct the jury to bring in a sealed verdict, at the opening of the Court, in case of an agreement during a recess, or adjournment for the day." Extract from sec. 170 of Practice Act.

The jury did not bring in the alleged verdict; it was given to the Coroner, who gave it to the Clerk during the adjournment.

"Sec. 171. When the jury have agreed upon their verdict, they shall be conducted into the Court by the officer having them in charge. *Their names shall then be called, and they shall be asked by the Court, or by the Clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same.*" Practice Act, sec. 171.

The statutory provisions must be strictly followed. In New York,

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under a similar statute, it was so held. *Graham's Practice*, 2nd ed., pp. 316 and 317.

A party is entitled to poll the jury where a sealed verdict is brought in, unless he has expressly assented to waive the right. *Jackson v. Hawks*, 2 Wend., p. 619.

The defendant did not waive any of his statutory or other rights; on the contrary, we moved to set aside the verdict on this ground at the earliest possible moment.

It is difficult to conceive how a verdict can be objected to, until it is properly in Court. If our theory is correct, the verdict never was properly given in; and we have only to show that fact to set it aside.

The case of *Morgan v. Hugg*, 5 Cal. 409, has no application here, for the point was raised in the Court below in this action.

II. Misconduct of jury in handing verdict to Coroner.

We have already shown the duties of the jurors by reference to sections 170 and 171 of the Practice Act. Instead of giving their verdict to the Coroner, they should have delivered it to the Court, in open Court.

There is no legal verdict but a public verdict, given openly in Court. *Root v. Sherwood*, 6 Johns., p. 68.

An agreement that the jury may bring in a sealed verdict, does not take away from the parties the rights to a public verdict duly delivered. *Ib.*

Until a verdict is received and recorded, the jurors may alter it. *Ib.*; *Blakely v. Sheldon*, 7 *Ib.*, p. 32.

III. Excessive damages appearing to have been given under the influence of passion or prejudice.

The jury, in their alleged verdict, say: "We, the jury in the above entitled action, find for the plaintiff, for 2,320 sacks of wheat, ninety-one pounds each:

"211,120 pounds, 5 cents per pound.....\$10,556

Damages 2,500

— — \$13,056."

There was not any evidence introduced to show the number of pounds each sack contained, or how many pounds the wheat number

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of sacks would average; yet the jury *presume* each sack contained ninety-one pounds.

Not any evidence was introduced by the plaintiff as to his damages over and above the value of the grain; yet the jury gave the plaintiff *two thousand five hundred dollars* over and above what they find the value of the grain to have been.

IV. Error in law arising at the trial, and excepted to by the defendant.

"The defendant moved that plaintiff be nonsuited upon the following grounds, viz:

"1st. That the plaintiff had not shown a sale of the wheat in controversy to him.

"2nd. That the plaintiff had not shown a delivery of the wheat to him.

"3d. That the plaintiff had not averred in his complaint that a demand was made upon the defendant for wheat; and,

"4th. That the plaintiff had not proven that any demand was made upon the defendant for the wheat previous to this action," which mention was overruled.

1st. The Court erred in overruling motion for nonsuit. The evidence did not show a sale and delivery; the wheat remained in the possession of McCloud.

Was there such a sale and delivery of the wheat by McCloud to the plaintiff, as is contemplated in the Statute of Frauds? (Compiled Laws, sec. 20.) That section requires the sale to "be accompanied by an immediate delivery, and be followed by an actual and continued change of possession." Compiled Laws, p. 205, sec. 15; *Stewart v. Scannell*, 8 Cal., p. 80. See also, *Whiting v. Stark*, 8 Cal., p. 514; *Vance v. Boynton*, *Ib.*, p. 554.

2nd. There was no allegation in complaint of demand made of defendant, nor any proof of one.

The demand should have been alleged and proven on the trial.

In order to charge a Sheriff, who has levied upon the property of an execution creditor, which is mixed with other property, the plaintiff must show notice and a demand of the property, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal., p. 43.

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Again; the statute contemplates that parties claiming property levied upon should give notice to the officer. Practice Act, sec. 218.

But the defendant was entitled to notice and demand. The plaintiff's complaint is in *trover*, and he seeks to recover without averring "demand and refusal." It will not be denied that a demand is a necessary allegation in a complaint in *trover*, and that such allegation must be proven on trial. Therefore, the Court below erred in denying defendant's motion for a nonsuit.

3d. The Court below erred in overruling the defendant's objection to the witness McCloud being sworn in chief.

The paper of pretended release of implied warranty from the plaintiff to McCloud, having been executed without consideration, as stated by McCloud, was not sufficient to make him a good witness.

4th. The Court below erred in overruling defendant's offer to show McCloud's declarations, made the last of January, 1858, as to the *bona fides* of the alleged sale by him to the plaintiff.

The defendant had a right to ask this question, to lay the foundation to attack the credibility of witness. *Howe v. Scannell*, 8 Cal., p. 325.

V. Insufficiency of the evidence to justify the verdict, and that the verdict is against law.

Crockett & Crittenden, Whitcomb, Pringle & Felton for Respondent.

The instructions filed by defendant clearly cannot be taken into consideration by this Court.

The defendant insists that the facts, that the jury were not called and asked if they had agreed upon their verdict, and that they gave the verdict to the Coroner to give to the Clerk instead of giving it directly to the Clerk, are fatal to the verdict.

To this point we answer:

1st. That such error, if error it be, should have been excepted to at the trial. 5 Cal., pp. 409 and 410, *Morgan v. Hugg*.

2nd. The irregularity complained of did not in any respect affect the substantial right of the defendant. Section 193 of the Practice Act is explicit to the effect that a new trial can only be granted for causes materially affecting the substantial rights of such parties. See

5 Cal. 409, *Morgan v. Hugg*, and cases there cited by counsel for respondent.

As to the Coroner's receiving the verdict from the jury before they separated, in addition to the above reasons, we would further say, that this is clearly the proper practice. The Coroner was the officer of the Court, and the only officer in the Court when the jury returned with their verdict. He was the officer to whom the jury were especially entrusted.

The second point made by appellant which we shall discuss, is the one which appears first on his brief. It is this: "The Court below erred in overruling the defendant's challenges, for causes shown, to jurors Richard Fowler, W. F. McKee, R. W. Stevenson and L. T. Smith."

The statute providing for new trials expressly requires that the cause for granting a new trial shall be one materially affecting the substantial rights of the party moving.

The defendant has refrained from showing for what cause, good or bad, these two jurors were challenged. As every presumption is in favor of the order refusing a new trial, now appealed from, and as this statement is entirely the statement of defendant, it is evident that the whole burden is on the defendant to show that he has been injured by any irregularity or error in the lower Court.

The decision of this Court in 1 Cal. 384, *The People v. McCauley*, covers all this branch of the case. Indeed, that case is very much stronger than this, because there the jurors objected to actually did sit upon the trial jury, and the case was a criminal case involving life.

The case cited by defendant from 5 Cal. 350, of *The People of California v. Reyes & Valencia*, merely goes to the point as to what questions are proper to put to the jury to ascertain whether they are or are not biased or prejudiced.

In the case in 6 Cal. 206, *The People v. Williams*, cited by defendant, the juror was asked if he had formed or expressed an unqualified opinion as to the guilt or innocence of the accused, and answered that he had expressed an opinion *which was not qualified*. He was justly held incompetent.

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The next point made by the defendant is, that the Court below erred in overruling the motion for nonsuit.

When the plaintiff rested his case, it will be seen that no question at all had arisen as to the rights of the creditors of Kelty & Reynolds. No judgment had been proved against them. It is true, that the defendant testified that he took the goods under an execution against them; but this Court has held that in such a case the judgment also must be produced to establish the indebtedness, and that had not been done.

The question raised by the defendant, as to whether an immediate and continued change in possession, under the Statute of California, had been shown from McCloud to plaintiff, had not arisen when the motion for a nonsuit was made.

1st. Because the wheat was not in the actual or constructive possession of either Kelty or Reynolds at the time when defendant seized it.

2nd. Because an actual and continued change of possession is only necessary as against creditors and subsequent purchasers of the vendor; and this wheat was not taken by any creditor or purchaser from McCloud, the vendor to plaintiff.

3d. Because when plaintiff rested, defendant had not yet proved any judgment or debt against either Kelty or Reynolds.

The authorities therefore cited by defendant from California Reports have no application to this motion for nonsuit. They are all cases on the point as to what is an actual and continued possession as against creditors and subsequent purchasers. See cases *Stewart v. Scannell*, 8 Cal. 80; *Vance v. Boyerton*, 8 Cal. 554; *Whitney v. Stark*, 8 Cal. 514.

When, then, this motion for a nonsuit was made, the only question presented to the Court, was simply whether, as between the plaintiff and McCloud, a sale and delivery had been proved.

The next reason urged by the defendant, in support of the motion for a nonsuit is, that there was no demand alleged or proved by plaintiff on defendant for the wheat. In support of this singular proposition, he cites the case of *Daumiel v. Gorham*, 6 Cal. 43. Admitting that case to be law, it has not the least bearing on the present case. This

case is just the converse of the case cited. There it is held, that the Sheriff is entitled to a demand where he has been misled, by the fact that goods were left in the possession of the judgment debtor. See 1 Cal. 160, *Ledley v. Hays*, Sheriff.

The next point made by defendant is, that the Court below erred in overruling the defendant's objection to the witness McCloud being sworn in chief. No authority is cited, or reason given by defendant, to show that this ruling was erroneous.

1st. The plaintiff having released McCloud from any implied warranty, the plaintiff could not afterwards either recover the money already paid by him to McCloud, or resist the judgment of the money still due to McCloud on the ground of failure of title to the wheat.

2nd. As McCloud was not a party to this suit he would not be bound by it. It appears by the testimony of McCloud, that he did not give anything for the release, nor had he paid the consideration mentioned therein. It is evident that this did not make him interested in the result of this suit. His obligation to pay the consideration money mentioned in the release, even if it existed at all, was an absolute independent obligation created by his acceptance of the release, and dependent on no contingency.

The next point made by defendant is this: The Court below erred in overruling defendant's offer to show McCloud's declarations made the last of January, A. D. 1858, on the *bona fides* of the alleged sale made by him to the plaintiff.

It hardly requires argument to show, that the declarations of a party as to the title of a piece of property, whether real or personal, are inadmissible after he ceases to have an interest in that title. There are no authorities cited on this point by defendant, and we imagine it would be difficult to find any. After the sale to plaintiff, McCloud was as completely a stranger to the title of this wheat as if he had never had any connection at all with it.

This Court has already decided that, "where it is apparent that in case a new trial should be granted, the verdict of the jury must be in favor of the plaintiff, a judgment in his favor will not be disturbed." *Tohler v. Folsom*, 1 Cal. 207; *Speck v. Hoyt*, 3 Cal. 413.

That a sale made to a *bona fide* purchaser for a valuable consider-

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ation is valid where the vendor acquired his title through fraud, has been decided by this Court, and very frequently by the Courts of the other States. *Merryfield v. Batchelder*, decided at the October Term, A. D. 1854, cited in Crocker's Digest, title Fraud, (4). See, also, 2 Pick. 183, *Somes v. Loud*, and cases there cited. See also, the opinion of Marshall, C. J., in the case of *Fletcher v. Peck*, 6 Cranch, 133.

FIELD, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The instructions filed by the defendant cannot be the subject of consideration. They are not embodied in any statement or bill of exceptions, and are neither certified to by the Judge, or signed by him, and thus want the authentication essential to constitute any portion of the record. The case must, therefore, be determined upon the sufficiency of the errors alleged, in disallowing the challenges for cause to three of the jurors called; in the delivery by the jury of their sealed verdict to the Coroner, and their subsequent separation; in the entry of the verdict without calling the names of the jurors, and asking them whether they had agreed upon the same; in the refusal of the nonsuit; in the admission of McCloud as a witness; in the exclusion of evidence of his subsequent declarations as to the *bona fides* of his sale to the plaintiff, and in overruling the motion for a new trial on the ground that the evidence was insufficient to justify a verdict for the plaintiff, and that the damages assessed were excessive.

The challenges made to the jurors Fowler, McKee and Smith, were properly overruled. They were interposed in general terms for cause, without a specification of the particular grounds. The statute enumerates several different grounds for which such challenges may be taken, and a designation of the one upon which any particular challenge rests is essential to its consideration by the Court (*Practice Act*, sec. 162). It is not sufficient to say, "I challenge the juror for cause," and then stop — as in the present case. The ground upon which it can be sustained, if at all, must be also stated. See *Graham on New Trials*, Waterman's ed., 2 vol., note to page 473; *Maun v. Glover*, 2 Green's N. J. Rep. 195. But, aside from this consideration, none of these jurors thus challenged sat upon the trial. They were afterwards all

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challenged peremptorily. Two other jurors, it is true, were challenged for cause, and the challenges disallowed; but it does not appear for what cause, or at what time, nor that the parties desired to challenge peremptorily after such disallowance. The two jurors may have been called and examined before the three jurors, and the defendant may have declined to challenge them peremptorily.

The case was given to the jury in the evening, and upon retiring for deliberation, they were instructed to bring in a sealed verdict the following morning. After agreeing upon their verdict they sealed it up, and the Clerk of the Court being absent, delivered it to the Coroner, under whose charge they were at the time, and requested him to give it to the Clerk. On the same evening the Coroner gave it, sealed up as when received, to the Clerk, who opened it the following morning in Court. All the jurors were at the time in their seats, and the verdict was opened in their presence and read to them. Their names were not, however, called, and they were not asked whether they had agreed upon the verdict, and this omission and the delivery of the sealed verdict to the Coroner, constitutes the objection urged by the appellant. The answer to the objection, that the names of the jurors were not called, is ready and conclusive. No exception was taken at the time, and it is too late for the defendant to take advantage of the omission after acquiescence by his silence in the mode of proceeding. It is not pretended that the verdict entered, differs from the one sealed up, or that the result was in any respect affected by the omission. Errors which are immaterial and do not affect the substantial rights of the parties are unavailing on appeal, even when the subject of exception, much less so when they are permitted without objection. Practice Act, sec. 188.

The objection as to the delivery of the verdict to the Coroner, instead of the Clerk, is untenable. The Coroner was the officer under whose charge the jury were deliberating, the Sheriff being incapacitated by his position as a party to the suit. The possession by him left the verdict as much in the possession of the Court itself as if it had been directly delivered to the Clerk. We can perceive no valid objection to its delivery, upon the separation of the jury, to the sworn officer under whose charge they were deliberating. The authorities cited by

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appellant only establish the general proposition that the jury possess the right to alter their verdict, and the parties a right to poll them, at any time previous to its record. If this were true, in all instances, it would not help the case of the appellant, for it is not claimed that any desire to change the verdict was ever exhibited by the jury, or any right to poll the jury was ever insisted upon by either party. But we are not prepared to concede that the proposition is true in all instances. We are inclined to doubt whether a jury, after agreeing upon a sealed verdict and separating, can change it, except in mere matters of form. The opportunities of tampering with juries after separation are so numerous, and in important cases the temptation so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. But upon this point we refrain from expressing any decided opinion, as unnecessary to the determination of the point presented.

The next question arises upon the refusal of the motion for nonsuit. The action was brought to recover twenty-three hundred and twenty sacks of wheat, of the value of nine thousand three hundred and ninety-six dollars, alleged to be the property of the plaintiff, and to have been taken by the defendant and converted to his use. The defendant in his answer denied the taking and conversion of the property, and set up as a special defense the recovery of a judgment by one Fisher against Kelty & Reynolds for the sum of \$11,356, the issuance of execution thereon, the levy of the same upon the wheat, and that such wheat was the property of the defendants in the execution, and was at the time in the possession of one McCloud, under a bill of sale to him by Kelty & Reynolds, executed with intent to defraud their creditors. When the motion for nonsuit was made, the plaintiff had proved a purchase of McCloud of three thousand sacks of wheat, more or less, in a certain warehouse; his taking a warehouse receipt for the same, and agreeing to pay the storage from the date of his purchase; that the wheat was sold to him all in one body, not mixed with anything else; that he paid for the wheat, at different times, over nine thousand dollars; that he had removed about seven hundred sacks, and that the balance was taken by the defendant, as

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Sheriff, under an execution against Kelty & Reynolds. The motion was based upon the ground that the plaintiff had not proved a sale to him of the wheat, or its delivery, or averred a demand for it in the complaint, or proved a demand for it previous to the commencement of the action.

The evidence offered made out a *prima facie* case for the plaintiff. The defendant had not, as yet, laid the foundation for the special defense set up by the introduction of the judgment against Kelty & Reynolds. The property was in the possession of McCloud, a stranger to the execution. Its seizure by the defendant, and subsequent sale had been shown. As a justification for that seizure, the execution was insufficient. The judgment upon which it was issued was also essential, and until its production, the defendant was not in a position to attack any claim of the plaintiff. The sale from McCloud to the plaintiff was sufficient without any delivery. The statute only requires an actual and continued change of possession as a protection against creditors and subsequent purchasers of the vendor. At the time the motion was made, the connection of any other person than McCloud with the wheat, as vendor, had not been disclosed, and the defendant was not acting for any creditor of his, or any purchaser from him.

It was not essential to aver a demand of the defendant of the wheat in controversy in the complaint, or to prove a demand on the trial. If the property in fact belonged to the plaintiff, and it is upon this theory the suit is brought, and to this effect the evidence tended when the plaintiff rested, the seizure by the defendant was tortious; and it is a general rule, that when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required. (*Acker v. Campbell*, 23 Wend. 371; *Sedley v. Hays*, 1 Cal 160.) The case of *Daumiel v. Gorham*, 6 Cal. 43, only decides, that where the goods of a third person are mixed with the property, or are in the apparent possession of the judgment debtor, a Sheriff who levies upon them, supposing them to belong to the defendant in execution, is not liable as a trespasser *ab initio*, and it is necessary to show a notice and

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a demand of the goods, and a refusal to deliver. In the case at bar, the officer was not misled by any apparent possession of the defendants in execution, or by any mixture of their property with that claimed by the plaintiff.

The objection to the competency of McCloud was untenable. The release executed, discharged him of all interest in the event of the action. He could not be subsequently held liable upon any implied warranty, or be debarred by any defect in the title of the property from a recovery of the balance due on the sale. The non-payment of the consideration did not affect the operative effect of the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and was not dependent upon the contingency of a recovery in the action.

The offer to show the subsequent declarations of McCloud as to the *bona fides* of his sale to the plaintiff was properly overruled. Such declarations were clearly inadmissible. McCloud was then as much a stranger to the title as though he had never had any connection with the wheat, and his statements were entitled to no greater weight than mere hearsay. Declarations of the vendor, prior to sale, stand upon very different grounds. *Bridge v. Eggleston*, 14 Mass. 250.

The motion for a new trial, on the ground that the evidence was insufficient to justify a verdict for the plaintiff, was properly overruled. The other points made in the motion have already been considered. The testimony on the part of the defendant, embodied in the transcript, abundantly establishes the right of the plaintiff to a recovery; indeed, it warrants no other result. According to that testimony, Kelty & Reynolds were the original owners of the wheat, and in June, 1857, executed a bill of sale, and delivered possession of it to McCloud, who stored it in a warehouse, rented by him. Though this sale was void, as against the creditors of Kelty & Reynolds, in being made to the knowledge of McCloud, to prevent Fisher from reaching the property on execution, or by attachment, it was good as between Kelty & Reynolds and McCloud; and a sale by the latter to the plaintiff, for a valuable consideration, without notice of the original fraud, passed a perfect title. The plaintiff could not be affected in his purchase, though

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the title of his vendor was acquired by fraud. The sale to McCloud was not an absolute nullity. The title to the property passed to him, and would have remained with him as against any assertion of right by his vendors. It was subject to be defeated upon the action of their creditors; but, until such action, his power of disposition was absolute. The title originally affected with a taint became cured by the subsequent conveyance. It could be defeated only whilst it remained in him, unless the plaintiff had previous notice of the fraud rendering void the title. (Statute of Frauds, sec. 24.) To this effect is the decision of this Court in *Merryfield v. Bachelder et al.*, rendered at the January Term, 1854, (not reported). In that case, the plaintiff brought suit to recover certain mining interests purchased by him of one Witts. The defendants set up a purchase under a judgment recovered against one Ortman, and that the conveyance by Ortman to Witts was made to defraud his creditors; but the Court said: "Whatever fraud may have entered into the original sale from Ortman to Witts, it is not shown that Merryfield was privy to it; he must, therefore, be treated as an innocent purchaser," and affirmed the judgment for the plaintiff.

Conveyances of real and personal property, made to hinder, delay or defraud creditors, are subject to the same defect, liable to be avoided at the suit of the creditors, but valid as between the parties, and vest a title which can be transferred perfect to a *bona fide* purchaser for a valuable consideration. In *Fletcher v. Peck* (6 Cranch, 133) the doctrine is thus clearly expressed by Mr. Chief Justice Marshall: "Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others; and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned."

In *Bean v. Smith et al.*, (2 Mason, 274) Mr. Justice Story says: "A conveyance to defraud purchasers, or to defraud creditors, is not

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'utterly void,' as has been sometimes supposed; it conveys the estate effectually as between the parties and their representatives; and the estate may be maintained against all persons but those whom it was intended to defraud. The grantor himself cannot convey the same title to any mere volunteer, nor can he avoid his own grant in his own favor; nor can a mere stranger contest the validity of the conveyance. The estate, therefore, passes *toties quoties* by every subsequent conveyance, and it is good against all the world, except creditors and purchasers, in the possession of every successive grantee, even with notice of the fraud;" and after commenting upon a distinction drawn by Chancellor Kent, in the protection afforded to *bona fide* purchasers, without notice, when the conveyance from the original grantor was made in fraud of purchasers, and when it was made in fraud of creditors, observes: "The policy of the law generally is, to support *bona fide* purchasers, for a valuable consideration, in the titles acquired; and this policy is at least as ancient as Woodcock's case, in 33 Hen. 6, 14, where a conveyance from a fraudulent grantee to such a purchaser was permitted to defeat highly meritorious and legal claims. The great object of the law is to afford certainty and repose to titles honestly acquired. It is of no public utility to destroy titles so acquired, on account of the taint of a prior secret fraud, which was unsuspected and unknown, and which, probably, no diligence could detect. If the creditor of the original grantor be cheated by holding such titles valid, the innocent purchaser would be no less cheated by holding them void. And, therefore, the common law, which leans to equity, is unwilling to visit upon innocent persons the consequences of fraud. It enables them to hold estates acquired *bona fide*, for a valuable consideration, purged of the anterior fraud that infected the title." See *Trott et al. v. Warren*, 11 Maine, 227; *Jackson v. Henry*, 10 John. 186; *Mowrey v. Walsh*, 8 Cowen, 238; *Root v. French*, 13 Wend. 570; *Somes v. Brewer*, 2 Peck, 184; *Rowley v. Bigelow*, 12 Pick. 308; *Dexter v. Harris*, 2 Mason, 531.

There is no evidence contained in the record which shows or tends to show any knowledge on the part of the plaintiff of the fraudulent character of the sale from Kelty & Reynolds to McCloud. All the parties to that transaction assured him that the sale was a valid and

honest one. McCloud was in the possession of the property with the evidence of title from the original owners, and had been in such possession for months previous to the purchase, and the subsequent conduct of the plaintiff was that of a man unsuspicious of any taint resting upon the title of his vendor. He appears to have relied implicitly upon the representations of the parties. He paid, at different times, the greater portion of the contract price, and yet left the bulk of the property in the possession of McCloud. He did not even take any steps for its removal, except in parcels, as he found occasion to dispose of it.

The damages awarded to the plaintiff, beyond the value of the wheat, after remitting the two thousand dollars directed by the Court, do not appear excessive — certainly not to that extent to justify the reversal of the judgment.

The value of the wheat, as found by the jury, is beyond that established by the evidence. Starbuck, who places his estimate upon its value at five cents a pound, does not appear to have examined or seen it. Nye, who had examined it, placed its value at four and one-half cents per pound. The jury took the highest estimated value, and the difference between the two estimates is ten hundred and sixty-six dollars. In this amount the judgment must be reduced.

The judgment, therefore, will be affirmed at the cost of the respondent, upon his filing a *remittitur* of one thousand and sixty-six dollars of its amount.

Ordered accordingly.

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TERRY, C. J.—The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the Court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from sitting. The law establishes a different rule for determining the qualification of Judges from that applied to jurors.

The province of a Judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not final; and if erroneous, the party has his remedy by bill of exceptions and appeal. *Id.*

Whilst, on the other hand, the province of the jury is, to determine from the evidence the issues of fact presented by the parties; and their decision is final in all cases where there is a conflict of testimony. *Id.*

The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Question of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title and present right of possession is shown to be in the defendant. *Id.*

Where the Governor of the State, who is authorized, and it is made his duty by law, to take immediate possession of the State prison and grounds, then in the possession of a lessee of the State, goes, in company with other officers of State, upon the grounds of the prison, and demands of the person in charge the keys of the prison, which being refused, the door of the room in which the keys were, was forced by order of the Governor, and the keys taken, and thus the possession of the prison and grounds taken by the Governor in the name and on behalf of the State: *Held*, That such acts amounted to a forcible entry on the part of the Governor, and he is personally liable therefor. Further *held*, that the acts of the Governor warranted the conclusion that any attempt on the part of the lessee to resume possession of the prison, would be resisted by force. *Id.*

Although the State possesses the constitutional power to take private property for public purposes, by providing just compensation therefor, yet, the means of compensating the owner must be provided before the property is taken. *Id.*

The Act of February the twenty-sixth, 1858, under which the Governor justified the taking, made no provision for compensation, and is therefore clearly in violation of the eighth section of Article I of the Constitution of this State. *Id.*

FIELD, J.—The validity of the lease under which the lessee held the premises, cannot be tried in this action, nor can the lessee be deprived of the advantages resulting from the possession of the premises under the lease, by a forcible ouster under legislative enactment.

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Assuming the lease to have been valid — there was in the plaintiff a property of which he could not be divested for public use without just compensation. His right, so far as the land and buildings were concerned, was in no respect affected by the fact that they were designed as a place for the confinement of convicts. The purposes for which premises are leased cannot alter the nature of the leasehold interest as property. To take such property without compensation is beyond the reach of legislative power. Such compensation must be made, or a fund provided from which it can be made in advance. So strictly is this rule adhered to, that the enforcement of any statute to take such property, where the indemnity has not been provided, will be stayed by injunction. *Id.*

An Act of the Legislature appropriating private property, without providing compensation, is unconstitutional and void. It may not be absolutely essential that the compensation should be provided in the same Act which authorizes the seizure, but it is essential that it should be provided before the seizure can be enforced or justified. *Id.*

The Governor cannot rest his justification in taking the premises upon any possible forfeiture of the lease under which the plaintiff held. Such forfeiture cannot be asserted except by force of a judicial determination. The Legislature cannot take upon itself, nor the officers of government upon themselves, to adjudge what right has accrued to the State, and then proceed to enforce it, any more than a private citizen. *Id.*

APPEAL from the County Court of the County of Marin.

This was an action of forcible entry and unlawful detainer. The action was originally commenced in a Justice's Court, where the cause was tried by a jury, and a verdict of "not guilty" returned: upon which judgment was entered for the defendants. The plaintiff appealed therefrom to the County Court of Marin, where the cause was tried anew.

The plaintiff alleges in his complaint, that on the first of March, A. D. 1858, he was in the actual, peaceable and lawful possession of the messuage, lands, and tenements, situate in said township, and known as the "State prison" premises, at Point de San Quentin, and had been in possession thereof for a long time prior thereto.

That on the first of March, aforesaid, John B. Weller, Joseph Walkup, and Ferris Forman, with strong hand and multitude of people, and not in a peaceable manner, and without right of entry given by law, entered by force, and dispossessed him of said premises, etc., and detained the same. And that the value of the premises, from the time of entry, was not less than five thousand dollars per month.

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The defendant Weller, (who was then the Governor of the State) in answer to the complaint, denied the actual possession of the plaintiff, and the forcible entry. He further stated that the premises sued for belonged to the State of California, and had been kept and used by said State, through her agents, as a public prison, or penitentiary, for the confinement of persons adjudged guilty of felony.

That, according to his information, one J. M. Estill took charge of said prison in March, 1856, claiming under a contract between himself and R. M. Anderson, (then Lieutenant Governor of said State) G. W. Whitman, Controller, and Henry Bates, State Treasurer, and that plaintiff claimed to be in possession, by his agents, by virtue of an assignment of said contract to him by Estill.

That, on the first day of March, A. D. 1858, acting by authority of an Act entitled "An Act to provide for the temporary government of the State prison, and to appropriate money therefor," approved February twenty-sixth, 1858, he, without resorting to force, took possession of said premises, and held possession until the first of May, when he, Walkup and Forman, took possession, as Commissioners, under the provisions of an Act approved April twenty-fourth, 1858, and had retained the same up to that time.

The Act of February the twenty-sixth, under which the Governor acted, reads as follows:

"SECTION 1. The Governor of this State is hereby authorized and empowered, and it shall be his duty, by and through such agent or agents as he may, in his discretion, appoint, to take immediate possession of the State prison and grounds, together with all the property of the State therein situated, and to assume the custody, control, and management of the State prison convicts therein confined, or to be therein confined, and thereafter to continue the possession of the property aforesaid, and control of said convicts, until further provided by law," etc.

Walkup and Forman answered separately, denying all the allegations of the complaint, except their possession, and justifying that possession under the Act of twenty-fourth April, referred to in Weller's answer.

The defendants moved the County Court for a change of venue, on the ground of prejudice of the presiding Judge, and based their appli-

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cation upon the affidavits of Lieut. Governor Walkup, Col. F. Forman and W. J. Mackay.

Walkup and Forman both testified that they did not believe the defendants could have a fair and impartial trial in that Court, (or County,) on account of the bias of the presiding Judge, R. B. Frink; that said Frink was present during the trial before Justice Clark, took a deep interest in the plaintiff's success, and was in frequent consultation with plaintiff's agent and attorneys, in regard to the cause, giving advice in reference thereto. Walkup further stated that said Frink was a material witness for the defense.

Mackay, who was not a party to the suit, also testified to the same facts stated by Walkup and Forman, and stated that said Judge was expressing himself so strongly in favor of plaintiff that bystanders, on more than one occasion, told him he was doing wrong to take so deep an interest in the case, as it would probably come before him.

The motion was overruled and defendants excepted. Plaintiff had judgment in the Court below for the restitution of the premises, and a personal judgment against John B. Weller, for the sum of twelve thousand two hundred and forty-nine dollars and ninety-three cents; and also the further sum of \$282 costs. Walkup and Furman were discharged. Defendant Weller appealed to this Court.

Thompson & Williams for Appellant.

First—The order refusing a change of venue.

The first prerequisite which strikes us as all-important in the administration of justice, is, that the Judges must be free from bias and partiality, both positive and constructive.

A Judge cannot, under the law, be both arbiter and advocate in the same cause; neither should he be both arbiter and counsellor. Mankind are so agreed in this sentiment, that any departure therefrom not only shocks their sense of justice, but of propriety also.

The twenty-first section of the Practice Act declares that the Court may, on motion, change the place of trial, "when there is reason to believe that an impartial trial cannot be had therein," (the County) and "when, from any cause, the Judge is disqualified from acting in the action."

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I am inclined to think, that under either of these subdivisions of the sections quoted, this motion might have been granted. "When, from any cause, he is disqualified," says the statute.

Now, does this mean a mere statutory disqualification? or does it go further, and embrace all disabilities which would preclude or pervert the administration of justice? A common sense construction would seem to imply the latter.

It has been the constant practice in this State to grant changes of venue upon the same grounds on which this application was based. If I am wrong in my view as to the power of the Courts to grant the change for this cause, then all such changes have been illegal, because the statute (sections eighteen and nineteen of Practice Act) expressly fixes the place of trial, subject only to be changed as provided in that Act, and no Judge can hereafter make such an order without the express consent of all the parties to the action, as he cannot seek authority outside of the statute.

I cannot imagine a more unpleasant position in which to place a high-toned, honorable, and sensitive Judge, than to have such a motion as this under discussion, made, and then, by the refusal of consent thereto by the opposite party, to render him powerless to grant it. Nor can I imagine a more dangerous position for the litigant, than to drag him into a Court and compel him to submit his cause to a Judge who has already determined to pronounce against him.

Up to this point of time, I have been merely contending for the power in the Court to grant the change which we sought. If the power is proven or admitted, then it is necessary that we show by the facts that this was a proper case for the exercise of the discretion of the Court, favorable to us, and that the failure to do so was gross abuse of such discretion.

If we are able to make such showing, then it is clear that we are entitled to a reversal of the judgment upon the first assignment of error. *Sloan v. Smith*, 3 Cal. 410; *Comminsky v. White*, January Term, 1855; *The People v. Lee*, 5 Cal. 353.

1st. That, admitting the contract as valid, the State had a perfect right, at any time, to rescind, violate, or annul it, without the assent of the lessee or his assigns.

2d. That the title of the premises being in the State, she had a right to take possession of the same by her officers, with or without force.

3d. That the entry complained of was not forcible.

4th. That, considering the premises sued for the private property of the plaintiff for the time being, the State had a right to take the same for public purposes, by providing just compensation therefor, and that such compensation was provided.

I. It is an admitted proposition by all, that the Legislature is omnipotent, and "that its power and jurisdiction is so transcendental and absolute, that it cannot be controlled or confined, either for person or cause, within any bounds," except so far as it may be restrained by constitutional prohibitions.

That there is no constitutional prohibition applicable to this case, which would have prevented action by the Legislature, was settled by this Court in *Myers v. English*, 9 Cal. 341.

After an able review, both upon that and a former occasion, of the authorities cited in support of an adverse position, Justice BURNETT — C. J. TERRY concurring — concludes with this remark: "Under the view we take, we still adhere to the position stated in the former opinion. That provision of the Constitution refers to contracts between individuals. It could not refer to contracts between individuals and the State, because the State cannot be sued."

This was upon a rehearing, and consequently this opinion expresses the conviction of the Court, after great deliberation. I shall not, therefore, present authorities to sustain the decision, for it needs none, nor will I review those cited by the other side, and claimed to be repugnant to it.

For legislative precedent, I refer the Court to the past legislation in this State in reference to State prison affairs. In 1851, (Statute '51, 427) M. G. Vallejo and James M. Estell were made lessees of the prison for ten years. At the next session, Estell was constituted sole lessee (Stat. '52, 134); and again, in 1855, this Act was repealed, and the prison placed under the government and control of a Board of Directors. (Stat. '55, 292, 296.) In 1852, the Board of Commissioners made a contract with F. Vassault, (*alias* J. M. Estill)

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under the Act of May 1, '52, (Stat. '52, 132) for the erection of a State prison; and in the following year the Legislature passed an Act, (Stat. '53, 157) declaring said contract null and void; and during the same session (p. 312) instructed the Controller not to issue warrants on account of such contract, until otherwise directed. The Board of Directors of 1855, and the contracts made by them, were subsequently disposed of in the summary manner which the practice I have detailed warranted; and when Estill took this last contract, he well understood the construction which the Legislature placed upon its power to rescind the same at pleasure.

II. The answer of the defendant Weller sets up title to the premises sued for in the State, and charges the entry to have been by virtue of a law directing it. The evidence clearly sustains the allegation of title. The plaintiff, in making out his case, proved this by the introduction of the contract, showing that he claimed under the State.

The title being in the State, I claim for her the right, by her officers or agents, to enter and take possession, at any time, without applying to the Courts, as in case of individuals; whilst the learned counsel for plaintiff holds that she should have resorted to an action of ejectment. In England, the right of the Crown to land is usually asserted in one of two ways; by inquest of office, where the evidence of title is not in the Crown, and by taking possession without action, when it is. In no event is there a resort to the action of ejectment. "The King, though the chief and head of the kingdom, may redress any injuries which he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity."

"But the more effectual means of asserting the rights of the Crown, and redressing its injuries, are those which are obtained by the prerogative modes of process. Such is that by inquisition or enquest of office; which is an inquiry made by the King's officer, his sheriff, coroner, or escheator, *virtute officii*; or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitled the King to the possession of land or tenements, goods or chattels. This is done by a jury of no determinate number, being

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either twelve, or less, or more." "Stamford lays it down, that in all cases where a subject shall not have possession in deed or in law, without entry, the King will not be entitled without office found or matter of record." As, "if the King claims upon a forfeiture;" "the lands of an idiot, lunatic, etc., etc.;" "the year, day, and waste, of a felon attainted;" "or the temporalities of a Bishop, for contempt."

"These inquests of office were devised by law as an authentic means to give the King his right by solemn matter of record; without which he in general can neither take nor part from anything." Bacon's Abridgment, vol. 8, pp. 98, 99, title Prerogative.

"But no office is necessary, if the King's title appear as matter of record." "So, if a possession in law be cast upon the King, no office is necessary, but the King may seize without it." "So, when he ought to have chattels or profits of lands for a contempt, he may seize without office. And by Statute 33 H. 8, in case of attainder for high treason, the King shall have the forfeiture instantly without inquisition of office." Same book, 100.

I cannot more forcibly state the rule which prevails in the United States, than to quote from a pamphlet prepared by that great statesman and sound jurist, Thomas Jefferson, in 1810, entitled "The Proceedings of the Government of the United States in maintaining the Public Right to the Beach of the Mississippi, adjacent to New Orleans, against the intrusion of Edward Livingston: Prepared for the use of counsel, by Thomas Jefferson."

He says: "But I believe that no nation has ever yet restrained itself in the exercise of this natural right of reseizing its own possessions, or bound up its hands in the manacles and cavils of litigation. It takes possession of its own at short hand, and gives to the private claimant a specified mode of preferring his claim. There are cases of particular circumstance, where the Sovereign, as by the English law, must institute a previous inquest; but, in general, as the present, he enters at once on what belongs to his nation. This is the law of England.

"Whenever the King's (i. e. the nation's) title appears of record, or a possession in law be cast upon him by descent, escheat, etc., he may enter without an office found; for if his title appear any way of record,

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it is as good as if it were found by office; and if any one enter on him, even before his entry made, he is an intruder; he cannot gain any freehold in the land, nor does he put the King to an assize, or ejectment, or take away his right of entry; for he cannot be disseized but by record. *Stamford Prærogativa Regis*, 56, 57; *Com. Dig. Prærog.*, D. 71 — the substance of the authorities cited. * * *

We have before us, too, the example of many of the States, and of the General Government itself, which have never hesitated to remove, by force, the squatters and intruders on the public lands. Indeed, if the nation were put to action against every squatter, for the recovery of their lands, we should have only lawsuits, not lands, for sale. * * *

The correct doctrine is, that so long as the nation holds lands in its own possession, so long they are under the jurisdiction of no Court, but by special provision. The United States cannot be sued. The nation, by its immediate representatives, administers justice itself to all who have claims on its public property; hence the numerous petitions which occupy so much of every session of Congress, in cases which have not been confided to the Courts. But, when once they have granted the lands to individuals, then the jurisdiction of the Courts over them commences. They fall into the common mass of matter justiciable before the Courts. If the public has granted lands to B, which were the legal property of A, A may bring his action against B, and the Courts are competent to do him justice. The moment B attempts to take possession of A's lands, the writ of forcible entry, the action of trespass, or ejectment, and the chancery process, furnish him a choice of remedies. The holders of property, therefore, are safe against individuals, by the law; and they are safe against the nation by its own justice; and all the alarm which some have endeavored to excite, on this subject, has been mere *ad captandum populum*."

The practice of the General Government has, since a very early day, been in accordance with the views expressed by Mr. Jefferson, in the quotations above made.

On the third of March, 1807, Congress passed "an Act to prevent settlements being made on lands ceded to the United States. until authorized by law." (U. S. Statutes at Large, vol. 2, p. 445.) By the terms of this Act, the President was authorized to cause the United

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States Marshal, of the proper district, to remove all intruders upon ceded lands, including those who had settled or entered thereon before the cession, as well as those subsequently.

Afterwards, in 1821, the Secretary of War having referred the question of the power of the President, under this Act, to Mr. Wirt, then Attorney General, the latter unhesitatingly announced, as his opinion, that such intruders might be removed by military force, if necessary. Opinions of the Attorney General, vol. 1, p. 471.

And again, in that year, the same officer, in answer to a communication addressed him by the Secretary of the Treasury, said: "I have no doubt that the Marshal, under the orders of the President, may remove the intruders on the lands set apart for the cultivation of the vine and olive, in Mississippi. The instructions to the Marshal must proceed from the President." *Ibid.*, p. 475. As late as 1837, Mr. B. F. Butler, an able lawyer, and then Attorney General, gave to the President the opinion that the latter might expel, by force, if necessary, intruders upon the lands secured to the Chicasaws, east of the Mississippi. *Ibid.*, vol. 3, p. 255.

That the State may take possession of property, without inquest of office, or a proceeding in Courts of law, when authorized by statute, is admitted in the following cases: *Fire Department of New York v. Kiss*, 10 Wend. 266; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 622; *Craig v. Radford*, 3 Wheat. 599.

One of the reasons forming the basis of the doctrine I have been advocating, is, that the State (the Sovereign) cannot be disseized, and, therefore, cannot resort to the remedy of ejectment. Blackstone, vol. 3, p. 257, chap. 17, in discussing the methods of redressing such injuries as the Crown may receive from the subject, says: "As, therefore, the King, by his legal ubiquity, cannot be disseized, or dispossessed, of real property, which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff; such as an assize, or an ejectment."

The same doctrine has been held in this country as applicable to a State.

In *The State v. Arledge and Gaither*, 1 Bailey S. C. Rep. 552, Justice Johnson says: "It is very clear that in England the King

cannot maintain an ejectment to recover lands, and the reason given by Blackstone is, that on account of his legal ubiquity he cannot be disseized or dispossessed. All the elementary writers hold the same doctrine; and it is even more strikingly applicable here, where the sovereign power and right are in the hands of the people themselves, who want that personal identity on which a disseizin could operate; and for the further reason that a part of it abides in the defendants themselves."

The defendant, acting as Governor of the State, took possession of the premises in question, under and by virtue of an Act of the Legislature, approved twenty-sixth February, 1858, entitled "an Act to provide for the temporary government of the State prison, and to appropriate money therefor." It not only authorized the entry, but required it to be immediate. The Legislature did not design that he should resort to the slow processes of the Courts; but, in the exercise of their sovereign power, instructed him to take possession of property, the title to which was unquestionably in the State, and to do so (borrowing Mr. Jefferson's expression) at *short hand*. If there is force in precedent and authority, the Legislature did not exceed its constitutional privilege and power in passing this Act, and the Executive would have been derelict in duty had he not enforced it. *Salus populi, suprema lex est*, is a maxim not to be ignored for trivial causes.

The Executive having acted by authority of law, and having in no way exceeded the limits of that authority, is protected from all consequences resulting therefrom. This is sustained by an abundance of authority, of which I will only cite — 7 Howard U. S. 130; 4 Term R. 794; 6 Taunton, 41; 2 B. & C. 227; 2 Johns. 286; 7 Ohio, 211, part II.

III. If the plaintiff failed upon the trial to prove actual force in the entry of the defendant, we are entitled to judgment, although every other point in the case may be with him. Wood's Digest, 467.

"To sustain the action of forcible entry, actual force, threats, or violence in the entry, or the just apprehension of violence to the person, must be shown to have existed. To constitute a forcible entry, the following rule is laid down in Tomlinson's Law Dictionary, which has been referred to in most of the Courts of the different States of

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the Union: 'A forcible entry is only such an entry as is made with a strong hand and unusual weapons, an unusual number of servants or attendants, or with menace of life or limb; for an entry which only amounts in law to trespass, is not within the statute.'" *Frazier and Hastler v. Hanlon*, 5 Cal. 157. The same view is taken in *Williams v. Warren*, 17 Wend. 261-264; and in *Addison*, 17.

The whole affair was conducted in an orderly, good-humored manner, and there was neither violence nor threats of violence. None were necessary. But on the contrary, plaintiff and his agent seem to have afforded every facility to the Governor in the discharge of the duty imposed upon him by the Act; contenting themselves, as expressed in plaintiff's letter, with entering a protest.

They had ample means of resistance, if they had seen proper to resort to them; but such was not plaintiff's intention. It suited his purposes to permit the entry, at the same time saving his legal rights.

In *Pennsylvania v. Waddle*, *Addison*, 41, the Court uses this language: "If there was no force, he cannot be guilty. Words are the slightest symptoms of force. If you think it was the meaning and tendency of the words to impress on Johnson a terror of personal harm, if he should proceed to take possession — this is force. If you think their meaning was only to signify that Waddle would not give up his claim, which he thought a just one, till at legal trial it was declared unjust — this is no force."

IV. Admitting these premises to be the private property of plaintiff, still the State had the constitutional power to take it for public purposes, by providing just compensation therefor. And it is immaterial whether the compensation was provided in the Act directing the seizure of the property, or by subsequent Act.

The only difference being that the plaintiff might have enjoined the taking, until the compensation was made, or sufficiently provided. (1 *Baldwin*, C. C. R. 226, 227; 1 *Kernan*, 308, and authorities there cited.) In this last case, the Court says: "Where private property is taken for public use, it is sufficient that a certain and adequate remedy should be provided, by which the individual can obtain compensation, without any unreasonable delay."

The Legislature did, by a subsequent Act, (twenty-sixth April,

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1858) make provision for just and ample compensation to plaintiff, for the property (if it may be so called) taken by the Governor, on the first of March preceding. By that Act, (Statutes 1858, 339) a commission was organized, with power to examine the claims of plaintiff, and his assignor, and to award them such sum as they were justly entitled to.

The large sum of seventy-five thousand dollars was appropriated for the purposes of the Act, and the Commissioners were authorized to pay the same, or any part thereof, to said parties, upon final settlement.

The rule of law in such cases is, that the damages may be assessed in an equitable and fair mode, to be provided by law, without the intervention of a jury. (2 Kent's Com., note b to page 339, top.) And whenever the mode of ascertaining and assessing the compensation is fixed by statute, then that mode alone must be pursued. 1 Bald. C. C. 205, 221, 222; 4 Term R. 796; 7 Ohio, 568; 2 Kent, 339.

A. P. Crittenden for Respondent.

The question suggested by the Court for argument is, "Whether the State can, under any circumstances, without action, take possession of its own property, which is in possession of another?"

It is contended by appellant's counsel, that under any circumstances, whenever the title to the land is vested in the State, no action is required on the part of the State to recover possession against one holding adversely, but the State "has the right, by her officers and agents, to enter and take possession at any time, without applying to the Courts."

This is a startling proposition, at war with all received ideas of individual right, and utterly subversive of that security in the enjoyment of property which is supposed to exist under every free or constitutional government. Yet it is a proposition which the appellant must maintain in its broadest extent, or he is without protection for the act of which we complain.

He rests it, 1st. Upon the right of the English Crown; 2d. Upon the practice of the Government of the United States.

1st. As to the right of the English Crown. It is said by the appellant's counsel that "in England the right of the Crown to land is

usually asserted in one or two ways — by inquest of office, where the evidence of title is not in the Crown, and by taking possession without action, when it is."

It might well be contended that if the Crown of England did possess this extraordinary right of taking possession without action, it was only a prerogative right which could not exist here. But it is unnecessary to raise any question upon this point. Such a right never existed in the Crown of England in the terms and to the extent claimed.

"In England the King can neither take nor part with anything but by matter of record; by conveyance upon record, judgment, or by office." (8 Bacon's Abr. 99; Comyn's Dig. Prerogative, D. 66.) "It is true, that when once the title is vested in him by matter of record, he cannot be disseized or dispossessed, but if any one enters he will be an intruder upon the King's possession, for he can only be ousted by matter of record. And therefore it is that the King can maintain no action which supposes a dispossession of the plaintiff, such as an assize or ejectment," (3 Bl. Com. 257; Comyn's Dig. Prerogative, D. 71) and as no laches can be imputed to him, and he cannot be disseized by the entry of another, his right is never defeated by any limitation or length of time.

But because when title was once vested in the King by matter of record, his seizin continues, notwithstanding the entry of another; and because he cannot maintain an assize or ejectment, it by no means follows either that he cannot maintain any other appropriate action, or that he has the right by force, and without action, to remove an intruder. On the contrary, he may maintain any other action, (Comyn's Dig. Action, B. 1) and a special and peculiar action is given against one who enters upon the lands of the Crown. "If a man intrudes upon the King's lands, an information for the intrusion lies in the name of the Attorney General," (Comyn's Dig. Prerogative, D. 47; 8 Bacon's Abr. 101) and "Judgment for the King shall be, that the defendant be removed from the possession, and there shall be an injunction for the possession, for the King is supposed in possession," (Comyn's Dig. Prerogative, D. 77) and "thereupon every party to the information, or claiming under him, shall be removed from the possession." 8 Bacon's Abr. 102.

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This information of intrusion is a substitute for the action of ejectment, and accomplishes the same purpose. Why should it be resorted to, if its only end — the removal of an intruder — can be as effectually attained, without action, by the mere exercise of the inherent power of the Crown? That such an action exists, and should have been so often used as it appears to have been, (Comyn's Dig. Prerogative, D. 73 to 77) are forcible arguments against the right to exercise the power claimed for the Crown by the appellant's counsel.

The same term, to SEIZE, is used as well in speaking of the right of entry of the subject as of the Crown.

"So, an office is sufficient for the King without a *scire facias* against the party, where a common person may enter or SEIZE, without action." (9 Co. 96.) "But where a common person cannot enter or seize, without having an action, the King, after office, ought to have a *scire facias*."

The inquest of office was not a proceeding by which the King was put into actual possession of land, and an adverse claimant removed, but a mere inquiry as to the right. Its object was to determine whether the King was entitled to the possession of property, as to inquire "whether the King's tenant for life died seized, whereby the reversion accrues to the King." 3 Bl. Com. 258.

The inquest of office was a public proceeding, a trial by jury, whose finding was not conclusive, but was traversable, and might be reviewed. (8 Bacon's Abr. 99; 3 Bl. Com. 360.) So far from its giving any countenance to the idea that the King could himself determine upon his own right, and invade the possession of the subject, it was intended for the protection of the subject against the assertion and exercise of arbitrary power. In speaking of this proceeding, it is declared to be "a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon, nor seize any man's possessions, upon bare surmises, without the intervention of a jury." 8 Bacon's Abr. 99; 3 Bl. Com. 259.

The effect of the office, if found for the Crown, was to show title and right of possession in the King, by matter of record, and by the office only the King was in possession, without seizure, (that is, without entry) if the possession was vacant, but not otherwise. 8 Bacon's

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Abr. 100; Comyn's Dig. Prerogative, D. 68; Com. Dig. Prerogative, D. 69; 8 Bacon's Abr. 100.

It is apparent that the office does nothing more than a deed or other matter of record. It ascertains the right and vests the title in the King. The legal seizin and possession accompanies the title if at the time of the office the land be vacant — that is, if there be no adverse possession. But the question is still undecided, what may the King do if one enters upon his possession? The answer may be found in Comyn's Dig. Prerogative, D. 71 to 77. It is there asked how he shall be redressed in such a case? and the answer is, by information of intrusion.

It may be very clearly shown, that if the case now before this Court had arisen in England, the King could not have done what has been attempted under an alleged authority from the Legislature of this State, and if that be shown, it is sufficient for the purposes of this argument.

The King leases land for a term of years by deed recorded; he parts with the possession, and delivers it to his lessee to be held under the deed of lease. Without office found, without any judicial proceeding to declare a forfeiture, he forcibly resumes the possession. 8 Bacon's Abr. 98; Comyn's Dig. Prerogative, D. 67.

Now "an entry can only be made by the legal owner when another person, who hath no right, hath previously taken possession of lands or tenements." 3 Bl. Com. 174. But in this case the tenant entered and held by right, and his landlord, if a private person, certainly cannot legally enter upon the land during the continuance of the term. Adams on Ejectment, 157. In such a case, therefore, the King could not be entitled without office found.

The power of the Crown is hardly so despotic in England as we must believe it, if it be true that without process of law, without inquiry or trial, the King may seize whatever property he may adjudge to be his own. It was declared by *Magna Charta* that "no freeman shall be disseized or divested of his freehold, or of his liberties, or free customs, but by the judgments of his peers or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the King's hands, against the

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great charter and the law of the land. (3 Bl. Com. 139, and by statute 16 Charles I., c. 10.) That neither His Majesty or Privy Council, have any jurisdiction, power or authority, by English bill, petition, articles, libel, or by any other arbitrary way whatsoever, to examine or to draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by course of law." *Ib.*

When it is said that the King cannot be disseized, it is only intended that notwithstanding the intrusion of one without right, the legal seizin of the King shall in contemplation of law continue, and that none of the consequences of an ouster shall follow as in the case of a subject; that is, that the intruder can gain no freehold in the land; and cannot make a lease to maintain an ejectment; that the death of the intruder and descent cast on his heir, give no better right than his ancestor had, etc., and this is the reason why the King cannot maintain an ejectment or assize. Those actions admit what the law says can never take place — a disseizin — and therefore, as a substitute, the information of intrusion must be resorted to.

In both these particulars, the impossibility of a disseizin, and the consequent impropriety of an ejectment, our law differs from that of England.

The State of California may be disseized. Ten years' adverse possession will constitute a title as against the State. Within that time it may maintain any action for the recovery of real property which an individual might do. Act of Limitations, secs. 3, 4, 5.

But even if the power of the King of England were all that it is claimed to be by the appellant's counsel, and the right of the Crown might be asserted by taking possession of land without action under certain circumstances, it is clear, from the authorities above cited, that it could never have done so in a case like the present. It was a power which could only be exerted against one who held possession without right or color of right, a mere intruder, never certainly against one who held by right derived from the Crown by matter of record. It is certainly requisite to the exercise of such a power that the King should have the right of entry; and where the Crown has leased, or parted

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with the possession by matter of record, the right of entry is gone, and can only be restored by office found or other proceedings of record.

In support of some of the positions assumed above, I would refer the Court to the argument of counsel and opinion of the Court in the case of the People of the State of New York v. Brown and others, 1 Caine's R. 416.

2nd. The practice of the Government of the United States.

It is true, that on the third of March, 1807, Congress passed an "Act to prevent settlements being made on lands ceded to the United States, until authorized by law." Probably the first occasion on which the power given to the President was ever employed, was in the case of the New Orleans Batture. The Batture was claimed by Edward Livingston as his private property. Mr. Jefferson, then President of the United States, treating it as public property to which the provisions of this Act applied, instructed the Marshal to remove all persons found upon it, and take possession of it for the United States. Under these instructions, Mr. Livingston was dispossessed; and hence arose the celebrated controversy between himself and Mr. Jefferson, in the course of which was written by the latter the pamphlet referred to by the appellant's counsel, and an extract from which is given in the appellant's printed brief. As an answer to the arguments of Mr. Jefferson, I should desire to submit those of Mr. Livingston himself — a man more distinguished than Mr. Jefferson for profound knowledge of the law. But I have been unable to find any of the writings of Mr. Livingston upon the subject.

The opinions of Mr. Jefferson, quoted by the appellant, are not to be regarded as his deliberate and unbiased judgment, but rather as the argument of a heated disputant. He had been bitterly assailed, and in this pamphlet was arguing his own cause and seeking to vindicate his own conduct. Deliberately, and as a sober conviction, he could never have contended that "the holders of property are safe against the nation by its own justice."

It is to be observed, that this Act of 1807 applies only to lands "ceded or secured to the United States by any treaty with a foreign nation, or by a cession from any State to the United States;" in other words, to lands to which the United States have clear title, in which

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she has parted with no interest, and in which, consequently, there can clearly be no adverse right on the part of individuals. It applies only to those who are manifestly mere intruders, wrongdoers, trespassers upon that possession of the Government which results from its title. So, Mr. Jefferson speaks only of the exercise of this power of removal "where the nation holds lands in its own possession," and the opinions of the Attorney General, to which we are referred, were given in cases of mere intrusion manifestly without right.

An application was made to the President of the United States to remove a Mr. Henderson, who was represented to be an intruder upon the public lands. It afterwards appeared that he was in possession under a Spanish title. Thereupon Mr. Wirt, then Attorney General of the United States, gave the opinion that "Mr. Henderson was not an intruder within the meaning of the Act of the third of March, 1807, and consequently it was not competent for the Executive to remove him by force under that law." Vol. 2 Public Lands, Laws, Instructions and Opinions, p. 166.

In 1833, a question was submitted to Mr. Taney, then Attorney General of the United States, in regard to the construction of this Act, and its application in the case of lands ceded to the United States by the Creek Indians. In his opinion he says: "The white men who have entered upon this land are unquestionably intruders within the meaning of the law." The Act "proposes to defend the possessions of the United States against wrongdoers, who, without any pretense of title, and in open violation of the rights of the United States, intrude upon the public property, and appropriate it to their own use." "Indeed, it can hardly be supposed by any one that the United States have not the same right that an individual possesses, to defend their possessions, by force, against a trespasser. Must they surrender up the possession of the public property whenever lawless violence attempts to seize upon it? It cannot be imagined that the United States are bound to stand idle and see their possessions wrested from them, and then be put to their action of ejectment to regain possession of their forts, arsenals and light houses, or to resort to a replevin to recover the public arms and accoutrements, or an action of trover to obtain compensation in damages for their loss." Same vol., pp. 181 to 183.

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This opinion points out the distinction between the case referred to by Mr. Taney, and the one before this Court. The United States had never abandoned the possession, and the intruders never acquired a lawful possession against them. The State of California did abandon its possession, and McCauley acquired against the State a lawful possession for a term of years.

I have examined the authorities cited in behalf of the appellant, and find in them nothing inconsistent with the views here expressed.

In *The Fire Department of New York v. Kip*, 10th Wend. 266, it was held only that "when, for the violation of an Act of the Legislature, a FORFEITURE of goods and chattels is imposed, and a right to sue for such violation is given by statute, the right to the property does not *ipso facto*, by the prohibited act being done, vest in the party to whom the property is given, but that a proceeding in a COURT OF LAW must be had ADJUDGING THE FORFEITURE and DECLARING THE PARTY entitled to the property; and that such proceeding has not been had, may be objected even by the officer who seized the property under the initiatory proceeding, in an action against him by the party claiming to be entitled to the property as forfeit.

In *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 622, the question was, whether an alien enemy could take lands in Virginia by devise, and hold them until office found. Lord Fairfax had been the owner of certain land called the Northern Neck of Virginia, under title derived from the Crown of England by grant. He died during the War of the Revolution, and devised the land to Denny Fairfax, a British subject and alien enemy, who continued seized of the land at the treaty of peace, and by the treaty it was stipulated that no future confiscations could be made; the land was granted by the State to Hunter. For the devisee of Fairfax it was contended that he was competent to take and hold the title until divested by office found, and that there having been no office found prior to the treaty, nor any equivalent act done to vest the estate in the Commonwealth, the treaty released the forfeiture, and his title had become perfect. Against this it was contended that the title of the Commonwealth was complete before the treaty by the death of Lord Fairfax; that the office was no part of the TITLE; that it was the remedy and not the right. The

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Court held, that it was clear by the common law that an alien could take land by purchase, and that it was settled upon the fullest authority, that the title so acquired was not divested until office found.

In *Craig v. Radford*, 3 Wheat. 594, the same point arose, and the same decision was made upon the authority of *Fairfax's Devisee v. Hunter's Lessee*.

In the case of the State *ex rel. v. Arledge & Gaither*, 1 Bailey's South Carolina Rep. 551, it was determined only that it was proper for the State to recover the possession of land to which it had title by information of intrusion, filed by the Solicitor of the State, and upon which the defendant could answer and a trial be had as between citizen and citizen; and that the State could not maintain trespass to try title or ejectment, because it could not be disseized.

It would seem, then, that giving to the power of the King of England, and of the Government of the United States, the utmost extent which has been claimed for it, it would reach only to the removal of a mere intruder, who has no claim of right, and indeed no possession. How far short does this fall of any application to the case before the Court, which is not one of intrusion, nor of mere claim of right, but one of lawful possession under the deed of the State?

Whether the contract of lease was valid or not, was a question for judicial determination. Both parties had acted under it. The possession of the property was delivered and held under it. That possession was itself property, and entitled to the same protection as the most perfect title.

The Act of the Legislature of the twenty-sixth of February, 1858, under which the appellant justifies, was unconstitutional and void, and can afford no protection for the wrongful act which he has committed. He stands in the same position as a Sheriff or other ministerial officer acting under process absolutely void.

The Act was unconstitutional and void:

- 1st. As impairing the obligation of a contract.
- 2d. As depriving a person of his liberty without due course of law.
- 3d. As the exercise of judicial power. It was not a law but a sentence in a single case; a judgment rendered and executed by authority of the Legislature.

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4th. And as an appropriation of private property for a public purpose, if it can be so considered, though there is nothing in the Act to indicate such an intention, it is equally unconstitutional and void, for it made no provision for just compensation.

I do not propose to discuss these propositions. I submit them upon the printed opinion of counsel above referred to, the brief for respondent on file, and the following additional authorities: Sedgwick's Stat. and Const. Law, 158, 173; *Osborn v. Bank of United States*, 9 Wheat. 798, 843, 858; *Ponder, Ex'r, v. Graham*, 4 Florida R. 23; 9 Gill & Johns. 413.

Where is there to be found in the Statute of Forcible Entry and Detainer, any exception from its provisions of those who act in the name of the State, or under a void authority derived from the Legislature? Is not a forcible wrong done to the possession of a person by one acting in the name of a State, as much within the mischief intended to be remedied by that statute, as a similar wrong done by a private citizen? Or was it the intention of the statute to repress violence and outrage on the part only of the private citizen, and leave to the dignitaries of the State an unbounded license of oppression, and reserve to those acting in the name of the State a monopoly of wrong?

I do not so read the statute. It declares that "no person or persons shall hereafter make any entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases, not with strong hand nor with multitude of people, but only in a peaceable manner; and if any person henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine."

And throughout this Act, it is as general and comprehensive in its terms as language can make it. It provides a remedy for "any unlawful or forcible entry." It makes no exception of the State, nor of the Governor, nor the Lieutenant Governor, nor the Secretary of State, nor any of the less distinguished functionaries of the Government.

Was not the State, and were not all these officers of the State bound by this statute? If enacted in England, the King would have been bound by it, for "where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury

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and wrong, the King shall be bound by such Act, though not particularly named therein." 8 Bacon's Abr. 92.

There being no question of title in the case, and the law under which the defendant justifies, being clearly unconstitutional, and it being in the power of the Justice to declare it so, it only remains to consider whether the entry complained of was forcible within the meaning of the statute. Upon that point, the Court, I apprehend, can entertain no doubt. But in this connection, I would remark, that even had the Act of twenty-sixth February, 1858, been valid and effectual to give the right of entry, (which it was not) under its authority the defendant could not, without violating the provisions of the Statute of Forcible Entry and Detainer, enter upon the respondent's possession "with a strong hand, nor with multitude of people, but only in a peaceable manner." The Act of the twenty-sixth of February did not authorize the use of force. In making entry as he did, forcibly, "to the contrary" of what is enjoined in the Statute of Forcible Entry and Detainer, the defendant exceeded his authority, and in the words of the statute is to be "duly convicted and punished by fine."

TERRY, C. J.—This is a proceeding under the Statute concerning Forcible Entry and Unlawful Detainer to recover possession of certain premises known as the State prison, with damages for the detention.

The facts, as disclosed by the record, are as follows: In 1856, Jas. M. Estill was in possession of the premises, under a lease from R. M. Anderson, Henry Bates and G. W. Whitman, styling themselves "State Prison Commissioners;" after retaining possession for about one year, Estill assigned the lease and delivered the possession of the premises to plaintiff, who remained in possession by himself and his agents and employes until the first of March, 1858, when the alleged forcible entry was made.

At the time of this entry, plaintiff himself was not upon the premises, but the same was in charge of his agent Sims. Defendant, accompanied by several others, entered a building connected with the prison, and informed Sims that he was the Governor of the State, and had come with the intention to take possession of the premises, pursuant to an Act of the Legislature passed a few days previous. Upon the

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refusal of Sims to yield the possession, defendant called upon a person present, informed him that he was appointed Warden of the prison and then demanded the keys. Sims said that the keys were locked up in an adjoining room, and refused to deliver them. The door of the room was immediately forced by order of defendant, and the keys taken.

A judgment was rendered by the Court below in favor of plaintiff for a restitution of the premises, with damages, and defendant appeals.

The errors assigned are: 1st. The refusal of the Court to change the place of trial; and, 2d. The refusal to grant a new trial.

The application for a change of venue was made upon affidavits setting up that defendants could not have a fair and impartial trial in the Court below, on account of the bias of the presiding Judge of the County Court, who was charged with having been present, consulting and advising with the agent and counsel of plaintiff during the trial before the Justice; and having, during the progress of such trial, expressed himself so strongly in favor of plaintiff's right to recover, as to occasion remonstrance from bystanders upon the impropriety of such conduct on the part of a judicial officer.

The statute authorizes a change of venue "when, from any cause, the Judge is disqualified from acting." The things which *disqualify* a Judge are specified in section 87 of the Act "concerning the Courts and Judicial officers," Wood's Digest, p. 157. 1st. When he is a party to, or interested in the action. 2d. When he is related to either party within the third degree; and, 3d. When he has been attorney or counsel for either party.

These are the only causes which work a disqualification of a judicial officer. The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgments of the Court and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from sitting. The law establishes a different rule for determining the qualification of Judges from that applied to jurors. The reason of this distinction is obvious. The province of the jury is, to determine from the evidence the issues of fact

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presented by the parties; and their decision is final in all cases where there is a conflict of testimony. Therefore, the expression of an unqualified opinion on the merits of the controversy, which evinces such a form of mind as renders him less capable to weigh the evidence with entire impartiality, is sufficient to exclude a juror.

The province of a Judge is to decide such questions of law as may arise in the progress of the trial. His decisions upon these points are not final; and, if erroneous, the party has his remedy by bill of exceptions and appeal.

If forming or expressing an opinion upon the merits of the controversy was sufficient to disqualify a Judge, it would be necessary that the venue of a cause should be changed, after a mis-trial or the granting of a new trial; for, after hearing the evidence and argument of counsel upon a mis-trial, the Judge would, of course, have formed an opinion upon the merits of the controversy; and the fact of granting a new trial is often equivalent to the expression of such opinion.

The refusal to change the venue is no sufficient ground for reversing the judgment.

Under the second assignment of error, appellants seek to raise a question as to the validity of the lease to Estill, and the assignment of such lease to plaintiff. These points do not arise in the case under consideration, nor can they be considered or determined in this form of action.

The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform. We have, therefore, declined to consider the objections which are taken in the briefs of counsel to the validity of the lease and assignment.

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The remaining points are:

First. "That, admitting the contract to be valid, the State had, at any time, a right to rescind, violate or annul it without the assent of the lessee or his assignees."

Second. "That the title of the premises being in the State, she had the right to take the same for public purposes, by providing just compensation therefor; and that such compensation was provided."

Upon the first point, the only authority cited is part of a paragraph taken from the opinion of one of the former Judges of this Court upon an entirely different state of facts; and which, when taken in connection with the context, is not at all applicable to the case under consideration.

Upon the second point, numerous authorities, both English and American, are cited, none of which, as we conceive, are directly applicable to the case under consideration. The English authorities show that an action of ejectment will not lie at the suit of the King; for the reason that the Sovereign cannot be disseized; but it does not follow that he may therefore expel by force a party in possession of lands belonging to the Crown; there are other remedies to which he may have recourse.

"If a man intrude upon the King's lands, an information for intrusion lies in the name of the Attorney General." (Comyn's Dig. Barogatine, D. 74; 8 Bacon's Abr. 101) by which proceeding the intruder and all claiming under him could be ousted and enjoined from further interfering with the possession.

The fact that such a remedy is provided to enable the King to recover lands held by a mere intruder, would seem to imply that the right to seize forcibly without legal process, did not exist at common law. In the State v. Arledge and Gaither, 1 Bailey South Carolina Rep. 562, quoted by appellants, the Court held that the State could not maintain the action of ejectment. Mr. Justice Johnson says: "It is very clear that in England the King cannot maintain an ejectment to recover lands; and the reason given by Blackstone is, that, on account of his legal ubiquity, he cannot be disseized or dispossessed. All the elementary writers hold the same doctrine; and it is even more strikingly applicable here, where the sovereign power and right

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are in the hands of the people themselves, who want that personal identity on which a disseizure could operate; and for the further reason, that a part of it abides in the defendants themselves." But the Court did not hold that the State could, by its officers, resume possession without process; on the contrary, it was held that the remedy was by information for intrusion.

It is undoubtedly the practice of the United States Government to remove intruders upon the public lands without legal process; this proceeding is authorized by Act of Congress of March, 1807, the validity of which Act is sustained by the opinions of various Attorney Generals of the United States. The provisions of this Act, however, and the principles announced in the opinions referred to, apply only to intruders or trespassers on the public domain without claim or right, and have in no case been extended to a *bona fide* possession under color of title. On the contrary, it has been expressly held not to apply to such cases. Public Lands, Laws, Instructions, and Opinions, vol. 2, page 166.

Chief Justice Taney, while Attorney General, asserted the power of the United States, under the Act of 1807, to expel intruders from lands ceded by the Creek Indians, on the ground that the parties were mere wrongdoers, "who, without any pretense of title, and in open violation of the rights of the United States, intrude upon the public property and appropriate it to their own use;" and that "the United States had never abandoned their possession, and the intruders had never acquired a lawful possession against them," but were mere naked trespassers upon the public domain. See Public Lands, Laws, etc., vol. 2, p. 181.

There is a vast difference between the case of a mere wrongdoer, and one who enters by the license and consent of the Government.

In the present case, it appears that plaintiff and his assignor had been in the actual peaceable possession of the premises for a period of nearly two years, under color of title purporting to be derived from the State. The legality of his possession, and the validity of the contract under which he held, had been recognized by the successive Legislatures, as appears by the Acts of 1856 and 1857, by which appropriations were made pursuant to the terms of the contract, and

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by the journals of the Legislature. Plaintiff can, then, in no sense be considered as an intruder, without claim or pretense of title; and the reasoning of the authorities, cited from the opinions of the Attorney General of the United States, does not apply to the facts of this case. The possession of plaintiff having been acquired by the consent of the Legislature, and been recognized by it as legal, could only be legally divested by the judgment or decree of a competent Court.

It is said that the State cannot commit a forcible entry. This position will not, I presume, be controverted; but the defendant is not the State; and certainly there is no reason why a public officer, who acts without authority, or under a void authority, or who transcends the authority conferred by law, should not be held to strict accountability for such act.

The objection that the entry complained of was not forcible, is entirely unsupported by the facts disclosed by the record. Several men go to an outer building, occupied by the agent of plaintiff, and in which were the keys of the premises, against the will, and notwithstanding the protest of this agent; an inner door is forced and the keys taken, with which an entry into the main building is effected. The acts of the parties warranted no other conclusion than that any attempt on the part of the plaintiff to resume possession would be resisted by force.

"To constitute forcible entry and detainer, it is not necessary that violence and outrage upon the person and property should in fact be resorted to. If the actual possession of another in a house or tenement be taken and held under circumstances which show that it will not be surrendered without a breach of peace on the one side or the other, this constitutes a case of forcible entry and detainer." *Childers v. Black*, 9 Yerg. 317; 1 Scam. 407.

The statute was intended to prevent bloodshed, violence and breaches of the peace, too likely to result from wrongful entries into the possession of others; and it would be absurd to say, that to enable a party to avail himself of its provisions, there must have occurred precisely the evil which it was the object of the law to prevent. The power of the Legislature to absolutely control the custody and disposition of the State prisoners, and to enter upon the premises for the

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purpose of removing such persons, does not arise in this case, and we are not disposed to question its authority to do so.

The simple question involved in the record is, whether premises, which were in the peaceable and actual possession of plaintiff, were forcibly and unlawfully entered and *detained*.

The last point is, that, "admitting these premises to be the private property of plaintiff, still the State had the constitutional power to take it for public purposes, by providing just compensation therefor; and it is immaterial whether the compensation was provided in the Act directing the seizure of the property, or by subsequent act."

The first proposition is certainly true, but the Act under which defendant justified his entry, made no sort of provision for any compensation whatever, and was clearly in violation of the eighth section of article one of the Constitution. For the second proposition, we can find no authority; and we are unable to see how an illegal entry on the first of March can be affected by the passage of an Act some two months thereafter.

It is well settled, and upon this point there is no conflict of authority, that when private property is taken for public use, the means of compensating the owner must be provided before the property can be taken. *Smith Com.* 473, *et seq.*; *San Francisco v. Scott*, 4 Cal. 114; *McCann v. Sierra Co.*, 7 Cal. 121.

The judgment of the Court below is affirmed.

FIELD.—The validity of the lease from the State cannot be tried in the present action, nor can the plaintiff be deprived of the advantages resulting from the possession of the premises, by a forcible ouster under any legislative enactment. Assuming the lease to have been valid, there was in the plaintiff a property of which he could not be divested for public use without just compensation. His right, so far as the land and buildings were concerned, was in no respect affected by the fact, that they were designed as a place for the confinement of convicts. The purposes for which premises are leased cannot alter the nature of the leasehold interest as property. To take such property without compensation is beyond the reach of legislative power. Such compensation must be made, or a fund provided from which it

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can be made in advance. So strictly is this rule adhered to, that the enforcement of any statute to take such property, where the indemnity has not been provided, will be stayed by injunction. The appropriation without providing the compensation is unconstitutional and void. In *Gardner v. Village of Newburgh*, (2 John. Ch. 162) Chancellor Kent said: "To render the exercise of the power [to take private property for public purposes] valid, a fair compensation must, in all cases, be previously made to individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of the legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice."

In *Bloodgood v. The Mohawk and Hudson Railroad Co.* (18 Wend. 17) Chancellor Walworth, in expressing his dissent to a decision of his predecessor, in *Jerome v. Ross*, (7 John. Ch. 344) that it was not necessary to the validity of a statute authorizing private property to be taken for public use, that a remedy for compensation to the owner should be provided, said:

"On the contrary, I hold that, before the Legislature can authorize the agents of the State and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, an adequate and certain remedy must be provided, whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation. I do not mean to be understood that the Legislature may not authorize a mere entry upon the land of another, for the purpose of examination, or of making preliminary surveys, &c., which would otherwise be a technical trespass, but no real injury to the owner of the land, although no provision was made by law to compensate the individual for his property, if it should afterwards be taken for public use. But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the

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future justice of the Legislature to provide a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided; and upon an adequate fund, whereby he may obtain such compensation, through the medium of the Courts of justice, if those whose duty it is to make such compensation, refuse to do so." Sedgwick on Statutory and Cons. Law, 525, 526, 533.

To the same effect are the decisions of this Court. In the case of the City of San Francisco v. Scott, (4 Cal. 114) a street was extended through the property of one Price, by ordinance of the Common Council of the city, and in conformity with the requirements of its charter, assessments were made of the damages caused to each individual by the extension. To Price, who was in possession of a portion of the land appropriated, an award of \$1,925 was made. Shortly afterwards, the street was opened, and it remained open for four or five months, during which period it was used as a public thoroughfare. At the expiration of this period, the award not being paid, the defendant, as agent of Price, entered upon the land and obstructed the street, claiming, on behalf of his principal, the right to reappropriate the same to private use. For the obstruction the defendant was prosecuted before the Recorder, by whom judgment was passed against him. On appeal, the judgment was reversed, with the concurrent opinion of all the Judges. "Our bill of rights," said the Court, "provides that private property shall not be taken for public use, without just compensation being made therefor; and it is now the better opinion, that such compensation must be made before the citizen can be divested of his rights. It is not sufficient that the law points out the mode by which the damage may be ascertained, and provides the party with a remedy to enforce his rights; no such obligation can be imposed upon him; he is entitled to the damages which he has sustained, without resorting to a legal tribunal to enforce the payment. The law watches the exercise of this prerogative of sovereignty with a jealous regard for the rights of the citizen.

"Admitting all the steps for opening this street were properly and legally taken, (a proposition denied by appellant's counsel) it is evident the premises in question did not become a public street by virtue

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of such ordinance, until the city had paid or tendered the amount of the assessment to the defendant; in other words, a city ordinance could not divest the title to private property, and *ex proprio vigore* operate a dedication to the public use."

In *McCann v. Sierra County*, (7 Cal. 121) the Supervisors of that county had, by resolution, extended a street or thoroughfare through the land of the plaintiff, without providing any compensation for the private injury consequent thereon; and the Court, all the Judges concurring, said: "The Constitution of California provides, 'that private property shall not be taken for public use, unless just compensation be made therefor.' A similar provision is to be found in the Constitution of every State in the Union; and the result of the decision on this subject may be briefly stated thus: That compensation must be made in advance, or a fund must be provided, out of which compensation shall be made, so soon as the amount can be determined. The property of the citizen cannot be taken from him without ample means of remuneration are provided. From this it results that the act of the Supervisors of Sierra county, in appropriating the property of the plaintiff to public uses, before making provision for paying him the value thereof, was illegal, and that he might resort to the Court of Equity to restrain them from interfering with the freehold."

It is, then, the settled law, that the compensation, or the offer of it, must proceed or be concurrent with the seizure and entry upon private property of the citizen. It may not be absolutely essential that the compensation should be provided in the same Act which authorizes the seizure; but it is essential that it should be provided before the seizure can be enforced or justified. Little, indeed, would be the security afforded to the citizen, if his property could be taken by the agents of government, and himself left to the future sense of justice of the Legislature. It would be poor consolation to the head of the family, stripped of his entire possessions, to be informed that the Legislature would, at some subsequent day, deal fairly by him.

The statute upon which the Governor bases his defense and justifies his acts in terms, authorizes and empowers him, and, in fact, makes it his duty, to take immediate possession of the State prison and grounds,

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together with all the property of the State therein situated, and to assume the custody, control and management of the State prison convicts therein confined, or to be therein confined, and thereafter to continue the possession of the property and the control of the convicts until further provided by law. The prison and grounds, which the Governor was thus directed to take and retain possession of, were in the possession of the plaintiff, with color of title under claim of right, upon a lease of five years. Had these premises been a warehouse, occupied by a tenant under a lease from the State, for the ordinary purposes of mercantile business, no one would have had the hardihood to uphold the validity of a statute directing the seizure of the same and the dispossession of the tenant, except by regular proceedings in the tribunals of the country. How does the case at bar differ from the case supposed? Grounds and buildings were leased; the leasehold interest was property, and for its enjoyment against invasion and seizure under attempted legislation, or by individual violence, the plaintiff could claim the protection of the Constitution. The fact that the grounds and buildings leased were used for the confinement of State convicts, does not alter the case. The right to the labor of the convicts is not involved. That the State may not have any other place of confinement, as urged in argument, is its misfortune, but cannot impair the right of the plaintiff to hold the premises until indemnified for their taking. If the State had leased out the Capitol, it would afford no justification for seizing and dispossessing the tenant, that it had no other place for the meeting of the Legislature. The difficulty under which the State is resting, arises from the provisions of the lease, and the failure to insert a clause for the repossession of the premises whenever the Legislature should determine to resume the control of the prisoners.

What I have thus far said, has been upon the supposition that the lease from the State is valid, for its invalidity cannot be questioned in this form of proceeding. In any view, whether valid or invalid, it gave a color of title to the plaintiff. It took from his possession the character of intrusion without claim of right, which alone the government can remedy by force. Where private right is asserted, the

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government is as impotent as the humblest citizen to impair or destroy it. The validity of the lease could only be determined in a different tribunal and by proceedings of a different character.

Nor could the validity of the assignment from Estill to the plaintiff be the subject of consideration in the present action. The plaintiff was in peaceable possession; the defendant ousted him by force; and before the legality of the title of the parties to the premises can be the subject of consideration, they must be placed in *statu quo* with reference to the property. The law will not suffer the defendant, or those whom he represents, to enjoy the advantages resulting from the possession when obtained by violence and force.

Nor can the defendant rest his justification upon any possible forfeiture of the lease. Such forfeiture cannot be asserted except by force of a judicial determination. The Legislature cannot take upon itself, nor the officers of government upon themselves, to adjudge what right has accrued to the State, and then proceed to enforce it, any more than a private citizen. For the recovery of money due, or the possession of property withheld under a claim of right, the Legislature, and the highest officer, and the humblest citizen, stand upon the same footing, and must pursue the same course.

There may be, and probably is, great truth in the observation of the Attorney General, that in the hands of the defendant and those associated with him, the management of the State prison has been eminently wise and economical, and one which reflects great credit upon him and them. This may all be so, but it is difficult to see what bearing it can have upon the rights of the plaintiff. There would undoubtedly have been the same wise and economical management, if the Governor had taken by force, for the confinement of the prisoners, any other equally capacious property, belonging to any private citizen, other than the plaintiff.

I concur in the affirmance of the judgment.

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DUTCH FLAT WATER CO. v. MOONEY *et al.*

In an action of ejectment to recover mining claims, an answer to the complaint which avers, "that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry," is insufficient, in not setting forth the rules, customs, etc. This averment of forfeiture is a legal conclusion upon which no issue can be taken. The facts should be stated so as to enable the Court to determine whether the forfeiture did accrue.

The mode of acquiring and the extent of a mining claim must be in conformity with the local rules of miners; but, *query*, can the local regulations alter the general rules of the right of holding property, by creating a new and arbitrary rule, or by abrogating the old rules?

APPEAL from the Eleventh District, County of Placer.

The facts sufficiently appear in the opinion of the Court.

B. F. Myers for Appellant.

M. E. Mills for Respondent.

BALDWIN, J., delivered the opinion of the Court—FIELD, J., concurring.

Ejectment for mining claims. Defendant answered, averring that the plaintiff had lost whatever right he had by a failure to comply with the rules, regulations and customs of the mining district. To this loose and general allegation the defendant demurred. The Court overruled the demurrer. The parties are entitled to a definite issue upon which the case can be intelligently tried. The object of pleading is to advise the adverse party of the distinct subject matter of averment or defense intended to be relied on. If the matter itself be good—which is not a little questionable—the manner of its statement is so loose and vague that no purpose of a pleading is subserved by it; for what were these regulations or customs—how many—how violated—when—under what circumstances? The general allegation of forfeiture is a legal conclusion upon which no issue can be taken. The

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facts must be stated so as to enable the Court to see whether the forfeiture did accrue.

We do not decide the question as to the power of a mining district to pass a valid regulation declaring the tenure of this species of property to be different from that created by the general law. The Act of the Legislature giving effect to these local regulations, qualifies the power by providing that the rules so passed shall not be inconsistent with the Constitution or laws of the State. We see no inconsistency in holding that the mode of acquiring, and the extent of the claim, shall be according to these local rules; but when a right of property shall have attached, it may be more difficult to maintain that it can be divested by a rule or regulation, when the rule opposes the general law fixing the tenure.

It is true, that the right coming entirely from possession may be lost by an abandonment of the possession, and the law determines what shall be or prove an abandonment; but the question is, can the local regulation alter this general principle, either by creating a new and arbitrary rule, or abrogating the old ones. As this is an important matter, and the question has not been fully argued, we reserve a decision of it. For the errors assigned, the judgment is reversed and cause remanded.

WATERS v. MOSS, TRUSTEE OF THE SACRAMENTO VALLEY RAIL-ROAD COMPANY.

In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the uninclosed commons;" where the defense is negligence on the part of the plaintiff in thus allowing the horse to run at large.

Plaintiff was not guilty of negligence in thus allowing his horse to run at large. The rule of common law, which requires owners of cattle to keep them confined within their own close, does not prevail in this State. The common law was adopted only so far as it was not repugnant to the Constitution and statutes of the State.

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Before the discovery of the gold mines, this was exclusively a grazing country: its only wealth consisting in vast herds of cattle which were pastured exclusively upon uninclosed lands. The custom continued to prevail after the acquisition of the country by the United States, and has been, in various instances, recognized by the Legislature.

APPEAL from the Sixth District, County of Sacramento.

The facts are stated in the opinion of the Court.

Clark & Gass for Appellant.

1st. The Court erred in refusing to permit plaintiff to prove on the trial that the custom had been throughout this State, from its earliest history, to permit cattle and horses to run at large.

2nd. That the Court erred in finding, as a fact, that the plaintiff was guilty of negligence in permitting his horse to run at large on the commons.

3d. That the Court erred in its conclusions of law in holding, that slight negligence on the part of the plaintiff, although remote, could relieve the defendant from all responsibility, and deprive the plaintiff of all redress for injury, although it resulted from the immediate negligence of defendant. 3 Ohio State R. 175; 14 Conn. R. 293; 5 Gilman's R. 130; 1 Strobhart's R. 175; Swift's Dig. R. 525; 11 East's R. 58, 567; 1 Adolph. & Ellis' R. 35; 3 Carr. & Payne's R. 554; 2 Eng. Common Law R. 183; 38 *Ib.* 252; 39 *Ib.* 559; 15 *Ib.* 91; 53 *Ib.* 53; 16 Conn. R. 421; 19 *Ib.* 507; 24 Vermont R. 488; 23 *Ib.* 388; 14 Paige's R. 593.

Latham & Sunderland for Respondent.

The first error complained of by appellant's counsel, is a refusal of the Court to allow, on the trial, proof "that the custom had been throughout this State, from its earliest history, to permit cattle to run at large upon the uninclosed lands in this State."

The rule of the common law was, that a man must keep his cattle on his own land, or within his own close, and was liable in trespass for allowing them to go upon his neighbor's land. But railroad companies having the exclusive right to use their roads, the very object of their incorporation forbids any joint occupation for any purpose.

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In Ohio, it is held, "that the company is liable for *want of such reasonable care as is consistent with the safety of the persons and property on the train.*" *Kernhacker v. C. C. & C. R. Co.*, 3 Ohio State, 172; *C. H. & D. R. R. Co. v. Watson*, 2 Ohio State, 424, 433.

In Pennsylvania, where the common law has been modified as in Ohio, the Supreme Court says, that the common law rule does apply to uninclosed lands in the vicinity of railroads; and if the owner allows his cattle to run at large in the vicinity of them, he does so at the risk of losing them, and paying for their transgressions. *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. State, 298; *Knight v. Albert*, 6 Penn. State, 472.

The same doctrine is laid down in Illinois, where they also recognize the modification of the common law rule as to cattle not being trespassers on uninclosed lands; but the Supreme Court of that State says they do become trespassers when they wander upon the track of an uninclosed railroad, and the railroad company is not liable for killing them while on the track, unless its agents are guilty of "willful or wanton injury, or of gross negligence, evincing reckless or willful misconduct." *Chicago & Miss. R. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. R. Co. v. Thompson*, 17 Ill. 131; *Central Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois Central R. R. Co. v. Reedy*, 17 Ill. 580.

We therefore state it to be well settled law, and in accordance with the almost unanimous authority of the Courts, that a railroad company, not compelled to fence its track by special statute, is not responsible for injuries to cattle coming upon its track, through the want of such fence, without proof of some other default.

"It may maintain an action for damages done by such cattle unlawfully coming upon its track; and, on the other hand, it is not liable to the owner for injuries inflicted on his cattle, thus trespassing, while it is in the lawful exercise of its right to the exclusive use of its track." *Perkins v. Eastern R. R. Co.*, 29 Maine, 307; *Woolson v. Northern R. R. Co.*, 19 *Ib.* 267; *Cornwall v. Sullivan R. R.*, 3 Foster, 170; *Hurd v. Rutland & Bennington R. Co.*, 25 Vermont, 123; *Jackson v. Same*, *Ib.* 150; *Morse v. Same*, 29 *Ib.* 49; *Moss v. Boston & Maine R. R. Co.*, 2 Cush. 536; *Tower v. Providence & Worcester R.*

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R. Co., 2 R. I. 404; *Terry v. N. Y. Central R. R. Co.*, 22 Barb. 574; *Corwin v. N. Y. & Erie R. R. Co.*, 3 Kernan, 46; *Vandegrift v. Rediker*, 2 Zabris. 185; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. State, 298; *Northeastern R. R. Co. v. Sineath*, 8 Rich. 194; *Cranston v. C. H. & D. R. R. Co.*, 1 Hardy, 193; *Williams v. New Albany & Salem R. R. Co.*, 5 Ind. 11; *Alton & Sangamon R. R. Co. v. Baugh*, 14 Ill. 211; *Williams v. Michigan Central R. R. Co.* 2 Gibb, 259; *Henry v. Dubuque & Pacific R. R. Co.*, 2 Clark, (Iowa) 303.

TERRY, C. J., delivered the opinion of the Court—BALDWIN, J., concurring.

This is an action to recover the value of a horse killed by the cars upon the Sacramento railroad. The case was tried below without a jury—defendant had judgment and the plaintiff appealed.

It appears that the horse had been permitted to run at large upon the uninclosed commons. That at the time the cars were passing, the horse, in company with others, was about crossing the railroad track, upon a public road; becoming frightened, it ran along the track some hundred yards, where the road crossed an open culvert, there being a fence on each side of the track; that the horse failed in the attempt to leap this open culvert, and was run over and killed by the locomotive.

The Court below refused to permit plaintiff to prove that it was the custom of this State to permit domestic animals to roam at large upon the uninclosed commons; but held that, in so permitting his horse to roam at large, the plaintiff was guilty of negligence, and that he was not entitled to recover damages for a loss which was, in fact, occasioned by such negligence.

This was error. The rule of common law which required owners of cattle to keep them confined to their own close has never prevailed in California. Before the discovery of the gold mines this was exclusively a grazing country; its only wealth consisting in vast herds of cattle, which were pastured exclusively upon uninclosed lands. This custom continued to prevail after the acquisition of the country by the United States, and has been in various instances recognized by the Legislature.

The common law was adopted only so far as it was not repugnant

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to the Constitution and statutes of the State. Now, the rule contended for by respondent, and adopted by the Court below, is repugnant to no less than three statutes passed by the session of the Legislature at which the common law was adopted, to wit: The law regulating *rodeos*; the Act concerning marks and brands, and the Act concerning lawful fences.

If it were contemplated by the Legislature that all such animals were to be confined to the close of the owner, where was the necessity of providing for a general herding of all the cattle of a neighborhood, after notice, in order that all might attend and each select his own? Or of requiring cattle and horses to be branded before reaching a certain age? Or the justice of providing that damages for loss of crops destroyed by cattle should only be recovered by those whose farms are inclosed by a certain description of fence?

Judgment reversed and cause remanded.

SANFORD v. BORING, SHERIFF.

- A Sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt.
- No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the Sheriff under either writ, will discharge such Sheriff from liability. The statute is express that such instruction must be in writing.
- The evident meaning of the language of the Act embraces all acts done by the Sheriff in respect to the execution of process, including the care and disposition of the property levied upon.

APPEAL from the Fourteenth District, County of Nevada.

This was an action against the defendant, Sheriff of Nevada county, for a failure to make a levy and sale of property — previously attached in the same suit — under an execution issued upon a judgment in favor of plaintiff and against Pultney & Armstrong.

Plaintiff also claimed the penalty of two hundred dollars given by

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statute for failure of the Sheriff to return the execution within sixty days, as therein commanded.

The testimony, as well as the findings of the Court, disclose the following facts:

The plaintiff, Sanford, brought suit against Pultney & Armstrong for four hundred and twenty-nine dollars; sued out an attachment, and placed the writ in the hands of the Sheriff, on the eighth day of February, 1858.

On the same day the Sheriff levied said writ upon personal property of Pultney & Armstrong (then defendants) sufficient to satisfy Sanford's claim.

The Sheriff did not remove the attached property, which consisted of saddles, horses, buggies, etc., but left it all in the stable where it was attached, and in the possession of Armstrong, one of the (then) defendants, who continued in possession, and conducted the business (livery stable keeping) as he had done before.

On the fifteenth of March, 1858, one J. B. Lobdell commenced suit with attachment against Pultney & Armstrong — placed the writ in the hands of the Sheriff, who levied it on the morning of the sixteenth, upon all of the personal property then in the possession of the defendant Armstrong.

On the same day Sanford recovered judgment in his suit against Pultney & Armstrong, and in the evening of that day, and after the levy of Lobdell's attachment, placed his execution in the hands of the Sheriff, who proceeded to levy it upon the property in the possession of Armstrong.

Neither Pultney or Armstrong owned any other property whatever in the county.

Lobdell afterwards recovered judgment against Pultney & Armstrong — took out execution — under which the Sheriff sold, and paid the proceeds to Lobdell, which were only sufficient to satisfy Lobdell's judgment and costs.

On the trial, the defendant offered to prove that plaintiff verbally directed the defendant to put Armstrong in possession of the property attached at the suit of Sanford as keeper.

This evidence was objected to, upon the ground that the statute

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required such instructions to be in writing. The objection was sustained by the Court, and the defendant excepted.

Plaintiff had judgment for the full amount of his claim, and defendant appealed to this Court.

McConnell & Niles for Appellant.

Chase & Caldwell for Respondent.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

We see no error in this record. The action was brought against the defendant, Sheriff, to recover of him so much money, being the value of property in his hands, which he had levied on and suffered to remain in the possession of the defendant in attachment. Upon obtaining judgment, the plaintiff sued out execution, but the money was not made on it. We think the complaint is sufficient. It sets out the facts: That an attachment was levied upon sufficient property to satisfy the debt by the Sheriff; and that an execution was issued on the judgment subsequently had and placed in the Sheriff's hands, and the Sheriff failed to make the money. The levy of the attachment placed the property in the hands of the Sheriff to abide judgment and execution, and this property was the plaintiff's security for his debt. If the Sheriff wasted or lost it, or suffered it to be diverted to some other purpose, he is liable. He had no right to suffer the property to go out of his possession, except in due course of law, and is responsible if he did. His return charges him with this property, and he has not discharged himself.

Nor did the Court err in refusing to permit evidence of parol instructions from the plaintiff in execution to the Sheriff, to permit the defendant to take or keep possession.

The statute is express, that no direction or authority by a party or his attorney to a Sheriff in respect to the execution of process, or the return thereof, or to any act in relation thereto, shall be available to discharge or excuse the Sheriff for a liability for neglect or misconduct unless it be contained in writing, etc.

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The construction of appellant's counsel of this Act is too narrow and technical. The evident meaning of the language embraces *all* acts done by the Sheriff in respect to the execution of process, including, of course, the care and disposition of the property levied on — the most important of these acts.

The judgment is affirmed.

ELLISON v. THE JACKSON WATER COMPANY AND BAYERQUE.

The term "ratified," when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent.

E. contracted with J. W. to construct an extension to a ditch, and after the ditch was completed, was to be paid out of the sales of water. At the time of the execution of the contract, B. held a mortgage upon the ditch. After E. had partly completed his work, B.'s mortgage fell due, and he brought an action to foreclose it, and had a Receiver appointed to receive the water rents of the ditch. E. refused to go on and complete the work. B. agreed with E., that if he would go on and complete the work, he should be paid out of the receipts from the sale of water by the Receiver. Under this promise, E. completed the work; *Held*, That this is an undertaking to answer for the debt, default or miscarriage of another, and is therefore within the Statute of Frauds.

It is essential to the validity of such contract, that it, or some note or memorandum thereof, be in writing; that it express the consideration; and that it be subscribed by the party to be charged thereby.

A promise by B. to perform J. W.'s contract, could furnish no consideration for a promise from E., nor could the consideration of the original contract attach to the subsequent promise of B.

The Act of 1850 gave a mechanic's lien only upon buildings and wharves. The Act of 1853 extended the Act of 1850, so as to include in its provisions bridges, ditches, flumes or aqueducts constructed to create hydraulic power, or for mining purposes. The Act of 1855 repealed the Act of 1850. *Held*, The repeal carried with it the supplementary Act of 1853, which extended the provisions of the original Act. Without the original Act, there was no mode of enforcing the supplementary Act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal.

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Neither the Mechanics' Lien Law of 1855 or 1856 give a lien upon canals or ditches. The language of the statute is, "building, wharf, or other superstructure." A ditch is not a building, or a wharf, and in no sense can it be designated a superstructure.

Flumes constructed at different parts of the line of a ditch, cannot change the general character of the work as an excavation. Such flumes are mere connecting links of the ditch over ravines and gulches, and the whole work must be regarded as a ditch.

Equity raises no lien in respect to real estate, except that of a vendor for the purchase money.

APPEAL from the Fifth District, County of Amador.

This was an action brought to recover a judgment against the defendants in the sum of \$48,154.14, for services rendered by plaintiff under a contract with the Jackson Water Company, for the construction of a ditch or canal, and also for the enforcement of a mechanics' or laborers' lien upon the work.

On the twenty-second day of December, 1855, the plaintiff contracted, in writing, to and with the Jackson Water Company, for the construction of a certain ditch or canal in continuation of one owned by the company. By the terms of the contract, the plaintiff was entitled — after the water was let into the ditch — to collect the water rents, and retain one-half thereof, which was to be applied in discharge of his debt against the company for the construction of the work. It is alleged by the plaintiff, that he completed the ditch within the contract time. A breach of the contract is alleged by the plaintiff on the part of the company, by depriving plaintiff of the right to collect the water rents of the ditch, after he had collected only \$2,790.36, leaving unpaid for the work \$48,154.17. On the twenty-eighth of February, 1857, the plaintiff filed in the office of the County Recorder where the ditch is located, certain papers claiming a lien upon the ditch and its appurtenances, in pursuance of the provisions of the Mechanics' and Laborers' Lien Law. In the notice of his intention to hold a lien upon the work, it is alleged that the ditch was constructed by plaintiff between the twenty-second of December, 1855, and the twenty-eighth of January, 1857.

Prior to the making of the contract between plaintiff and the company, the company had mortgaged the ditch to the defendant, Bayer-

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que, to secure the payment of \$50,000. While plaintiff was in progress of the work, the mortgage debt fell due, and Bayerque instituted an action to foreclose the mortgage, and subsequently obtained a decree to that effect. Plaintiff alleges that, in June, 1856, he gave Bayerque notice of his contract, etc. Here is the allegation of the complaint upon which the plaintiff seeks to hold Bayerque responsible for the payment of the construction of the ditch: "On the ——— day of June, A. D. 1856, the defendant Bayerque, by himself and by his agents and attorneys, in consideration that plaintiff would not abandon his said work, and would not sue defendants at that time, adopted and ratified said contract, and agreed and stipulated that plaintiff should finish the work aforesaid contracted for, and that he be paid therefor by the Receiver, Thomas B. Wade, who, it is prayed, be made a party to this suit, and who was appointed said Receiver in the suit for the foreclosure of the mortgage aforesaid between the defendant Bayerque and the Jackson Water Company; and, pursuant to said stipulation, the said Receiver was directed to pay plaintiff for such work according to said contract, as expressed in the terms thereof. And the said plaintiff avers, that in consideration of said satisfaction of said contract, and believing that the defendant Moss was a party to such ratification — as plaintiff is informed and believes he was — the plaintiff proceeded to finish said work, and to complete the contract on his part; and plaintiff avers that it ever was the intention of defendants, Moss and Bayerque, that said contract should be carried out, and that said defendants, knowing the premises, agreed and stipulated that the same should be done."

On the seventh day of July, 1856, the ditch was sold under the decree of foreclosure, and Bayerque became the purchaser; and subsequently a Sheriff's deed was duly executed and delivered to Bayerque.

Plaintiff had judgment in the Court below for the amount of his demand and for the enforcement of his lien; Bayerque appealed therefrom to this Court. No appeal was taken by the company.

Levi Parsons for Appellant.

I. It does not appear that Bayerque made any promise or agreement with the plaintiff, or with any one under whom the plaintiff claims.

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It is not stated with whom, in what way, at what time, or under what circumstances, Bayerque "adopted," or "ratified," or "recognized," the contract. It is difficult to ascertain what is meant by his adopting, ratifying or recognizing a contract to which he does not appear to have been either party or privy. Bayerque cannot be charged upon contract, without its being alleged what contract he made. Can any one tell from the complaint, what contract he made? With whom it was made? The terms of it? The consideration? When to be performed? What Bayerque was to do? and what the party contracting with him was to do, or was to pay?

But, did Bayerque agree to pay the plaintiff for his work? No such thing is claimed. Did Bayerque agree that the company would pay the plaintiff? That is not claimed. Did he undertake to guarantee the performance of the contract by the company? There is no such allegation, in terms; and if there were, such guaranty would be void as within the Statute of Frauds.

II. Bayerque is not liable upon any of the allegations in the complaint, because any promise or undertaking which might be inferred from them, would be void within the Statute of Frauds, as a special promise to answer for the debt, default, or miscarriage of another. Compiled Laws, 200, 201, sec. 12.

If it can be gathered from the complaint that Bayerque made any contract whatever, it is, that he undertook to perform a contract which the Jackson Water Company had made, and which it was their duty to perform; in other words, to answer for the debt, default or miscarriage of the company. And this comes not only within the terms of the statute, but within the very mischief which the statute was intended to guard against. If a person can be made liable, on such loose generalities as are contained in this complaint, to perform a contract entered into by another, the statute would be of no effect. Indeed, such a construction would amount to a judicial repeal of it, and the gate would be thrown wide open for all the frauds and perjuries which the statute was made to shut out of Courts of Justice.

It is not pretended that Bayerque "subscribed" any "agreement," or note, or memorandum thereof, expressing the consideration¹⁶ in

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writing." His agreement, therefore, was void. This seems too plain to admit of discussion.

It is unnecessary to go over the authorities on this point, inasmuch as the case of *Clay et al. v. Walton*, 9 Cal. 328, saves us that trouble. The entire opinion of the Court might, with strict propriety, be embodied in this case; for the reasoning upon which it proceeds, and the authorities cited in support of it, are as applicable to the facts now before the Court, as they were to the facts in that case. And I ask the Court to consider that opinion as embodied *verbatim* in this argument.

III. Though the contract be valid, the law gave no lien for the work done under it.

No lien was given by the common law, and there is no statute giving one.

The Statute of 1850 (Compiled Laws, p. 808) gave a lien only on a "building or wharf." Under this Act it was held, (*Burt v. Washington*, 3 Cal. R. 246) that a bridge was not a "building," within the meaning of the Act, and was not subject to a mechanic's lien. Clearly it was not a "wharf."

But by the Act of 1853, (Compiled Laws, 811, 812) the Act of 1850 was extended so as to "include in its provisions bridges, ditches, flumes, or aqueducts, constructed to create hydraulic power, or for mining purposes," etc.

By the Act of 1855, (Laws of 1855, pp. 156-159, sec. 12) the Act of 1850 was repealed, which repeal, of course, carried with it the amendment of 1853; for, after such repeal of the Act of 1850, there was left no method of enforcing the amendment of 1853, and this amendment became, by reason of such repeal, a dead letter.

The same Act of 1850 was again repealed by the Statute of 1856. Laws of 1856, pp. 203-205, sec. 11.

The contract in question was made in December, 1855. The work under it was performed between the twenty-second day of December, 1855, and the twenty-eighth day of January, 1857, and must, therefore, have been mostly, if not entirely, done after the Act of 1856 took effect.

It might, therefore, be a very nice question, which act must govern

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the case. But there is no need of discussing that question here, as the plaintiff can have no lien under either Act.

Both these Acts give a lien only upon a "building, wharf, or superstructure." See Laws of 1855, p. 156, sec. 1; Laws of 1856, p. 203, sec. 1.

These statutes, from 1850 to 1856, being in *pari materia*, must all be construed together, as forming one general system. (Dwarris on Stat. 568-572.) In this way we arrive at the meaning of the several terms used by the Legislature.

The Legislature, by repealing the Act of 1853, which in terms gave a lien on "ditches, flumes and aqueducts, constructed to create hydraulic power, or for mining purposes," and by omitting these terms in the Acts of 1855 and 1856, have declared, as explicitly as they could, without using express negative words, that they did not intend to give a lien on "ditches, flumes, aqueducts," etc.

Even though we could not, however, resort to this clear legislative construction, and were left to interpret the Statutes of 1855 and 1856, from their terms alone, we must arrive at the same conclusion. The words used in these two Acts are the same — "building, wharf, or superstructure"; and it would be deserving of nothing but ridicule, to suppose a mining "ditch" to be included within either category, were it not that we are treating of serious matter, and that important interests are at stake.

The language of these Acts, giving rights in derogation of the common law, must be construed strictly. *Bottomly v. The Rector, etc.*, 2 Cal. R. 91; *Houghton v. Blake*, 5 Cal. R. 240.

We have seen that a "bridge" is not a "building or wharf," (3 Cal. R. 246) much less, then, is a "ditch." Is the latter a "superstructure?" There might be some plausibility in calling a "bridge" a "superstructure." But a "ditch" — who would think of denominating a "ditch" a superstructure! We might as well call a hole in the ground a "superstructure."

A building and a wharf are classed by these Acts within the term "superstructure." The language is, "building, wharf, or other superstructure." The meaning, then, of the term "superstructure," extends only to things analogous to a "building," or to a "wharf;" and thus,

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the benefit of the Acts is extended only to "other superstructures," of a character similar to a "building" or a "wharf."

Again: that this is the true construction is made still more manifest by the language used in sec. 5 of Stat. of 1855, and by sec. 4. of Stat. of 1856.

Did these statutes give a lien for digging a tunnel through a mountain? Why not, if it gives a lien for digging a "ditch" around one?

If the latter can be deemed a superstructure, I see no reason why the former should not be also. But the plaintiff might as well claim that the *cayote* has a lien upon his hole, "together with a convenient space around the same," or so "much as may be required for the convenient use and occupation of the premises."

Smith & Hardy for Respondents.

I. It is claimed by counsel that the complaint does not charge that Bayerque contracted with Ellison. The allegation is, that Ellison notified Bayerque of the terms of his contract, and demanded his adoption of it; and in "consideration that Ellison would do the work and comply with the contract on his part, Bayerque adopted, ratified and confirmed it on his part." The contracting parties are tolerably clearly defined.

We refer the Court to the definition of "a contract" given in counsel's brief; from 3d Blackstone, 442, as our authority on this point, and then direct their attention to that part of the complaint of which the foregoing is an extract.

II. The next error assigned grows out of the attempt to enforce a lien, and counsel has construed statutes and cited authorities on statutory liens sufficient to make a very good library on that question. In reply it is not necessary to admit or deny his logic. It is sufficient to remind this Court that there were such things as equitable liens, and liens *ex contractu*, before our statute was made. We have heretofore been of the opinion, that if by contract a workman was to retain his work until he was paid therefor, that he had a lien on the work, not only as against the party for whom the work was done, but as against all the world. And we have further understood, that as against the

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owner, equity always gave the vendor, laborer, mechanic or architect a lien for the price.

Let us see if we were right, when tested by authority.

In *Bagley v. Greenleaf*, the equitable lien of the vendor for the purchase money as against the vendee is fully recognized and confirmed, and many cases are cited in support of the decision. 7 Wheaton U. S. Reports, page 46; *Cox v. Fenwick*, 3 Bibb, 183; *Fish v. Howland*, 1 Paige, 29.

Independently of the general equitable lien, however, there was a contracted lien. The words of the contract are, that respondent is to have half the water running in the main flume, and is himself to sell the same and collect the rents thereof, until he is entirely paid. In other words, the work itself is pledged for the payment of the contract price, and respondent was entitled to possession of it by virtue of this pledge.

In conclusion, upon this point we differ with the learned counsel as to the effect of our statute.

It is admitted, that by the lien law of 1853, a statutory lien independent of the contract, would have existed. A reference to the law will show that the Act of 1853 was an independent Act of the Legislature which extended the provisions of the Act of 1850 to ditches, flumes, etc. Then, in the reading of the Act of 1853, the words used in the law of 1850, should be considered part and parcel of the latter law. There was no repugnancy in their respective provisions, and the latter Act stood as if all the words of the former had been engrossed in and made a part of the latter.

The Act of 1855 only repealed the law of 1850. The subsequent law was not affected by this repeal. The fact that the same words in the law of 1850, as were used in the law of 1853, were stricken out of that law, would not by any reasonable construction strike them out of the other. There is nothing in the law of 1855 repugnant to the law of 1853. The only persons affected by the law of 1855, are the mechanics and builders of houses, wharves, and superstructures. So far as the law of 1850 affected this class of liens, it was repealed, but so far as the lien of laborers and material men on ditches, flumes and the like, were concerned, they were left where the law of 1853 had placed them. See Act of 1855, page 159, sec. 12.

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In the construction of legislative enactments, Courts will so construe the law as to give effect to all the legislative declaration, and where there are two statutes on the same subject, the Court will, if possible, so construe them as to give effect to each. 1 Blackstone's Com. 89. Opinion of Chief Justice Murray, *Cheever v. Hays*, 3d California, p. 537.

"Another rule of equal importance is, that remedial statutes are to be liberally construed, and so as to most effectually secure the beneficial end in view." Broom's *Legal Maxims*, marginal, p. 247.

Another salutary rule is, that a "law shall not be repealed by implication. The repealing Act must either contain repealing words or be couched in negative language." And again: "If both Acts be merely affirmative, and the substance such that both may stand together, they shall both have concurrent efficacy. 1 Blackstone, marginal pages 89 and 90.

But it is argued that the repeal of the law of 1850 took away the remedies of the Act of 1853. This argument seems to us wholly untenable. The Act of 1850 provided benefits to one class of persons; the Act of 1853 provided them to another class. The repeal of the Act for the former did not affect the latter.

III. As to the argument founded on the Statute of Frauds, we confess our inability to apply it to the case at bar. Every word of Bayerque's promises were in writing. The contract itself, when Bayerque took hold of it, was only executory. The consideration had not passed, a debt had not been created, but on the contrary, his promise was his own. The consideration was expressed in Parsons' letter to Captain Ellison. "If you extend the ditch," the promise was, "the extension shall be pledged for payment." In the stipulation made in the case of *Bayerque v. "The Jackson Water Company,"* the consideration was again expressed "that Capt. Ellison do the work contracted for." The promise was, "that he be paid therefor according to his contract."

FIELD, J., delivered the opinion of the Court — TERRY, C. J., and BALDWIN, J., concurring.

It is unnecessary to pass in review the several objections raised on

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demurrer to the sufficiency of the complaint, and which are urged upon the attention of the Court by the counsel of the appellant in a very elaborate brief, as the case can be disposed of upon its merits, independent of any question of pleading. The action is brought to recover a judgment against the Jackson Water Company and Bayerque, for work performed by the plaintiff in the construction of a ditch, under an alleged contract between him and the company, made in December, 1855, and to obtain a decree enforcing a lien claimed for the work upon the ditch thus constructed. Other parties were made defendants but as no judgment passed against them, they may be dismissed from the consideration of the case. The action, as against the company, rests upon the alleged contract, and as against Bayerque, upon what is inaptly termed by the plaintiff its "adoption and ratification" by him. The contract purports to have been made on the part of the company, by only three of its five trustees; one of that number acting as attorney in fact for the third; but whether for this reason, or for any of the reasons assigned, it was without binding obligation, it is immaterial to inquire. The company have not appealed from the judgment, and cannot, therefore, raise any question as to the legality of the contract, and the defense of Bayerque rests upon independent grounds. As against the company, the judgment for damages must be affirmed. It is only necessary, then, to determine the effect of the alleged "adoption and ratification" of Bayerque, and the validity of the lien asserted upon the ditch.

It cannot in strictness be said that Bayerque "adopted and ratified" the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed between the company and Bayerque; the contract between it and Ellison was not made in Bayerque's name, or for his benefit, or upon any authority from him. What the plaintiff, however, intends by these terms, is this: that Bayerque assumed the obligations of the company to Ellison upon the contract, or in other words, guaranteed the performance of the contract on the part

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of the company. In examining, then, the evidence contained in the record, we find nothing which establishes or even tends to establish any undertaking upon which Bayerque can be personally charged. The stipulation of the solicitor in the foreclosure suit only goes to the extent of authorizing the Receiver to apply one-half of the net proceeds of the extension of Ellison, in pursuance of his contract with the company. It does not purport to make any new contract, or to assume any obligation on the part of Bayerque, even had the solicitor possessed any power to do so, of which there is no pretense. The certificate of the Receiver, based upon such stipulation, and the supposed authority of his appointment, acknowledging and confirming the contract, was utterly inoperative to charge Bayerque. Neither the order or stipulation gave the least power to the Receiver to execute any such acknowledgment and confirmation. And, besides, the Receiver testifies that neither Bayerque nor any of his agents either knew of it or assented to it. The letter of Parsons does not even purport to have been written on behalf of Bayerque, or by his direction, or with his knowledge or approbation. It purports to have been written after a consultation with T. F. Moss, who is not a party to the suit. This Moss was, it would seem, a superintendent of the affairs of Bayerque in connection with the water ditch, but that his authority went beyond an ordinary superintendence nowhere appears. No evidence was given that he possessed any power to make an original substantive contract of the character claimed by the plaintiff. The record is bare of any attempt to establish the possession of such a power.

But aside from this view of the case upon the record, there is another fatal objection to the plaintiff's recovery. The undertaking which he seeks to establish against Bayerque falls within the Statute of Frauds. It is an undertaking to perform a contract which the Jackson Water Company had made, and which it was obligatory upon the company to perform; in other words, it was an undertaking to answer for the debt, default or miscarriage of another. By the 12th section of our Statute of Frauds, which is substantially borrowed from the 4th section of the English statutes of 29 Charles II, it is essential to the validity of any such contract, that it, or some note or memorandum thereof, be in writing; that it express the consideration; and that it be subscribed by

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the party to be charged thereby. Neither of these particulars are found in the present case. There was no agreement in writing, or any note or memorandum of any agreement, and of course it would be idle in such case to speak of the want of an *express* consideration or the subscription of the party. The plaintiff was bound by his contract to perform certain work for the Jackson Water Company. A promise to Bayerque to perform this contract could furnish no consideration for a promise by him. The consideration of the original contract could not attach to the subsequent promise. On this point the authorities are numerous, and without conflict. *Clay v. Walton*, decided by this Court, (9 Cal. 328) is one, and the cases cited in the opinion fully sustain the position.

In *Packett v. Bates*, (4 Ala. 390) the plaintiff had agreed with one Kelly to construct a house, at the usual rate of charges. Whilst the house was in the progress of erection, Kelly left the State, and went to Louisiana. The defendant then verbally promised to pay the plaintiff, if he would proceed and complete the work; and it was held the promise was collateral, and within the statute, and consequently without binding effect. The consideration resting wholly in the performance by the plaintiff of his antecedent contract, did not support the promise of the defendant.

The remaining question for determination relates to the validity of the lien asserted by the plaintiff upon the ditch. The Act of 1850 gave mechanic's lien only upon buildings and wharves. (Comp. Laws 808.) The Act of 1853 extended the Act of 1850, so as to include in its provisions bridges, ditches, flumes or aqueducts constructed to create hydraulic power, or for mining purposes. (Comp. Laws, 811.) The Act of 1855 repealed the Act of 1850. (Session Laws, 156, sec. 12.) The repeal carried with it the supplementary Act of 1853, which extended the provisions of the original Act. Without the original Act, there was no mode of enforcing the supplementary Act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal. The Act of 1855 gave a lien only upon buildings, wharves and *other superstructures*. The same is the case with the Statute of 1856. The work for which the plaintiff asserts a lien, was performed between the twenty-second of December, 1855,

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and the first of February, 1857, and was therefore chiefly done after the Act of 1856 took effect. It is immaterial, however, under which Act the work was done, as both give a lien upon the same structures; neither gives a lien upon ditches in terms. The flumes constructed at different parts of the line cannot change the general character of the work as an excavation. These flumes were mere connecting links of the ditch, over ravines and gulches. As a ditch, then, the general work must be regarded, and as such, the statute gives no lien upon it for labor bestowed, or materials furnished, in its construction. The language of the statute is, "building, wharf or other superstructure." A ditch, of course, is not, a building, or a wharf, and in no sense can it be designated a superstructure.

The plaintiff cannot, therefore, maintain the lien he asserts, under the statute; and outside of the statute, there is no lien which can be enforced. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money.

We purposely refrain from the expression of any opinion on the point whether Bayerque acquired any lien by his mortgage, or any right by his purchase, under the decree in the foreclosure case, upon the extension constructed by the plaintiff. The mortgage, it is true, does, in terms, purport to cover, not merely the works completed, or in progress at the time, but also lines of ditches and flumes for conducting or distributing water, which might be thereafter constructed by the company, as appurtenant to, or connected with, the works. This broad language cannot, however, we apprehend, give a lien upon ditches, for the construction of which no steps had been taken, by a survey and location of their lines, and which rested merely in contemplation. Some specific right of way — capable of identification from a previous survey or location — would seem to be necessary to constitute such property as is capable of mortgage or transfer, so as to pass subsequently constructed works thereon. In the present case, it does not appear from the record, whether, at the date of the mortgage, any survey or location had been made of the line of the extension: and without it, the property was not covered by the mortgage, and did not pass by the master's deed. It would still remain subject to execution on the plaintiff's judgment, as the property of the company. The

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effect, however, of the mortgage in creating a lien, cannot be determined upon the evidence in the present case.

It follows, from the views we have taken, that the judgment for damages against the Jackson Water Company, must be affirmed, and that the judgment for damages against Bayerque, and the decree adjudging a lien upon the works constructed by the plaintiff, must be reversed, and the cause remanded for further proceedings.

Ordered accordingly.

FRALER *et al.* v. SEARS UNION WATER CO.

Is an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim.

The owner of the dam is bound to see to his own property, and to so govern and control it, that injury may not result to his neighbors.

The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered.

APPEAL from the Fourteenth District, County of Sierra.

This was an action for damages resulting from the careless and negligent construction of a dam by the defendants, across a stream, and the consequent injury therefrom, to the plaintiffs' mining claim.

The plaintiffs had judgment in the Court below, and the defendants appealed.

The facts are sufficiently stated in the opinion of the Court.

Francis J. Dunn for Appellants.

The complaint is defective in this, that this Court has well said, that although the form of actions, under our Practice Act, has been well defined, yet as to the matter of complaint, as of old, two separate causes of action — unless in the same class — may not be joined without the distinctive features dividing them. Keegan & Co. of Cold Spring

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Co. v. Bigelow et al. of Bigelow Co., Jan. Term, Supreme Court of California, 1847.

In this case, then, is a clear conflict with the rule laid down in the case above referred to, in this: that the cause of action, that is, for the breaking of the dam of the defendants, and the consequent injury resulting therefrom, is joined with a count in the same complaint, mixed and joined for damage, in consequence of the plaintiffs being prevented from working their claims.

We say, the demurrer should have been sustained, in virtue of the fact, as set forth in the demurrer, that the true cause of action is not stated in the complaint. At common law, we take it, that the cause, as the facts elicited, was one in trespass only, being immediate and not consequential; yet the said complaint is one for consequential damages.

The action is in the nature of an action of trespass; although the count or complaint is in case, the two could not be joined.

McConnell & Niles for Respondents.

1st. The instructions given for plaintiffs, numbered 1, 3, 6 and 7, refer to the degree of negligence of defendants, in the construction of their dam, which would render them liable for injuries resulting from its breakage.

In the case of *Tenney v. The Miners' Ditch Co.*, (April Term, 1857) this Court said: "There is no doubt that the owners of a ditch would be liable for wanton injury or gross negligence, even if prior in point of time." We do not believe that this Court intended to say that the ditch owners, prior in point of time, would be liable only for wanton injury or gross negligence; but in the case at bar, we may safely admit that it was the intention of this Court, in the case cited, to extend the limit of the ditch owners' liability to that extreme, for every one of the plaintiffs' instructions call upon the jury to find for plaintiffs, only in case they find the defendants guilty of gross negligence or recklessness.

It was the breakage which caused the injury, and no care of plaintiffs in the management of their property, could have prevented it. Hence defendants' instructions were properly refused. *Cook v. Cham-*

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plain Nav. Co., 1 Denio, 92; 1 Smith's Leading Cases, Hare & Wallace's Notes, ed. of 1855, p. 365; Bird v. Holbrook, 4 Bing. 628; Platte v. Wilkes, 3 B. & A. 308; Walters v. Pfeil, 1 Moody & Malk. 362; Davies v. Mann, 10 Mees. & Wel. 546; Lynch v. Murden, 1 Adolph. & Ellis, N. S. 29; Smith v. Dolson, 2 Man. & Gran. 59; Mayor of Col. v. Brooks, 7 Ad. & Ellis, N. S. 338.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This was an action for injuries to mining claims, and loss of gold-bearing earth, occasioned by the negligent building of defendants' dam across and over a ravine, upon which the plaintiffs' claims were located — the claims being above the dam. The injury is charged to have resulted to the plaintiffs, from the careless construction of the dam, and a reservoir, whereby the gold-bearing earth of the plaintiffs was washed away by the water and lost, and other injuries done to their mining claims and property.

The defendants demurred to the complaint, and assigned several technical causes of demurrer. The main ground taken here in argument is, that there is a misjoinder of causes of action in the complaint in this: that the complaint claims damages for the immediate injury, by the breaking of the dam, to the pay-dirt, etc., of the plaintiffs, and also to the plaintiffs in preventing them from working their claim. But this is no misjoinder — if the objection be warranted by the facts — even according to the rules of common law pleading, which recognized the nice, and now obsolete, distinction between the action of *trespass vi et armis*, and the action of *trespass on the case*. For either of these classes of damages, the form of remedy would be *case* by the old rule; the gist of the action not being the erection or breaking of the dam, but the negligence — the indirect consequence of which negligence was the injury — just as in cases of injuries caused by the not keeping of streets in repair, and the like. Chitty on Pleadings, 1 vol. 126.

The complaint seems to be well drawn, and sufficiently states the facts, viz.: that the plaintiffs, before the committing the grievances complained of, owned and possessed the premises injured, and that the

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defendants carelessly, negligently and unskillfully built the dam and reservoir, and filled it with great quantities of water, which they detained at and along the dam, thereby causing the plaintiffs' claims to overflow, and the gold-dirt to be washed away, and the claims to remain unworked, etc.

Numerous instructions were given, and several were refused. The Court instructed the jury that the plaintiff could not recover unless the defendant was guilty of gross negligence. This was repeated in a variety of forms. We think that, if any fault is to be found with the charges given, it is that they were too favorable to the defendant.

An instruction (marked No. 4 of those asked by the defendant) was refused, and the refusal excepted to. The Court was asked to charge that, if the jury believe that the injuries could have been prevented by the exercise of reasonable care on the part of the plaintiffs, they must find for the defendant. This was refused. If such an instruction be proper in any case, it is not in this. The plaintiffs were in no default for keeping their property on their own premises, nor were they bound to remove it, nor to rebuild or alter the defendant's dam. He could not be held to the knowledge of the consequences, or the probable injuries resulting from the defendant's negligence. The defendant was bound to see to his own property, and to so govern and control it, that injury would not result to his neighbor's. If, in consequence of gross neglect, on the part of the plaintiffs, the injury happened, a different rule *might* be applied; but a mere want of reasonable care to *prevent the injury*, does not impair the right to recover. We apprehend, if a man carelessly fires a gun into the street, that it would scarcely be admissible for him, when sued for the injury done another by it, to say that, by reasonable care, the other might have got out of the way. The instructions given in this general form, if the substance could be supported under any given state of facts, could only be to mislead the jury in this case; for what would be reasonable care under the circumstances? What should the plaintiffs have done? Should they have controlled the property of defendant? or removed his own effects? if so, when? or inspected the dam — or offered to repair it — or given formal notice of defects? These

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inquiries show the danger of such an instruction, as well as illustrate the radical error it embodies. See *Lynch v. Nurdin*, 1 Adol. & El. 29.

Several other instructions were asked, but the substance of them had already been given; and the body of the charges—some twelve or more—presented to the jury, fully and clearly, the propositions of law which applied to the whole case, and every material point, and enabled the jury fairly to pass upon the entire issue.

We cannot interfere with their verdict, there being some evidence upon which it can rest.

Some other errors were assigned, but we think it unnecessary to notice them.

The judgment is affirmed.

MAGRUDER v. MELVIN *et al.*

Where the appellant's case is supported by neither law, justice, nor fact, the appeal will be affirmed with damages for the delay.

APPEAL from the Twelfth District, County of San Francisco.

***Perley & MacKinley* for Appellants.**

***M. H. Farman* for Respondents.**

BALDWIN, J., delivered the opinion of the Court—FIELD, J., concurring.

This appeal is without merit. The appellant's case is supported by neither law, justice, or fact. The appeal was evidently intended for delay, and the judgment is affirmed, with five per cent. damages.

Baldwin v. Simpson.

BALDWIN v. SIMPSON.

Where a party takes possession of a tract of land, and incloses it with a fence consisting of posts seven feet apart, and one board, six inches wide, nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract, under a deed to the whole. Possession of a part, under a deed to the whole tract, where the possessor's grantors had the land surveyed, and the lines marked by the blazing of trees, is sufficient possession as against a party who enters upon a part of the tract, and builds a fence wholly insufficient for any other purpose than to mark the line of his claim.

APPEAL from the Eleventh District, County of Placer.

This was an action to recover the possession of a tract of land, and for an injunction to restrain the defendant from cutting and moving timber therefrom.

The land in controversy is probably a part of the public domain. The claims of both parties are stated in the opinion of the Court. The cause was tried in the Court below by a jury, who returned a verdict for the defendant, and judgment was entered thereon; plaintiff appealed to this Court.

Tuttle & Hillyer for Appellant.

B. F. Myers for Respondent.

BALDWIN, J., delivered the opinion of the Court—FIELD, J., concurring.

This was a controversy for a piece of land—forty acres. Defendant claimed under a deed for four hundred and eighty acres; his predecessor had it surveyed and the trees blazed; and the defendant entered under the deed into actual possession. The plaintiff afterwards entered upon this forty-acre tract, but did not reside on it. He inclosed it with a board fence, but the fence was insufficient to keep out cattle, etc.—the fence being one board in height. The land was not cultivated in any way, and was chiefly valuable for its timber.

We do not think the points of appellant well taken. The plaintiff

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was not entitled to recover on this statement, against the defendant. He had no sufficient possession to justify a recovery against the defendant. The fence, such as it was, if sufficient under other circumstances to show possession, was not sufficient as against a party in possession of part, under claim to the whole. We do not see why a survey, a stake and blazed trees, are not equal to such a fence as this was, to show possession. The rule, we believe, is general, that a party entering under a deed with specific boundaries, and holding actual possession of part, is to be taken as against a mere trespasser, as in possession of all the land within the boundaries of his deed; at least, he could not be dispossessed by one who merely comes on part of the land, to build a fence entirely insufficient for any other purpose than to mark the line of his claim.

Upon this admitted state of facts, the plaintiff was not entitled to recover, and the Court might have so charged the jury. The plaintiff was not prejudiced by the errors assigned, if there were any; but we think there was no material error.

Judgment affirmed.

MORLEY v. DICKINSON *et al.*

Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon property of the principal sufficient to satisfy the same. After the levy, the Sheriff, under the directions of the plaintiff in execution, took the principal's note for the amount of the judgment, and released the levy. Subsequently, a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff; *Held*, That the release of the levy of the first execution, and the taking of the principal's note, discharged the surety.

The contract, until rescinded by the return of the note, was sufficient to postpone any right to enforce the execution, although the note may have been given in fraud.

APPEAL from the Thirteenth District, County of Stanislaus.

The facts are stated in the opinion of the Court.

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L. Quint & Jas. W. Coffroth for Appellants.

I. The plaintiffs had the right, any time within five years, to issue execution upon the judgment, provided it was unsatisfied. See Practice Act, 209.

The execution, with the return of the Sheriff, (which is made a part of the complaint) did not operate as a satisfaction. The return, after reciting a levy upon certain personal property, reads as follows: "I return this execution, satisfied by *two notes* of hand — one for \$91.72, the other for \$650 — making in all \$741.72; and the above property is released."

II. The Sheriff had not the power to discharge the execution even by returning it satisfied, unless he proceed and execute it in due course of law.

The taking of a negotiable promissory note, receipting as payment, and returning the execution satisfied, would not operate as a discharge of the execution (much less of the judgment) even though the defendant afterwards pay such note to third parties, to whom it has been transferred. *Bank of Orange Co. v. Wakeman*, 1 Cowen's R. 46.

E. F. Hunter for Respondent.

1st. The levy of the execution on sufficient personal property of one of the judgment debtors, was a satisfaction of the judgment. The authorities are clear on this point. *Vide Hoyt v. Hudson*, 12 Johns. 207; *Ladd v. Blant*, 4 Mass. 403; 1 Salk. 322; *Ex parte Lawrence*, 4 Cowen, 417; *Ontario Bank v. Hallett*, 8 Cowen, 194.

BALDWIN, J., delivered the opinion of the Court — FIELD, J., concurring.

Plaintiff filed this bill in equity, alleging that he was surety on a contract for other parties, and judgment was recovered against all the makers thereof, himself included; that execution issued on this judgment, and was levied on sufficient personal property of one of the principals; that the Sheriff released the property on the giving by the principal of his promissory note; the Sheriff returned the execution satisfied — stating these facts; and further, that defendants — plaintiffs

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in the execution — have sued out another execution, and are proceeding to levy it on the property of plaintiff here; that the promissory note for all except the costs due on the execution was received by the plaintiffs in execution, who participated in and assented to this arrangement.

It seems that the note so received by the plaintiffs was sued on by them, and a recovery defeated.

These facts, with some others not material, are found by the Court. The case was tried by the Judge, and a decree of perpetual injunction rendered. We think the decree right. The creditor having secured his debt by a levy on the property of the principal debtor, could not discharge the levy to the injury of the surety. Any extension for a definite period by the creditor to the principal, without the assent of the surety, if the contract be on good consideration, discharges the surety. So any discharge of securities of the principal in the hands, or within the power of the creditor, operates a like discharge of the liability of the surety. This has been held in many cases, and is a well settled principle of law. Parsons on Cont. 510, 514, and cases in note W to P, 511.

In this case, the money might have been made by the plaintiffs in execution, had they not voluntarily released the property subject to the process. Whether the note was given in fraud or not, the contract, until rescinded by the return of the note, was effectual to postpone any right to enforce the execution; but no such rescission seems to have been made.

Although some minor errors may have intervened, yet as this is an equity case, and the facts above stated are not affected by the alleged errors, we think there is no sufficient reason shown for disturbing the decree. It is affirmed.

Ingoldsbey v. Juan.

INGOLDSBY v. JUAN *et al.*

A deed properly executed and acknowledged by the wife, of her separate property, with the assent of her husband underwritten, not under seal, but properly acknowledged, is sufficient to pass the title.

Lands acquired by a married woman, under the Mexican laws, and which were her separate estate, might be conveyed, before the adoption of our statute, with the bare assent of the husband, by any informal instrument, or, possibly, without writing. By our Constitution, property thus acquired is the separate estate of the wife; she does not, therefore, look to our statute respecting conveyances, as the source of her authority to sell or dispose of her property. On the contrary, the statutes are a limitation upon the power — prescribing a new and distinct mode of conveying the land or evidencing the sale or disposition of it. It disables her from disposing of her property as she could before have done. So far as the disability is clearly evidenced, the restraint exists; but it goes no further to restrain her than this manifest intent. She retains all her original rights and powers over the subject, except such as are expressly taken away.

In such case, the joining of the husband in the conveyance is not for the purpose of passing title, for he has none to convey. It is only as a precaution against imposition, or to afford her his protection, or similar reasons of policy or to evidence his renunciation of the right to manage or control it.

A deed which recites the title of the wife, and then declares that the husband unites in the conveyance, in pursuance of the statute, is sufficient.

Literal conformity with the statute concerning conveyances of the separate property of the wife, as a general rule, is not required. A substantial compliance is all that is necessary.

It is a familiar rule, recognised by this and all other Courts, that where several papers, concerning the same subject matter, are executed by or between the same parties at the same time, all are to be construed together as one instrument.

There is no peculiar form for the signing of a deed. Any writing which clearly shows that a party has adopted a sealed instrument as his own, intended to be bound by the contents of it, is, if not a formal, at least a sufficient execution to satisfy the statute.

The sixth section of the Act concerning Husband and Wife, relates only to separate property acquired after the passage of the Act. No retrospective operation was intended, or, perhaps, could have been given to it. In such cases the statute only operates upon future transactions and matters.

A County Clerk may take and certify an acknowledgment to a deed, although he has no seal of office. This general phrase, "having a seal," was only intended to denote a Court of Record, which is defined to be a Court having a seal. The power of the Clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it.

APPEAL from the Seventh District, County of Contra Costa.

Ingoldby v. Juan.

This was an action of ejectment. The facts are stated in the opinion of the Court, but will, probably, be better understood by setting forth the amended answer of the defendants, which presents the question upon which the opinion of the Court is based. It is as follows:

"That all the right, title or interest which Martina Castro ever had in any part of the demanded premises, was held by her before her marriage with Lewis Depeaux, in 1849, and before the adoption of the Constitution of this State, and, that the same was her separate property; that she, in August, A. D. 1850, with the knowledge, consent and concurrence of her husband, made a deed to her children, for a valuable consideration, purporting to convey to them eight-ninths of the demanded premises, which conveyed an equitable title, and converted her into a trustee for their use and benefit; that all the rights which the children took under that deed, had, by divers conveyances, vested in the defendants; that the children entered into possession of the property, after the execution of the aforesaid deed, with the consent of the aforesaid Martina and her husband; and that they and defendants had made improvements to the amount of \$18,700, which were now on the premises demanded; that plaintiff and his co-tenant and grantor subsequently purchased the demanded premises of the said Martina Castro and her husband, with reference to her said deed to her children, and with full and actual notice thereof, and that the price paid by them was about one-half of the ninth part of the demanded premises, which she, in said deed to her children, reserved to herself; and that they purchased with full and actual notice of the rights of the defendants — of their possession and of the value of their improvements; and defendants deny any interference with the said Martina or plaintiff, in the enjoyment of the remaining one-ninth part of the land sought to be recovered." This answer was sworn to.

Plaintiff moved to strike out the amended answer upon the following grounds:

1st. Because the same was irrelevant.

2d. Because the same set up a sham defense.

The Court ruled that the amendment should be stricken out, unless defendants should elect to rely on such amendment to the exclusion of

the original answer; and defendants refusing so to elect, the amendment was stricken out, and defendants excepted.

R. F. Peckham for Appellant.

The first question presented in this connection is, whether the Act of April 17th, 1850, applies to property acquired before its passage. That it was not the intention of the Legislature that the Act should be so applied, appears from the fifteenth section thereof, which reads: "The rights of husband and wife, married in this State prior to the passage of this Act, or married out of this State, but who shall reside and acquire property herein, shall also be determined by the provisions of this Act, with respect to such property as shall be *hereafter acquired*." (Wood's Dig., art. 2616, sec. 15.) Martina Castro and her husband were married prior to the passage of the Act, and the property was previously acquired. If it was the understanding of the Legislature, that the provisions of the Act were to govern parties before then married in relation to all their property, there was no necessity of section 15 applying them to such persons as to property thereafter acquired; the maxim, *expressio unius exclusio alterius est*, must be applied, and the conclusion is obvious, that the Act under consideration has no application to property held by a woman married in this State before its passage. But, discarding the provisions of section 15, and the position that the Act would then have no application to parties married before its passage as to property before then acquired, would be fully sustained by the case of *Sawyer v. Plumb*, 21 Conn. Reports.

We are to contemplate the *feme covert*, before the passage of this Act, with reference to the laws then in force, and the rights and capacities which she enjoyed under them, and which were fixed, guaranteed, and protected by the Constitution, and ask whether they have been divested or abridged by the Act in question? In examining the question, we are to regard the wife as clothed with a separate legal existence so far as her separate property is concerned: in this we are supported by authority. *Edrington v. Mayfield*, 5 Texas; *Wood v. Wheeler*, 7 Texas; *Holmes v. Holmes*, 4 Barbour; *Harney v. Hill*, 7 Texas, 591.

In *Mitchell v. Tucker*, (10 Mis. 260) Scott, Justice, delivering the

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opinion of the Court, says: "By the Spanish law, which prevailed here prior to the introduction of the common law, lands might have been aliened by parol; this is settled. So in the civil laws, which is the foundation of the Spanish system of laws, no verbal solemnities were required to give validity to a contract; all that was required was the *apprehension and consent* of each party, expressed in any form of words."

Thus stood the law, and her power and rights in regard to the alienation of her property, until the adoption of the Constitution, which declares the rights of husband and wife, (see Wood's Dig. p. 36, sec. 14) which was adopted from the Constitution of Texas. This clause placed husband and wife upon terms of equality, so far as their separate property is concerned. See the remarks of this Court in *Selover v. The Russian American Co.*, January Term, A. D. 1857, in connection with the following cases from the Supreme Court of Texas: *Edrington v. Mayfield*, 5 Texas, 363; *McRay v. Treadwell*, 8 Texas, 176; *Womack v. Womack*, 8 Texas, 397.

Under this Constitution, and the laws then in force, she was vested with as full, perfect and absolute title to her separate property, as the husband possessed in reference to his, and the right of alienation was an inseparable incident to such ownership. She could sell and dispose of the same as she pleased, without the interference of her husband. *American Home Society v. Wadhams*, 10 Barb. 597; 2 Story Eq., sec. 1390; *Roper*, 177, 198; *Vanderhayden v. Mallory*, 1 Comst. 452.

We hold that this right, and power of alienation, could not be abridged or divested by any subsequent legislative enactment, and that all laws requiring her husband to join with her in the deed, to enable her to alienate her separate estate, are abridgments of her vested rights in the property under the Constitution, and are null and void; and in support of our position upon this point, offer to the Court for consideration the following authorities: *Wilkinson v. Leland*, 2 Pet. 627; *Wilson v. The State of New Jersey*, 5 Cranch, 164; *Westervelt v. Gregg*, 2 Kernan, 202; *Commercial Bank of Natchez v. Chambers et al.*, 8 S. & M.

But it is not upon the ground alone that the Act divests vested rights, that appellants contend that it is unconstitutional; but also

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upon the ground that it impairs the obligations of the married contract. We have seen that by the law of the marriage in 1849, Martina Castro could convey without his joining with her in the deed; and this law was a contract on his part, that she should enjoy and exercise that privilege. *Smith v. Smith*, 1 Texas, 621; *Holmes v. Holmes*, 4 Barb. 295; *Edrington v. Mayfield*, 5 Texas; *Womack v. Womack*, 8 Texas, 397; *Hooper v. Smith*, 23 Ala. R.; *Woods v. Wheeler*, 7 Texas, 13; *Selover v. The Russian Co.*, 7 Cal. 266.

The principles laid down in these cases show conclusively that the deed in question was valid, and binding upon Martina Castro, notwithstanding the Act of April 16th, A. D. 1850, without the signature of the husband, or her private acknowledgment.

But we insist, that if her separate acknowledgment was necessary to pass her title, that the acknowledgment by her on the day of execution of the deed, taken and certified by Peter Tracy, Clerk of the County Court, and the certificate thereof, were in all things sufficient to entitle the deed to be read in evidence; he was Clerk of a Court having a seal, within the meaning of section fourth of the same Act. (*Wood's Digest*, art. 341.) The law required that the County Court should have a seal. (*Session Laws of 1850*, p. 218, sec. 14.) And though no official seal had in fact been provided for that Court, yet it would be too narrow a construction to hold that its officers could not perform their assigned functions until an official seal should be in fact procured. On the contrary, the same section provides, that until the official seal be provided, the private seal of the Clerk may be used instead of a seal of the Court; and in Kentucky, where no such provision was made for the use of a private seal, it was decided that the seal generally used by the Clerk, though a private seal, must be presumed to have been adopted as the seal of the Court. *Collins v. Boyd*, 5 Dana, 316.

Gregory Yale for Appellants.

In addition to what is stated in Mr. Peckham's brief, respecting the sufficiency of the conveyance from Depeaux and wife to the defendants, we wish to repeat what was stated by counsel in the oral argument in this Court, that there is an important distinction in the terms

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used in the "Act concerning conveyances," passed April 16th, 1850, and the "Act defining the rights of husband and wife," passed April 17th, 1850, so far as relates to the *form* of the conveyance.

This inquiry is pertinent, in view of the objection made to the introduction of the deed of Martina Castro to her children, in which her husband, Lewis Depeaux, joined, upon the ground that the acquiescence of Depeaux was not under seal.

By the Act of the sixteenth of April, 1850, sec. 1, "conveyances of lands, or any estate or interest therein, *may be made by deed*, signed by the person by whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged, or proved, and recorded," as therein directed, construing "may" as meaning "shall," this provision signifies, generally, that conveyances of real estate made under that Act, must be by *deed*. This mode of conveyance necessarily imports a sealed instrument.

By section 19th, "a married woman may convey any of her *real estate by any conveyance thereof*, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided by the proper officer taking the acknowledgment."

She may convey "by any conveyance." The term is here used as the instrument by which the contract of conveyance is consummated. "Conveyance," as an instrument, does not necessarily, as the term "deed," import a *sealed* instrument.

But under the operation of the Act of the seventeenth of April, "defining the rights of husband and wife," the rights of a married woman, as respects her separate estate, are fixed and defined. By section six, "the husband shall have the management and control of the separate property of the wife, during the continuance of the marriage, but no *sale* or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, *unless by an instrument in writing*, signed by the husband and wife," etc. Here, in this special Act, relating to husband and wife, the terms "deed" and "conveyance" are not used, when speaking of the "sale" of the separate property of the wife. A "sale" cannot be made, "unless by an instrument in writing." An "instrument in writing" does not import a *deed*, duly signed and sealed. It may be of such a char-

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acter, but not necessarily. 2 Tomlin., 210, title "Instrument." It is the evidence of an agreement, when reduced to writing. It is the form of the agreement, and may be valid, and the agreement void on account of fraud. 1 Bouvier, 703, *Ib.*

The conveyance by Depeaux and wife to the defendants in August, 1850, or the conveyance by the wife, in which he acquiesced in the form stated in the record, is to be controlled by this Act. This is the sense in which these two Acts have been regarded by this Court, so far as the negative words used in the latter are interpreted to be a prohibition against any other mode of conveyance. *Selover v. The American R. Co.*, 7 Cal. 266.

A "sale," therefore, by the husband and wife, of the separate estate of the wife, can be made by "an instrument in writing," acknowledged as the Act requires, and need not be made by "deed" *under seal*, as contended in the objections made to the introduction of the title under which the children claimed.

She, however, uses a seal, and one seal is good for twenty grantors to a deed. (*Bohannons v. Lewis*, 3 Monroe, 877, citing *Shepherd's Touchstone*, 55.) The same doctrine is extended to *scrawls*, in the United States. *Ib.*

John Wilson for Respondent.

As to the first point made by Mr. Peckham, that our Statute concerning Conveyances does not apply to property held before the Act, was only intended to regulate the transfer of such as should be obtained after the passage of the Act.

There is no exception in the Act itself, and there is no reason why there should be; and there are no authorities which authorize such a construction of the Act, and if there were, such a construction as he contends for would certainly lead to great confusion, and its practical results would be absurd; and under it the Act in many cases would not take effect for more than half a century after its passage, as to some property, and as to other property owned by the *same individual* it would take effect immediately upon its passage. The Legislature certainly intended no such absurdity. The fourteenth section of the eleventh article of our Constitution provides, that the Legislature shall

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have power to prescribe the mode in which married women may dispose of their separate property, and the Legislature has done so; and it seems to me that there is no necessity for further argument upon this point. The case of *Selover v. The American Russian Co.*, 7 Cal. 266, seems to settle this whole question.

Mr. Peckham insists that married women could convey by *parol*, and without the assistance and authorization of their husbands. I believe this Court has held that conveyances could *not* be made by *parol*; and the proposition is as old as the civil law itself, that a wife must either have the authorization of her husband, or a decree of a Judge, before she could convey any of her rights, or make any contract under the civil law.

I come, then, to the proposition of the defendants, to give in evidence the supposed deed from Martina Castro. I maintain that it was rightly rejected, and refer to the second section of the Act of sixteenth April, 1850, concerning conveyances, which in so many words requires a wife's property to be passed by *joint deed*. The same Act requires all conveyances to be by deed, and by the sixth section of the Act of seventeenth April, 1850, no sale or other alienation of the wife's property can be made unless by an instrument of writing signed by the husband and wife.

Now, while she held the separate property in the ranch, as the paper on its face shows she did, still her husband had the entire control of, and was entitled to receive the whole rents and profits, and had an equal interest with her in all the improvements put upon it during the marriage, and his heirs after him would have inherited all he was entitled to therein at the time of his death. Therefore he had a large interest that could not pass unless by his deed. The paper shows no pretence that his interest was conveyed, and in his endorsement there are no words of conveyance, and if there was, then there was no seal, and without doubt he cannot convey his interest unless by deed.

Then the deed must be a joint one, or the instrument in writing must be signed by both, and therefore in no fair construction that can be put upon the statutes, can it be called a joint deed or instrument of

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writing signed by them both. The statute must mean that both shall be bound by the covenants therein — both must jointly convey all their interest in the subject matter of the conveyance.

1 Metcalf Rep. 542, *Bruce v. Wood*; 9 Ham. Rep. (Ohio) 121; 9 Mass. R. 218; 13 Mass. R. 223, *Lumpkin v. Austin*; 7 Blackf. R. 410, *Cox v. Wells*; 7 Blackf. R. 66.

In 1 Martin, N. S. R. 611, *held*, that separate deeds did not transfer the wife's estate. The law there is exactly the same as ours.

In Cal. Rep. January Term, 1856, *Helen Pool v. F. Gerard*, this Court decided the same as to the sale of a homestead, which stands on the same footing as to this point.

Selover v. The American Russian Co.; *Sempers & Cranmar v. E. Sloan*, 5 Cal. 457, the late cases of *Another v. Tewksbury*, all seem to me to settle this point. *Turnbull v. Cerba*, 1 Martin, N. S.

In 12 Robinson's R. 82, the Court held that where the husband authorized the wife to sell, she could not take back a mortgage for part of the purchase money.

In 1 Martin Rep. (O. S.) 294, the Court enters fully into the discussion of the power of married women to contract under the civil and Spanish law, and held that every condition must be strictly complied with.

See to same point, 19 Howard Rep. (U. S.) 148, *Megan v. Boyle*; 3 Louisiana R. (O. S.) 581, *Boucler v. Launse*; 3 Louisiana R. (O. S.) 84, *Draugent v. Prudomme*; 4 Barb. Ch. R. 296, *Holmes v. Holmes*; 4 Harris, (Penn.) R. 484, *Trainer v. Hagg*. These are ample authorities, as I suppose, to satisfy this Court that nothing passed by this paper upon its face.

I deny that Tracy had any authority to take the acknowledgment of this paper as County Clerk. Our statute only authorized a Clerk of a "Court having a seal." It is true he was *ex officio* Clerk of the District, County, Probate and Court of Sessions, and yet some of them had no seal at the date of this paper, or now and then of necessity, he must state in what capacity he took it, that the Court might see and inspect the seal he used, to see if it was the correct one. The County Clerk had no seal; he says he uses his private seal.

Proving the handwriting cannot help the case, because a married

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woman can only convey as pointed out by the statute. See case of *Another v. Tewksbury*, lately decided.

In 1 Peters (U.S.) Rep. 328, *Elliott v. Pearsal*, it was decided you cannot even show by parol proof that the wife was duly examined — the certificate must state that, and its defeat in form cannot be healed by parol or other proof.

In 3 La. Rep. 74, it is said that those who rely upon a married woman's deed, must show everything was done as the law requires. 7 B. Monroe, 255, 4th and 5th sections of Act 1850, page 249. Therefore this deed is also void for want of acknowledgment in accordance with the requirements of the statute.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This action of ejectment was brought to recover a tract of land, lying in Santa Cruz county, being part of the Soquel Ranch. The plaintiff claims, under a deed, made by one Martina Castro to plaintiff, and one Labaria, dated January 22, 1855, and a deed from Labaria, on the tenth of September, 1855, to plaintiff.

The record shows that the grantor claimed to be entitled to the premises in dispute, by virtue of a grant from Figueroa, the Governor of the late territory of California. It shows, also, that the defendants were in possession, claiming by virtue of a deed, made by the same Martina Castro (or Depeaux) on the twenty-ninth of August, 1850. At this time she was the wife of one Lewis Depeaux; but she had been, before her marriage with Depeaux, the wife of one Michael Lodge, who died previous to her inter-marriage with Depeaux. The grant to her by Figueroa was made while she was the wife of Lodge.

Many interesting questions are raised by the counsel, and they have been argued with learning and ability. We do not consider it essential to the disposition of this case upon its merits to pass upon them all. The main question which, we think, disposes of the question of title, rests upon the validity of the deed set up by the defendants in bar of the plaintiff's action. This deed purports to be a deed of bargain and sale, executed by Martina Castro to her children, eight in number, conveying to each one an undivided ninth part of the ranch. This deed

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was signed and sealed by her, in the presence of T. R. Perlee and Peter Tracy, as subscribing witnesses. The deed was acknowledged, in proper form, before Peter Tracy, County Clerk of Santa Clara county, on the day of its date. The husband, Depeaux, did not sign the deed in the body or at the foot of it, as usual in such cases; but at the bottom of the deed, and after the certificate of acknowledgment, these words were added: "I have read the foregoing, and fully agree with the conveyance made by my wife; Lewis Depeaux" — witnessed by the same persons as the deed. Then follows the certificate of acknowledgment by Depeaux before the same officer, that he executed the foregoing instrument freely and voluntarily, and for the uses and purposes therein expressed.

All this was contemporaneous with, and a part of the execution of the original deed.

The deed being the predicate of the title of the defendant was ruled out, because, under the statute of 1850, it did not convey the title of the grantor, Martina, in the premises. If this pretension could be maintained, probably no case could be found in which technical law so far prevailed over natural justice. The grant was made to Mrs. Castro for the benefit of her family. She sought unquestionably to carry out the true intent of the grant by securing to her children a portion of its benefits. The deed she afterwards executed to the plaintiff's predecessor, evidently by the terms of it (whatever its strict technical meaning) was only designed to convey the interest remaining in her after the deed to the children. But it is charged that, by force of some general words after a particular description of the part intended to be conveyed, the whole tract passed, the deed to the children being inoperative, because, though the husband, Depeaux, assented to the deed, yet he was not, *stricti juris*, a joint grantor with her.

We assume for the argument, and that only, that this property was the separate estate of Mrs. Castro, and that a separate estate vested before the passage of that Act defining the rights of husband and wife.

By the fourteenth section of the eleventh article of the Constitution, "all property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise

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or descent, shall be her separate property." The sixth section of the Act "defining the rights of husband and wife," passed April 17th, 1850, provides that the husband shall have the management and control of the separate property of the wife during the continuance of the marriage; but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband, before certain officers — the County Clerk not being one.

The Act of April 16, 1850, (Wood's Dig. 100) section two, provides that a husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried. Section three declares, that proof of acknowledgment of every deed of land may be taken by some Judge or Clerk of a Court having a seal. Section twenty — a married woman may convey any of her real estate by any conveyance thereof, executed and acknowledged by herself and her husband, and certified in the manner hereinafter provided, by the proper officer taking the acknowledgment.

Taking these Acts together, we think it cannot be contended that it was the intention of the Legislature to restrict the making of a contract respecting land by the wife to a formal deed. We do not consider these statutes as enabling Acts. They probably would be so if the common law operated upon the relations or marital contracts of the parties at the time of the contract. But, by the Mexican law and by the Constitution, the property was a separate estate in the wife. She could, before the statute, dispose of it, with the bare assent of the husband, as she chose, by any informal instrument, or, possibly, without any writing. The wife does not, therefore, look to the statutes as the source of her authority to sell or dispose of her property. On the contrary, the statutes are a limitation upon the power — prescribing a new and distinct mode of conveying the land or evidencing the sale or disposition of it. It disables her from disposing of her property as she could before have done. So far as the disability is clearly evidenced, the restraint exists; but it goes no further to restrain her than this manifest intent. She, of course, retains all her original rights

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and powers over the subject, except such as are expressly taken away. The law neither presumes nor favors restraints upon alienations of property or upon contracts. One of the attributes of property is the power to sell and dispose of it. By the general law the sale may be absolute or conditional, partial or complete; and the contract executory or executed. It may be evidenced in various ways or made in various forms; as, by mere memoranda in writing, or deed under seal, by agreement for a title, or mortgage, or on conditions precedent or subsequent.

It has been seen, that the Act of April 17th, uses the term "instrument" in writing. The Act of April 16th, in the twentieth section, the word "conveyance." By section thirty-six of the Act concerning conveyances (the Act of April 16th, Wood's Dig., p. 104) "the term 'conveyance,' as used in this Act, shall be construed to embrace every instrument in writing by which any real estate, or *interest in real estate*, is created, alienated, mortgaged or assigned, except wills," etc.

It is argued, that the words "may convey," especially in connection with the sixth section of the Act of April 16, which is prohibitory of any mode except that given, are to be construed as authorizing only a conveyance as therein provided; that is, that in order to make the deed of the wife effectual, the husband must join in the deed. It will be observed, that the estate is confessedly in the wife; *her* title it is that is to pass; the joining of the husband is not for the purpose of passing title. It is only as a precaution against imposition, or to afford her his protection, or similar reasons of policy, or to evidence his renunciation of the right to manage or control it. [In this case, the contract having been made, and the right of the wife having vested under a different system, it is, to say the least, doubtful whether the Legislature could give the husband any power to control or manage such separate property, and more than, if he had it under the old system, the Legislature could take it away.]

The deed was formally executed by the wife and acknowledged. She signed and sealed it; but for the coverture it would have passed her estate. But the husband, it is argued, did not seal it, and was no party to the deed. But after the deed was signed and sealed, the husband did sign, at the foot of it, an express approval and adoption of it. In terms he agreed to the conveyance. It is true this agreement

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was not under seal. The agreement did not convey any title, for he had none to convey. If he had signed and sealed the deed as an express party named in the premises thereof, the result would have been the same. All that his formal execution of the deed could have done, would have been a signification of his assent and agreement. Having no estate in the land, unquestionably the law would not require of him the vain act of pretending to convey title. It would have been enough if the deed had recited the title of the wife, and then declared that the husband united in the deed in pursuance of the statute. We know of no rule which requires a construction of this statute different from other Acts of the Legislature. Literal conformity is not, as a general rule, required. A substantial compliance is all that is necessary. When the end is answered, the mere mode is not usually of the substance of the Act. No prohibitory words are used in the clause (section nineteen) we are now construing. The language is, that a married woman *may* convey any of her real estate by *any conveyance* executed and acknowledged by herself and her husband. Prohibitory words are not used in the twenty-second section, as to the mode and fact of acknowledgment. The question now arises, what is a conveyance? We know of no authority which holds that a conveyance of an interest in land must necessarily be under seal; and, if it were so at common law, it does not follow that it is so required by our statute. On the contrary, the definition given by the thirty-sixth section, quoted before, shows that such was not the intention, for the language is, "Every instrument by which an interest in land is created" is a conveyance; and we all know, that "an interest in land" may be created by writing not under seal. The question is not — as we shall presently more fully explain — whether a paper unsealed passes the fee or strict legal title, but whether any right in or to the estate can pass without a seal.

It is a familiar rule, recognized by this and all other Courts, that where several papers, concerning the same subject matter, are executed by or between the same parties at the same time, all are to be construed together as one instrument. *Makepeace v. Harvard College*, 10 Pick. 297; *Stone v. Hansborough*, 5 Leigh, 422.

There is no peculiar form for the signing of a deed. It takes effect

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from delivery. The old form required no signature even, but a sealing was sufficient; and now the signature is often good, if made by another and adopted by the grantor. Any writing which clearly shows that a party has adopted a sealed instrument as his own, intending to be bound by the contents of it, is, if not a formal, at least a sufficient execution, to satisfy the statute. We have seen that a formal execution of this deed by the husband, would only be a written expression of his assent to it. But surely, in equity, a contemporaneous expression, in writing, of that assent, is not the less effectual because it is expressed; not in the body of the deed, but on the same paper, a few lines below the signature of the wife. If he had added, "The above is my deed," no one would have questioned that it was a good execution. Is there any substantial difference, when he says, "I agree to or with the foregoing deed," especially when, as said before, all that his signature as a party to the deed could amount to, is that agreement? But it is said that there was no execution of the deed by Depeaux, because the instrument is not sealed by him. We do not admit that the statute ever intended so great a strictness in the *mode* of execution by the husband. The *fact* of execution is indispensable, but we see no greater reason for holding to any more strictness in the *manner* of execution in this than in other cases. Could it be contended that if the deed were executed with a seal by the wife, and without a seal by the husband, that this defect would vitiate the deed? We are at a loss to see upon what principle. If there had been no seal, the instrument would have been good, as creating an equity, if not good to cast the fee. But this memorandum, signed by Depeaux, adopts the entire deed, and with it the seal affixed to the signature of the wife. (3 Monroe, 377.) But it may well be doubted whether, in such a case as this, the seal of the husband is necessary, having no estate to convey, but merely assenting to the passing of the wife's title. If the execution were defective in form, the substance or the Act having been complied with, it would be the common case of a defective execution of an instrument, which chancery might correct; but it would vest an equity in the grantees in possession under the deed.

The vice of the whole adverse argument, is in supposing that because

there must be a joining by the husband in the execution of the deed, and an acknowledgment by the wife in the required form, that there must necessarily be a strict pursuance of the *usual form* of the execution of the deed; whereas, as to the mere mode of execution, there is no difference between this class of deeds and other deeds; and as to the rules of construction, between this statute and other general Acts, no difference exists; the sense, policy and substance being the guides, and not the mere words. We think that in equity and practical effect, this deed was executed by the husband and wife; the husband doing, by his agreement at the foot of the deed, (which was duly acknowledged by him) all he could do if he had signed and sealed it as a formal party.

We have examined the cases cited against this view, but we can find no one which, upon principle and analogous facts, opposes it.

The sixth section of the Act of April 17th, 1850, already quoted, requires the acknowledgment to be made before the Judge, etc., and does not empower the Clerk to take it. As this Act was passed the day after the general Act of conveyances, and as the language is prohibitory, it is urged that the acknowledgment before the Clerk of the County Court is invalid.

There is an apparent confusion in the statutes on this subject, but the cause is easily perceived. The Act of seventeenth of April was designed to fulfill the requirement of the Constitution, "more clearly to define the rights of married women." After declaring, in the sixth section, that the husband should have the control of the separate estate of the wife, it was thought necessary to qualify and prevent misconstruction of this language; and, therefore, the Legislature added, by way of proviso, that the husband should not sell — nor the wife — except, etc.

But the sixth section only relates to separate property acquired after the passage of the Act. No retrospective operation was intended, or, perhaps, could have been given to it. In such cases, (see *Grimes v. Norris*, 6 Cal. 621) the statute only operates upon future transactions and matters.

The general Statute of Conveyances embraced as well deeds of separate property, existing before, as that acquired subsequent, to its

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passage; it did so by express terms—for the matter of the statute was the conveyance of estates—those conveyances being in the future, though the estates presently existed. But the subject of the Act of the seventeenth of April was the separate property itself, and that statute was passed to define and fix the relations of the parties to it; and, by the sixth section, the husband is made the manager of the separate property of the wife, and then the power of sale by him is denied, and the mode of sale fixed; but this only, by obvious rules of construction, applies to separate property afterwards acquired, or to property held as separate by women married after the passage of the Act. The Legislature had no power to affect marital relations or rights fixed by law previously; and if they had, we are not to presume, in the absence of an express declaration to that effect, that they so intended. See authorities cited in Grimes' case.

It is next objected that Tracy, the Clerk of Santa Clara, had no power to take the acknowledgment, because he had no seal of office. But this construction of the statute is too narrow. The Court of which he was Clerk, was entitled to a seal. This general phrase, "having a seal," was only intended to denote a Court of record, which is defined to be a Court having a seal. The power of the Clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it.

We have avoided the expression of any opinion upon many questions presented by the record, and have assumed some positions more for the purpose of argument than with a view to decide them, the real question passed upon being the validity of the deed from Martina and Depeaux. We expressly leave open the question whether a grant, made in the usual form and with the usual conditions, by the Mexican authorities, to a married person, creates a separate estate or common property. The Court erred in striking out the answer setting up this defense.

The error in excluding this defense, founded on this deed, is sufficient to reverse the judgment below, and, probably, decides the entire controversy.

Judgment reversed and cause remanded for further proceedings, in pursuance of this opinion.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

VOLUME XII.

By ALBERT RAYMOND.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

12 Cal. 11-20. **AMES v. HOY.**

Judgment.—Action lies upon, pp. 19, 20.

Cited to same effect in *Steuart v. Lander*, 16 Cal. 375, 76 Am. Dec. 539, judgment of justice's court, when time for execution had expired; *Brewster v. Ludekins*, 19 Cal. 170, action in one district court on judgment of another; *Rowe v. Blake*, 99 Cal. 170, 172, 36 Am. St. Rep. 46, 47, 48, an action to enforce foreclosure decree, although remedy by sale also exists; *Davidson v. Nebaker*, 21 Ind. 335, 83 Am. Dec. 350, a domestic judgment; *Simpson v. Cochran*, 23 Ia. 83, 92 Am. Dec. 412, a domestic judgment, holding execution merely cumulatory; *Burnes v. Simpson*, 9 Kan. 663, saying: "The proceeding seems harassing and vexatious and to serve no purpose that could not be reached by a more simple and less costly method. But these are reasons why the law should be changed and not that it should be disregarded"; *Hammer v. Lamphear*, 32 Kan. 442, 49 Am. Rep. 494, following *Burnes* case on principle of *stare decisis*; *Eldredge v. Aultman*, 35 Neb. 885, 37 Am. St. Rep. 477: "While there is some conflict in the decisions the proposition stated is sustained by the great weight of authority in this country"; *Mandlebaum v. Gregovich*, 24 Nev. 161, sustaining action by assignee; *Morse v. Pearl*, 67 N. H. 318, 68 Am. St. Rep. 672, holding right of action not lost by issuance of execution on judgment sued on; *McLean v. McLean*, 90 N. C. 532, holding, further, original judgment not merged in judgment upon it so as to prevent issuance of execution upon first. Explained and distinguished in *Pitzer v. Russel*, 4 Or. 127, holding such action not maintainable unless shown to be necessary in order to enable plaintiff to have full benefit of judgment, and this case is approved in *Hammer v. Lamphear*, 32 Kan. 442, 49 Am. Rep. 494, *supra*.

Lost Judgment.—Secondary evidence of destroyed judgment book is admissible, p. 20.

Cited to same effect in *In re Warfield*, 22 Cal. 64, 83 Am. Dec. 52, as to contents of petition for probate.

12 Cal. 20-27. TEWKSBURY v. PROVIZZO.

Estoppel—Partition Deed.—Cotenants held estopped from denying recitals and effect of partition deed in which they joined, p. 23.

Explained and distinguished in *Emerie v. Alvarado*, 64 Cal. 574, 577, 579, construing deed in question. Cited in note to *Tomlin v. Hilyard*, 92 Am. Dec. 125, as to question of warranty upon voluntary partition.

Complaint—Amendment.—Order permitting amendment is ineffective unless complied with, p. 46.

Cited to same effect in *Briggs v. Bruce*, 9 Colo. 284.

Damages—Joint Owners.—Where one joint owner recovers damages for trespass upon their property he holds them in trust for the others, p. 47.

Cited in *Nightingale v. Scannell*, 18 Cal. 327, where applied to recapture for benefit of plaintiff by his partner.

12 Cal. 27-50. KIMBALL v. GEARHART.

Appeal.—Verdict will not be set aside where evidence conflicting, p. 48.

Distinguished in *Wilson v. Cross*, 33 Cal. 68, holding rule modified where testimony consists entirely of depositions.

Appropriation of Water Rights.—Various instructions as to prior appropriation discussed, p. 48.

Cited in *McGarrity v. Byington*, 12 Cal. 431, holding (as to mining claim) the mere failure of diligence in working does not affect right once attached; *Nevada County etc. Co. v. Kidd*, 37 Cal. 311, 312, and 314, to same effect, holding, however, that when the prior appropriator is not in condition to use water and delays in perfecting right, another may acquire superior rights, and the former cannot enjoin diversion; *Mitchell v. Canal etc. Co.*, 75 Cal. 482, on point that pecuniary inability to prosecute work within reasonable time is not excuse for delay; and to same effect in *Keeney v. Carillo*, 2 N. Mex. 423; *Nevada Ditch Co. v. Bennett*, 30 Oreg. 85, 60 Am. St. Rep. 782, and note 810, holding under facts that reasonable diligence in appropriation had been shown; and *Hewitt v. Story*, 64 Fed. Rep. 515, stating general rules as to appropriation, and holding under facts prior rights abandoned by nonuser. Cited, also, in *Keeney v. Carillo*, 2 N. Mex. 493, upon point that where appropriation effected with due diligence title relates back to commencement of work; and to same effect in *Union Mill etc. Co. v. Dangberg*, 81 Fed. Rep. 109. Cited, also, in *Osgood v. El Dorado etc. Co.*, 56 Cal. 580, as to sufficiency of notice of appropriation. Cited, also, in *Warren v. Westbrook Mfg. Co.*, 86 Me. 38, as to rights of riparian owners on shores of river island; and *Union Mill etc. Co. v. Dangberg*, 81 Fed. Rep. 95, and note to *Heath v. Williams*, 43 Am. Dec. 280, 281, as to general rules of appropriation of water rights.

General Denial.—Evidence under such denial is admissible of anything that supports or attacks title, p. 50.

Cited in *Sparrow v. Rhoades*, 76 Cal. 210, 9 Am. St. Rep. 198, where applied in ejectment to evidence of illegality of consideration of deed under which plaintiff claims.

12 Cal. 50-56. PEOPLE v. BIRCHAM.

Court of Sessions.—Powers of held transferred to supervisors, p. 54.

Cited in *Kimball v. Alameda Co.*, 46 Cal. 24, as to jurisdiction of supervisors and holding it to include opening public highways over public lands. Also commented on in *People v. Provines*, 34 Cal. 528, granting power to police judge to act as police commissioner.

Statutes.—Legislative Intent may be accomplished by reference to unconstitutional act, p. 55.

Cited in *San Francisco v. Broderick*, 125 Cal. 192, construing section 61, County Government Act.

12 Cal. 56-72. STATE v. MOORE.

Taxation.—Mining claim is property, and subject to taxation, p. 69.

Cited in *Bakersfield etc. Co. v. Kern Co.*, 144 Cal. 152, noted under *Merced etc. Co. v. Fremont*, 7 Cal. 317; *Gold Hill etc. Co. v. Ish*, 5 Oreg. 106, on point that right of mining is a franchise; and in note to 68 Am. Dec. 274, as to nature of such right. Cited, also, and approved as to liability to taxation, in *People v. Shearer*, 30 Cal. 657, after doubt in *People v. Morrison*, 22 Cal. 80, and *State v. Central Pacific etc. Co.*, 21 Nev. 259—holding, however, possessory claim in public lands not taxable unless in actual possession. Explained and distinguished in *Hart v. Plum*, 14 Cal. 154, holding taxable the flume used for a non-taxable mining claim.

Value.—Standard of is selling price, p. 71.

Cited in *Doud v. Mason etc. Co.*, 76 Iowa, 440, holding evidence admissible in condemnation proceedings that land contained coal; and in like proceedings in *Montana Ry. Co. v. Warren*, 6 Mont. 281, when property was mining prospects.

General citation: *Topeka etc. Security Co. v. McPherson*, 7 Okla. 345.

12 Cal. 73-76. KELLEY v. SCANNELL.

Sheriff—Liability for Levy.—Property of stranger in possession of defendant is subject to attachment, p. 75.

Cited to same effect, holding sheriff, if otherwise without knowledge, liable only on notice of owner's claims and refusal to surrender, *Ful-*

ler Desk Co. v. McDade, 113 Cal. 363, and Vose v. Stickney, 8 Minn. 79 (but see dissenting opinion, p. 83). Cited, also, as to necessity of demand and refusal before suit in Perkins v. Barnes, 3 Nev. 563; and see Fuller case, *supra*.

12 Cal. 76-85. **BURNETT v. MAYOR.** S. C. 73 Am. Dec. 518, and note 522.

Eminent Domain.—Right of does not extend to taking of money, p. 83.

Cited to same effect in Cary Library v. Bliss, 151 Mass. 378, denying right to transfer by special act property public library founded by donations, from trustees to a library corporation; and criticised as to this point in Hammett v. Philadelphia, 65 Pa. St. 152, 3 Am. Rep. 619, denying power of municipality to levy local tax for general purposes. Cited, also, in Hagar v. Supervisors, 47 Cal. 234, holding enforcement of valid tax not to be a taking of private property for public use.

Taxation—Local Improvements.—Levy of special assessment for local improvement is not special tax, and such tax may be imposed by general taxation on all inhabitants of town or county, or confined to adjacent property owners, p. 83.

Cited to same effect in Emery v. San Francisco, 28 Cal. 352, 361, confirming assessment by special act for street improvement on adjacent property owners; Chambers v. Satterlee, 40 Cal. 514, a like assessment for street grading; Hagar v. Supervisors, 47 Cal. 234, swamp land reclamation and taxation upon districts, as to which, see also Reclamation District v. Hagar, 6 Sawy. 570, 4 Fed. Rep. 369; Whiting v. Townsend, 57 Cal. 519, confirming like assessment for street work; In re Madera Irrigation District, 92 Cal. 325, 27 Am. St. Rep. 126, as to assessment for irrigation purposes on irrigation districts, irrespective of special local benefit to taxpayer; Pulmer v. Stumph, 29 Ind. 336, as to local assessment for purposes of street improvement; County Judge v. Shelby etc. Co., 5 Bush (Ky.), 228, as to tax for railroad purposes on county through which road ran; Henderson Bridge Co. v. Henderson, 90 Ky. 503, as to taxation to specified district for bridge construction, and holding that when legislature has so imposed tax on district, the court will not inquire as to benefit derived from improvement by particular property within the district; Harvard College v. Aldermen, 104 Mass. 482, holding such assessment a tax and plaintiff exempt therefrom by its charter; Dailey v. Swope, 47 Miss. 385, as to assessment for levee purposes; Macon v. Patty, 57 Miss. 385, 34 Am. Rep. 453, and in Hayden v. City, 70 Ga. 823, as to assessment for improvement of streets, and distinguishing between assessments and exercise of police power; State v. Dodge County, 8 Neb. 130, 30 Am. Rep. 823, as to taxation by county under legislative authority for drainage of swamp and marsh lands; Rolph v. Fargo, 7 N. Dak. 664, construing local statutes; Kimball v. City, 19 Utah, 392, discussing powers of legislature as to mode

of taxation; *King v. Portland*, 2 Oreg. 158, as to assessment on adjacent owners for street improvement; *Winona etc. Co. v. Watertown*, 1 S. Dak. 51, 57, as to like assessment, distinguishing (p. 51) between powers of eminent domain and taxation; and note to *People v. Mayor*, 55 Am. Dec. 287, 288, and *Anderson v. Kerns etc. Co.*, 77 Am. Dec. 68, as to taxation for local improvements and its apportionment. Cited, also, on main point and criticised in *City v. Larned*, 34 Ill. 281, holding invalid an assessment made on basis of frontage of adjacent property.

General citation: *Dooley v. Foster*, 5 Kans. 279.

12 Cal. 85-88. **CROSBY v. WATKINS.**

Undisclosed Principal may sue in his own name on agent's contract made for his benefit, p. 88.

Cited to same effect in note to *Ruiz v. Norton*, 60 Am. Dec. 619.

Tender of Price held not necessary where goods deliverable on demand, p. 88.

Cited to same effect in *Dudley v. Thomas*, 23 Cal. 369, and applied to tender of mutual releases in arbitration proceedings.

Nondelivery.—Damages are different between contract price and value, p. 88.

Cited to same effect in *Boyer v. Cox*, 34 Neb. 816—holding, also, that where goods purchasable in open market, measure of damages is market price on day appointed for delivery, less contract price when not paid.

12 Cal. 89-90. **FRATT v. CLARK.**

Assumpsit lies for property tortiously taken, the tort being waived, p. 90.

Cited to same effect, as to conversion of personalty, in *Roberts v. Evans*, 43 Cal. 382; *Lehmann v. Schmidt*, 87 Cal. 20, action against bailee who had waived his lien; *Isaacs v. Hermann*, 49 Miss. 465, where goods tortiously taken are sold; *Braithwaite v. Akin*, 3 N. Dak. 370, where rule extended to any case where benefit received by tortfeasor, whether by sale, or retention, or otherwise; and in note to *Webster v. Drinkwater*, 17 Am. Dec. 242, 244, upon general subject of waiver of tort; *De la Guerra v. Newhall*, 55 Cal. 23, upon point that allegation of express promise to pay for pasturage of cattle need not be proved when facts showed implied promise; *Howell v. Graves*, 27 Ark. 367, on point that where tort waived plaintiff could recover only what defendant received, or actual selling price of converted property; cited in *Monroe v. Cannon*, 24 Mont. 320, sustaining implied contract for pasturage of sheep unlawfully on plaintiff's land.

12 Cal. 91. **MAY v. BOREL.**

Agent.—Notice to is notice to principal, p. 91.

Cited to same effect in *Watson v. Sutro*, 86 Cal. 516, where applied to notice of infirmity of title to attorney pending negotiations for purchase; and holding, further, that such constructive notice is irrebutable; *Wittenbroeck v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, following *Watson* case, supra, on similar facts, where notice was to one of firm of attorneys; *Parker v. Randolph*, 5 S. Dak. 555, as to knowledge by agent of outstanding lien; and *Lakin v. Sierra Buttes etc. Co.*, 11 Sawy. 240, 25 Fed. Rep. 342, where applied to doctrine of bona fide purchase without notice.

12 Cal. 92-99. **WHEATLEY v. STROBE.** 73 Am. Dec. 522.

Equitable Assignment.—Order to pay another full amount of claim operates as, though not accepted, p. 97.

Cited in *Pullen v. Bank*, 138 Cal. 174, but held inapplicable to check given without consideration with direction not to present until drawer's death; *Donohoe etc. Co. v. S. P. Co.*, 138 Cal. 187-189, holding ordinary bank check for part of deposit not so to operate; *Pope v. Huth*, 14 Cal. 408, where applied to part of moneys to come into hands of drawee; *Joyce v. Wing Yet Lung*, 87 Cal. 425, where acceptance was merely verbal; *Lawrence Nat. Bank v. Kowalsky*, 105 Cal. 44—holding, further, that intention to make assignment need not appear on face of order or bill of exchange; *Board v. Jameson*, 86 Ind. 165, on point that order drawn on particular funds operates pro tanto as such an assignment, and assignee can sue therefor as real party in interest; *Grammel v. Carmer*, 55 Mich. 213, in dissenting opinion—main opinion holding, however, that unaccepted draft does not so operate; *Nimocks v. Woody*, 97 N. C. 6, 2 Am. St. Rep. 371, an unaccepted draft for entire claim; *Gardner v. Bank*, 39 Ohio St. 605, under like facts, no other claim intervening, and the question being considered as between drawer and payee; *Pease v. Landauer*, 63 Wis. 29, 53 Am. Rep. 250, a bank draft, holding such assignment binding upon drawer, and not to be avoided unless for good cause—"we think reason and authority are in favor of the rule above stated." Distinguished in *Bush v. Foote*, 58 Miss. 14, 38 Am. Rep. 312, as to difference in this respect between orders and bills of exchange, and denied as to assignment by unaccepted bill. Cited, also, in note to *Mason v. Donsay*, 85 Am. Dec. 308, and *Baer v. English*, 20 Am. St. Rep. 376, as to validity of parol promise to accept bill; *Ford v. Angelrodt*, 88 Am. Dec. 178; and *Dana v. Third Nat. Bk.*, 90 Am. Dec. 219, upon equitable assignment by draft or order.

12 Cal. 100-102. **JORDAN v. GIBLIN.**

Service by Publication is invalid unless statute strictly followed, p. 102.

Cited in *In re Tracey*, 136 Cal. 390, applying rule to proceedings to terminate life estate; *People v. Huber*, 20 Cal. 82, holding void order of publication before issuance of summons; *Braly v. Seaman*, 30 Cal. 617,

where affidavit as to residence was defective; *Alderson v. Marshall*, 7 Mont. 296, holding that allegation of "due diligence" on affidavit was insufficient without stating facts; *Little v. Currie*, 5 Nev. 92, where affidavit held bad because stating only conclusions of law as to existence of cause of action; *Galpin v. Page*, 3 Sawy. 120, 9 Fed. Cas. 1136; and in same case on appeal, 18 Wall. 369, holding judgment by publication invalid because judgment roll did not contain affidavit of publication—and holding, further, that presumptions as to due jurisdiction do not attach where service is by publication; also, in note to *Hahn v. Kelly*, 94 Am. Dec. 968, as cited in *Galpin* case; and *Palmer v. McMaster*, 8 Mont. 192, upon similar facts. Cited, also, to same effect in *Vizzard v. Taylor*, 97 Ind. 94, where rule applied to notice by auditor under drainage act.

12 Cal. 103-104. **HUTCHINSON v. BURR.**

Municipal Bonds.—In action to restrain issuance of, persons to whom issue is to be made are indispensable parties, p. 103.

Cited to same effect in *Patterson v. Board*, 12 Cal. 106.

12 Cal. 107-111. **HEYMAN v. LANDERS.**

Restraining Order may be issued before complaint filed, p. 110.

Cited in *Ex parte Sayre*, 95 Ala. 290, holding such issuance a mere irregularity, which is cured by motion to dissolve after answer.

Damages for detention of money are only legal interest, p. 111.

Cited to same effect in *North Star etc. Co. v. Stebbins*, 3 S. Dak. 544, as to interest on balance of account; and *Godbe v. Young*, 1 Utah, 61 holding that where contract specifies no interest statutory rate is allowed on breach. Approved in *Lally v. Wise*, 28 Cal. 543, holding that in suit on injunction bond for detaining moneys it should carry only legal interest, and not what the money was worth.

12 Cal. 114-125. **ESTATE OF TOMPKINS.**

Community Property is subject to husband's debts upon his death, p. 124.

Cited in *Frankel v. Boyd*, 106 Cal. 613, and applied to creditor's claims after division of common property on divorce.

Homestead not subject to debts of deceased husband, p. 125.

Cited to same effect in *McCloy v. Trotter*, 47 Ark. 454, holding void order of probate court for sale of homestead to pay husband's debts; and in *Smith v. Shrieves*, 13 Nev. 325, distinguishing case, however, where no declaration made during husband's life.

Homestead is Estate in joint tenancy, p. 125.

Cited in *Brennan v. Wallace*, 25 Cal. 114, and note to *Pool v. Girard*, 65 Am. Dec. 483, as overruled by *Gee v. Moore*, 14 Cal. 474, and

Ingoldsby v. Juan.

passage; it did so by express terms—for the matter of the statute was the conveyance of estates—those conveyances being in the future, though the estates presently existed. But the subject of the Act of the seventeenth of April was the separate property itself, and that statute was passed to define and fix the relations of the parties to it; and, by the sixth section, the husband is made the manager of the separate property of the wife, and then the power of sale by him is denied, and the mode of sale fixed; but this only, by obvious rules of construction, applies to separate property afterwards acquired, or to property held as separate by women married after the passage of the Act. The Legislature had no power to affect marital relations or rights fixed by law previously; and if they had, we are not to presume, in the absence of an express declaration to that effect, that they so intended. See authorities cited in Grimes' case.

It is next objected that Tracy, the Clerk of Santa Clara, had no power to take the acknowledgment, because he had no seal of office. But this construction of the statute is too narrow. The Court of which he was Clerk, was entitled to a seal. This general phrase, "having a seal," was only intended to denote a Court of record, which is defined to be a Court having a seal. The power of the Clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it.

We have avoided the expression of any opinion upon many questions presented by the record, and have assumed some positions more for the purpose of argument than with a view to decide them, the real question passed upon being the validity of the deed from Martina and Depeaux. We expressly leave open the question whether a grant, made in the usual form and with the usual conditions, by the Mexican authorities, to a married person, creates a separate estate or common property. The Court erred in striking out the answer setting up this defense.

The error in excluding this defense, founded on this deed, is sufficient to reverse the judgment below, and, probably, decides the entire controversy.

Judgment reversed and cause remanded for further proceedings, in pursuance of this opinion.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

Constantine, 1 Idaho, 267, on point of allowing equitable defenses to actions at law; and in *Plaisted v. Nowlan*, 2 Mont. 361, denying appeal from part of judgment.

12 Cal. 148-168. **STANLEY v. GREEN.** S. C. Hayner v. Stanly, 8 Sawy. 218, 13 Fed. Rep. 220.

Deed.—Description held certain in view of parol evidence, p. 160.

Cited in *Estate of Geary*, 146 Cal. 109, where homestead declaration described land by name as lot of 160 acres on which husband had resided with family for three years which was then unsurveyed government land, attempted description by legal subdivisions, which after survey found incorrect, is surplusage; *De Leon v. Higuera*, 15 Cal. 496, holding description in mortgage, good; dissenting opinion in *Aguirre v. Alexander*, 58 Cal. 37, question of interpretation of deed, main opinion holding instructions as to description conflicting; dissenting opinion in *Crosby v. Dowd*, 61 Cal. 605—main opinion holding description by reference in foreclosure decree void for uncertainty, although good for purposes of mortgage and complaint; *Wheeler v. Bolton*, 66 Cal. 87, where parol evidence was held admissible to identify land in deed; to same effect in *Blair v. Bruns*, 8 Colo. 399, as to "all lots remaining undivided," etc.; *Kamphouse v. Gaffner*, 73 Ill. 457, as to location of premises in lease, and holding further that construction of lease was question for court; *Chicago etc. Co. v. Powell*, 120 Mich. 57, applying rule to construction of trustee's powers under deed; *Corrnell v. Gallagher*, 36 Neb. 762, applying rule to power of attorney to sell lands bought at execution sale; *Huberman v. Evans*, 46 Neb. 797, where guardian's petition for sale of real estate referred to all his ward's estate in a certain county or state; *Paroni v. Elleson*, 14 Nev. 63, where the description was the "McLeod woodranch" in a designated locality; *Brown v. Warren*, 16 Nev. 236, where such evidence was for purposes of identification; and *Armijo v. N. M. etc. Co.*, 3 N. Mex. 435 (292), admitting parol evidence for like purpose; *Cox v. McGowan*, 116 N. C. 133, where by mistake the parties ran by different line than that indicated in deed; and in *Messer v. Oestreich*, 52 Wis. 689, where also the building of fences without opposition was considered in determining the property granted. Cited, also, in *Marriner v. Dennison*, 78 Cal. 207, holding good a description in executory contract which contained no city, county, or state, where effect of parol evidence is not to introduce new description, but to complete that in the contract, and holding, further, that in action upon it complaint must contain averments of necessary extrinsic facts; and in *Mettart v. Allen*, 139 Ind. 652, to effect that description of tract by its well known name is effectual. Distinguished in *Clarke v. Huber*, 25 Cal. 597, rejecting parol evidence of error in description when constituting equitable defense not pleaded; *Clarke v. Lancaster*, 36 Md. 205, 11 Am. Rep. 490, where "degrees" was sought to be changed to "perches" and "perches" added to certain figures; and

Shuttleworth v. Shuttleworth, 34 W. Va. 23, where provision for "home" on land was to be enlarged into "support and maintenance."

Declarations of Grantor in possession are admissible against himself and claimants under him, p. 163.

Cited to same effect in *Moore v. Jones*, 63 Cal. 16, as to declarations of husband that property was bought with wife's separate funds; *Sharp v. Blankenship*, 79 Cal. 413, as to location of boundary line; *Rush v. French*, 1 Ariz. Ter. 144, as to grounds on which title based; *Probst v. Trustees*, 3 N. Mex. 381 (270), as to person for whom property was held by agent in possession; and *Sperry v. Wesco*, 28 Ore. 491, as to existence of townsite and location of blocks therein.

Deed—Description.—Statement of area yields to description by metes and bounds, or designation of number or place, p. 163.

Cited in *De Arguello v. Greer*, 26 Cal. 632, holding that boundaries govern courses, distances, and quantity; *Haley v. Amestoy*, 44 Cal. 138, that name of tract governs particular description; *Williams v. Harter*, 121 Cal. 52, deed to ditch carries appurtenant water rights; *Baldwin v. Temple*, 101 Cal. 402 (tax assessment), that acreage must yield to boundaries in case of conflict; *Ford v. Springer Ld. Assn.*, 8 N. Mex. 40, construing deed; *Cox v. McGowan*, 116 N. C. 133, that courses and distances yield to calls for stable monuments or natural objects, and also that a special description will govern general one in deed, whether preceding it or not.

Deed—Civil Law.—Requisites of stated, p. 166.

Distinguished in *De Merle v. Mathews*, 26 Cal. 469, holding omission of consideration in Mexican deed not fatal and to be supplied by parol. Cited in note to *Harlowe v. Hudgins*, 31 Am. St. Rep. 28, on point that unsealed indorsement on deed will convey title.

Unrecorded Deed.—Exceptions in bind claimants under, with notice, p. 166.

Cited to same effect in note to *Adams v. Cuddy*, 25 Am. Dec. 334.

Agent.—Notice to is notice to principal, p. 167.

Cited to same effect in *Watson v. Sutro*, 86 Cal. 516, and *Wittenbrock v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, as to which see also *May v. Borel*, 12 Cal. 91, ante.

12 Cal. 168-171. **CONNER v. CLARK.** 73 Am. Dec. 529.

Promissory Note.—Liability of one signing as "trustee" is personal, p. 170.

Cited in *Melone v. Ruffino*, 129 Cal. 523, 524, 79 Am. St. Rep. 134, 135 (and see note, 137) applying rule to administrator's contract; *Bank v. Looney*, 99 Tenn. 295, 63 Am. St. Rep. 840, as to note of "trustee"; *Warren v. Harrold*, 92 Tex. 420, as to note of "assignee"; *Andrus v.*

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Blizzard, 23 Utah, 255, 257, one signing note as guardian of incompetent is personally liable thereon; *Chamberlain v. Pacific etc. Co.*, 54 Cal. 106, where note signed X., "President," etc., there being no corporate ratification; *Robinson v. Springfield etc. Co.*, 21 Fla. 223, 225, where note, and mortgage signed by X., "Trustees," etc., and decree ran in that way, there being no restriction to trust estate; *Roger Williams Bank v. Groton etc. Co.*, 16 R. I. 507, where indorsement by X., trustee; and in notes to *Olcott v. Tioga etc. Co.*, 84 Am. Dec. 313, to *Sharpe v. Bellis*, 100 Am. Dec. 621, and to *Rand v. Hale*, Id. 765, on liability under such signatures.

Parol Evidence is inadmissible to contradict writing, pp. 170-1.

Cited to same effect in *Frink v. Roe*, 70 Cal. 316, where sought to show that title was not to pass under absolute deed; *Stein v. Fogarty*, 4 Idaho, 704, in absence of fraud or mistake, parol evidence of contemporaneous oral agreement is inadmissible to show note was by agreement payable in work and labor; notes to *Timms v. Shannon*, 81 Am. Dec. 638, *Griffith v. Furry*, 83 Am. Dec. 188, *Gelpcke v. Blake*, Id. 422, and *Hahn v. Doolittle*, 86 Am. Dec. 760, upon same subject.

12 Cal. 171-181. **DABOVICH v. EMERIC.** S. C. 7 Cal. 209.

Damages for breach of guaranty—rule of, stated; cannot include particulars not pleaded, p. 179.

Cited in *Maher v. Riley*, 17 Cal. 416, on point that measure of damages for nondelivery of goods sold is purchase price and interest, or highest market value up to trial; *Plunkett v. Minneapolis etc. Co.*, 79 Wis. 227, holding damages for care and cure of injured cattle recoverable under allegations, and further, that uncertainty in allegations should be attacked by motion; and in note to *Hoffman v. Chamberlain*, 53 Am. Rep. 789, as to rule of damages for nondelivery of purchased chattels. Cited, also, in *Parker v. Bond*, 5 Mont. 11, on second proposition, holding special damages recoverable under pleadings in action on injunction bond.

12 Cal. 181-191. **LOW v. BURROWS.**

Foreign Judgment.—Authentication held sufficient under facts stated in certificate, p. 188.

Cited in *Wickersham v. Johnston*, 104 Cal. 414, 43 Am. St. Rep. 122, holding certificate of foreign probate sufficient; *Case v. Huey*, 26 Kan. 560, where justice of peace certified as judge and as clerk of his own court; and *Keyes v. Mooney*, 13 Oreg. 182, where certificate of judge did not state him to be only or chief judge, but record did not negative this.

Foreign Administrator.—Assignee of foreign judgment recovered by, may sue him thereon, p. 188.

Cited on same point in note to *Peterson v. Chemical Bank*, 38 Am.

Dec. 311; and *Lewis v. Adams*, 70 Cal. 410, 59 Am. Rep. 426, and *McCully v. Cooper*, 114 Cal. 261, 55 Am. St. Rep. 69, granting power of foreign executor or administrator to sue him on foreign judgment or for goods unlawfully taken from his possession, not officially, but individually—latter case allowing also recovery by local ancillary administrator against domiciliary administrator for certificate of deposit in local bank. Cited, also, in dissenting opinion in *Humphreys v. Hopkins*, 81 Cal. 559, 15 Am. St. Rep. 79—main opinion holding property in hands of foreign receiver, brought here, subject to attachment by local creditors.

12 Cal. 191-200. *JONES v. THOMPSON*. *S. C. More v. Ord*, 15 Cal. 205.

Appeal.—Parties sought to be made defendants by respondents and affected by judgment may appeal therefrom, p. 197.

Cited in *Ballard v. Kennedy*, 34 Fla. 492, where heirs at law were made defendants, but complaint afterwards dismissed as to them and decree did not include them.

Execution.—Partnership interest of debtor is subject to, p. 198.

Cited to same effect in note to *Russell v. Cole*, 57 Am. St. Rep. 437; *Robinson v. Tevis*, 38 Cal. 615, and *Branch v. Wiseman*, 51 Ind. 3—holding, further, that all the firm property may be taken, subject to right of firm creditors and to other partners; *Commercial Bank v. Mitchell*, 58 Cal. 49, where firm creditors were given preference irrespective of order of garnishments over creditor holding judgment against partners as individuals on notes signed by them as individuals; and *Wright v. Ward*, 65 Cal. 527, where sale of entire firm property was held good on execution against partner, although in accounting he would have no interest therein—and holding, further, that in latter case execution purchaser would be guilty of conversion for sale of entire property before accounting with other partner.

12 Cal. 200-208. *ESTATE OF KNIGHT*. 73 Am. Dec. 531.

Administrator cannot use estate funds to remove prior encumbrance on its property, when estate not liable therefor, p. 207.

Cited to same effect in *Tompkins v. Weeks*, 26 Cal. 61, 63, 68, where he was charged with resulting loss; *In re Moore*, 72 Cal. 342, where administrator was denied power to rebuild or improve the property, although for heirs' benefit; *In re Rose*, 80 Cal. 173, denying his power to carry on decedent's business; and in note to *Wales v. Walker*, 99 Am. Dec. 296, as to liability for investments. *Brenham v. Story*, 39 Cal. 169, holding unconstitutional a special act allowing him to sell property to promote heirs' interest, debts or expenses or family allowance not requiring such sale.

Distinguished in *Estate of Freud*, 131 Cal. 672, affirming right of

executor to sell for purpose of redemption of property from decedent's mortgage; *Estate of Smith*, 118 Cal. 467, granting power to preserve from destruction vineyard belonging to estate, even if done without order of court.

12 Cal. 208-212. **WAGENBLAST v. WASHBURN.**

Mistake.—Parol evidence is admissible to show, for purposes of correction in equity, p. 212.

Cited to same effect in *Hathaway v. Brady*, 23 Cal. 124, where rate of interest was left blank in note, although it was such as under statute should have been written; and note to *Gillespie v. Moon*, 7 Am. Dec. 569, upon same subject.

12 Cal. 212-216. **KNOWLES v. INCHES.** *S. C. Willson v. McEvoy*, 25 Cal. 170, for suit on injunction bond.

Transcript on Appeal.—Incorporation of unnecessary matter criticised, p. 213.

Cited in *Barrett v. Tewksbury*, 15 Cal. 358, to same effect— and holding, further, as to necessity of setting forth grounds of appeal in statement; and *Albion etc. Co. v. Richmond etc. Co.*, 19 Nev. 229, where statement of substance of documents was held sufficient.

Appeal from Judgment suspends its force as evidence of title, p. 215.

Cited to same effect as to decree of divorce in *Sharon v. Hill*, 11 Sawy. 305, 370, 26 Fed. Rep. 347, 391; and *People v. Treadwell*, 66 Cal. 401, as to conviction of crime when used as basis for disbarment proceedings.

Bill of Peace will not lie until adjudicated by trial at law, p. 216.

Cited to same effect in note to *Woodward v. Seely*, 50 Am. Dec. 453; in dissenting opinion in *Lehman v. Shook*, 69 Ala. 499—main opinion holding that bill will lie to enjoin ejectment and remove cloud on title where defendants claim under unrecorded fraudulent deed prior to mortgage under which plaintiff claims. Cited, also, in *Northern etc. Co. v. Amacker*, 46 Fed. Rep. 236, denying right to sue in equity even to prevent multiplicity of suits, where one action in ejectment would cover all the property and all the parties involved. Distinguished in *Brooks v. Calderwood*, 34 Cal. 566, holding that in action to quiet title court may enjoin defendant and all claiming under him from asserting title thenceforth.

12 Cal. 216-226. **SMITH v. SMITH.** 73 Am. Dec. 533, 537. See *Smith v. McDonald*, 42 Cal. 486.

Community Property.—Property acquired during coverture is presumed to be, unless clear proof to contrary, p. 223.

Cited to same effect in *Scott v. Ward*, 13 Cal. 476; *Pixley v. Hugins*, 15 Cal. 131, where deed on purchase was to wife; *McDonald v.*

Badger, 23 Cal. 398, 83 Am. Dec. 126, under same class of deed; *Morgan v. Lones*, 78 Cal. 62, holding husband not estopped under facts from maintaining property to be community; *Tolman v. Smith*, 85 Cal. 284—holding, further, that character of property determinable in foreclosure suit; in dissenting opinion in *Charanteau v. Woffenden*, 1 Ariz. Ter. 273, main opinion holding property separate, under facts; *Smith v. Shrieves*, 13 Nev. 308; and *Yesler v. Hochstettler*, 4 Wash. 355. Cited also, as to such presumption in note to *Huston v. Curl*, 58 Am. Dec. 112; *McDonald v. Badger*, 83 Am. Dec. 129; *Cooke v. Bremond*, 86 Am. Dec. 632, 636, 638, 642, collecting cases further as to rebuttal of presumption; *Peck v. Brummagin*, 89 Am. Dec. 204.

Community Property.—Husband cannot transfer, in fraud of wife's rights, p. 224.

Cited to same effect in *Peck v. Brummagin*, 31 Cal. 447, 89 Am. Dec. 200, where distinguished (p. 449), upholding deed by husband to wife of community property; *Lord v. Hough*, 43 Cal. 585, holding such deed not fraudulent under facts, though made pending divorce suit; dissenting opinion in *Maskey v. Huntington*, 118 Ill. 98, as to wife's right to attack husband's deed testamentary in character; *Walker v. Walker*, 66 N. H. 392, 49 Am. St. Rep. 617. Distinguished in *Greiner v. Greiner*, 58 Cal. 120, holding wife cannot sue to set aside such conveyance while marriage exists. Cited, also, upon general subject in notes to *Thayer v. Thayer*, 39 Am. Dec. 218, 220; to *Beard v. Knox*, 63 Am. Dec. 128, and to *Lines v. Lines*, 24 Am. St. Rep. 493; *Murray v. Murray*, 115 Cal. 272, 56 Am. St. Rep. 150, as to power of deserted wife to attack husband's transfer of his separate property, in action for maintenance; *Spreckels v. Spreckels*, 116 Cal. 345, 58 Am. St. Rep. 174, as to power of husband as to gifts of community personalty (and see not 179); and upon same power of husband over community property in note to *Meyer v. Kinzer*, 73 Am. Dec. 543; and as to interest of cotenants in homestead, in *Bartholomew v. West*, 2 Dill. 293, 8 Bank. Reg. 14, 2 Fed. Cns. 964.

12 Cal. 231-241. BENSLEY v. ATWILL.

Delivery of Deed may be presumed from acknowledgment and recording, p. 236.

Cited to same effect in *Savery v. Browning*, 18 Iowa, 250, holding possession of deed by grantee presumptive though not conclusive evidence of delivery; *Wells v. Jackson etc. Co.*, 48 N. H. 537, holding further as to proof of execution when deed lost; and in note to *Hoffman v. Mackall*, 64 Am. Dec. 647, as to evidence of delivery from recording.

New Trial.—Where evidence conflicting, order of judge on motion will be affirmed, p. 240.

Cited to same effect in *Hall v. Bark*, 33 Cal. 525, where motion was granted, holding that appellant must show abuse of discretion in making order.

12 Cal. 241-243. KNEELAND v. WILSON.

Title.—Knowledge of held shown under facts, p. 243.

Cited in note to *Horton v. Smith*, 42 Am. Dec. 632, as to admissibility of declaration of vendor in possession.

12 Cal. 243-245. MARTIN v. TRAVERS.

Evidence.—Objection to introduction of must be specific, p. 245.

Cited to same effect in *Leet v. Wilson*, 24 Cal. 403, where objection was simply "that the evidence is inadmissible"; *Sneed v. Osborn*, 25 Cal. 627, and *Rush v. French*, 1 Ariz. Ter. 123, 125, holding objection improper if evidence admissible for any purpose, or under any possible circumstances; *Cochran v. O'Keefe*, 34 Cal. 558, where objections to deed were held uncertain and vague; *Fabian v. Callahan*, 56 Cal. 161, where general objection of incompetency to certificate of acknowledgment; *Brumley v. Flint*, 87 Cal. 474, as to like objection to competency of witness as expert; dissenting opinion in *Keys v. Grannis*, 3 Nev. 557, as to like objections to transcript of justice's docket; *State v. Jones*, 7 Nev. 415, as to like objection to admission of deposition in criminal case; and *Knapp v. Schneider*, 24 Wis. 72, as to like objection to order of introduction of evidence or impropriety of cross-examination. Distinguished in *Nightingale v. Scannell*, 18 Cal. 324, sustaining general objection of incompetency where the evidence was incompetent for any purpose; and *Roberts v. Chan Tin Pen*, 23 Cal. 265, where rule held not to apply to question of weight of evidence.

12 Cal. 245-247. MORGENTHAU v. HARRIS.

Assignment for Creditors held within statute, p. 247.

Cited in *Johnson v. Robinson*, 68 Tex. 402, holding that effect of assignment not within statute to be determined according to common law, and holding valid assignment by partner of part of firm property.

12 Cal. 247-255. MEYER v. KINZER. 73 Am. Dec. 538.

Community Property defined and described, p. 251.

Cited in note to *Cooke v. Bremond*, 86 Am. Dec. 628-9, defining community property, and at p. 635 as to inclusion of wife's earnings therein.

Property acquired after marriage is presumed to be community property, p. 251.

Cited to same effect in *Smith v. Smith*, 12 Cal. 224, 73 Am. Dec. 535, and in note 537, where rule applied to building erected on husband's property; and holding burden to rest on party asserting it separate; *Scott v. Ward*, 13 Cal. 470, where property acquired by purchase; *Pixley v. Huggins*, 15 Cal. 131, where deed of purchase taken in wife's name; *Mott v. Smith*, 16 Cal. 557—deed to wife—where evidence to rebut pre-

sumption held insufficient; *Kohner v. Ashenauer*, 17 Cal. 581, where husband deeded to wife, conveyance alleged to have been purchase, not gift; *Burton v. Lies*, 21 Cal. 91, where purchase made by husband; *Adams v. Knowlton*, 22 Cal. 288, where evidence held insufficient to show purchase by wife as sole trader; *Tustin v. Faught*, 23 Cal. 241, bargain and sale deed to wife, holding further as to husband's power to convey; *McDonald v. Badger*, 23 Cal. 398, 83 Am. Dec. 126, following principle in *Mott v. Smith*, *supra*; *Landers v. Bolton*, 26 Cal. 420—deed of purchase—holding, also, as to husband's control over; *Ramsdell v. Fuller*, 28 Cal. 42, 87 Am. Dec. 105, and note 107—holding presumption rebutted under facts; *Peck v. Vandenberg*, 30 Cal. 42, 55, 61, holding parol evidence admissible, however, that deed reciting money consideration was one of gift; *Tibbetts v. Fore*, 70 Cal. 245, holding property conveyed to wife her separate property under facts, and granting her injunction to prevent its sale on execution against husband; *Morgan v. Lones*, 78 Cal. 62, holding facts insufficient to overcome presumption; *Estate of Bauer*, 79 Cal. 307, holding presumption disputable, and that separate property could be followed through various changes, although commingled with community property; *People v. Swalm*, 80 Cal. 51, 13 Am. St. Rep. 100 (and see note 100), that fact of possession by wife did not rebut presumption on facts shown; *Tolman v. Smith*, 85 Cal. 283, 284, holding further that recital in mortgage that property is separate property of mortgagor does not bind mortgagee; *In re Boody*, 113 Cal. 686, holding evidence insufficient to overcome presumption; dissenting opinion in *Charauleau v. Woffenden*, 1 Ariz. Ter. 272, main opinion ruling presumption overcome by evidence offered; and in *Yesler v. Hochstettler*, 4 Wash. St. 334, holding presumption conclusive unless overcome by evidence. Cited, also, in notes to *Huston v. Curl*, 58 Am. Dec. 112, on presumption as to community character; to *Cooke v. Bremond*, 86 Am. Dec. 635, 636, 637, 638, *Ramsdell v. Fuller*, 87 Am. Dec. 107, *Peck v. Brummagim*, 89 Am. Dec. 204, *Shaw v. Hill*, 96 Am. Dec. 423, *Morris v. Hastings*, 8 Am. St. Rep. 574, and to *Spreckels v. Spreckels*, 58 Am. St. Rep. 179; also, in note to *Warren v. Brown*, 57 Am. Dec. 194, as to conveyances to and purchases by married women.

Cited in *Davis v. Green*, 122 Cal. 367, holding property community; *Hamilton v. Hubbard*, 134 Cal. 604, 607, but holding presumption inapplicable in case of gift of husband to wife; *Yesler v. Hochstettler*, 4 Wash. 353, holding presumption conclusive unless rebutted.

12 Cal. 257-264. WRIGHT v. LEVY.

Assignee of Judgment acquires assignor's rights and takes subject to all defenses as between parties to judgment, pp. 262-3.

Cited in *Curtin v. Kowalsky*, 145 Cal. 434, assignment of judgment though without consideration is valid; *Mohr v. Byrne*, 135 Cal. 90, quoting *Duke v. Clark*, 58 Cal. 465; note to *Chilstrom v. Eppinger*,

78 Am. St. Rep. 47, 52, on general subject; *Northam v. Gordon*, 23 Cal. 255, where default judgment was set aside after assignment; *Hobbs v. Duff*, 23 Cal. 626, where right of setoff was asserted against assignee; *Duke v. Clark*, 58 Miss. 474, where such defenses were restricted to those in debtor's favor; *Winz v. Goudon*, 2 Posey (Tex.), 214, holding that right to execution follows assignment; and in note to *Dugas v. Mathews*, 54 Am. Dec. 368, upon rights of assignee of judgment; to same effect in *First Nat. Bank v. Ferris etc. Dist.*, 107 Cal. 62, 64, where assignee for value and without notice of moneys due under contract, was held to take free of latent equities of third persons; and *Moreni v. Swift*, 15 Nev. 224, holding assignee of bill of sale to take subject to existing attachment.

12 Cal. 265-273. **MOORE v. PATCH.**

Tax is Debt due from property owner to state, p. 270.

Cited to same effect in *People v. Seymour*, 16 Cal. 344, 76 Am. Dec. 526—holding, further, that legislature may declare assessment prima facie evidence of regularity; and *S. F. Gas Co. v. Brickwedel*, 62 Cal. 646, on point that tax has effect of judgment and could be used as offset in claim against city. Distinguished with *Seymour* case, supra, in *Perry v. Washburn*, 20 Cal. 351, holding United States notes not receivable in payment of taxes.

Tax Collections.—Legislature may by act remedy defects in proceedings, p. 270.

Cited to same effect in *Cowell v. Doub*, 12 Cal. 274; and in *People v. Judge*, 17 Cal. 553, approving special act for change of venue of murder trial.

12 Cal. 273-275. **COWELL v. DOUB.**

Taxation.—Irregularities in assessment will not invalidate it where no error results, p. 274.

Cited to same effect in *Kelsey v. Trustees*, 18 Cal. 632, as to notice of meeting of board of equalization; *Guy v. Washburn*, 23 Cal. 115, as to valuation of property, and same case (p. 117) as to failure to complete "alphabetical index" within statutory time; *Rivers v. Thompson*, 43 Ala. 639, holding provisions as to assessor's attendance merely directory, and that failure to observe directory provisions will not invalidate tax. Criticised in *Power v. Larabee*, 2 N. Dak. 164, holding tax invalid for failure of officials to conform to certain statutory requirements. Cited, also, in *People v. Seymour*, 16 Cal. 344, 76 Am. Dec. 526, on point of obligation to pay taxes levied.

12 Cal. 275-277. **MARKLEY v. RAND.**

Judgment cannot be collaterally attacked in equity by stranger to it, p. 276.

Cited to same effect in note to Little Rock etc. Co. v. Wells, 54 Am. St. Rep. 251, as to parties to suit in equity to set aside judgment at law.

12 Cal. 277-279. SEARS v. HATHAWAY.

Malicious Prosecution.—Punitive damages held improper under facts, p. 278.

Cited to same effect in Vinal v. Core, 18 W. Va. 57, under similar facts, and holding further as to evidence admissible in mitigation; and note to Winkler v. Roeder, 8 Am. St. Rep. 161, as to allowance of attorney's fees as part of damages in such actions; Shaul v. Brown, 28 Iowa, 42, 4 Am. Rep. 153, on point that acquittal under facts similar to those of main case is to be considered on question of probable cause, but does not affect defendant's liability. Distinguished, Stansbury v. Fogle, 37 Md. 38, allowing punitive damages in such action under facts; and dissenting opinion in Kinsey v. Wallace, 36 Cal. 435, main opinion holding damages in such action excessive and remitting part thereof.

12 Cal. 280. DOYLE v. SEAWALL.

Appeal.—Supreme court has no jurisdiction when judgment less than \$200, p. 280.

Distinguished under new constitution, Dashiell v. Slingerland, 60 Cal. 656, holding "matter in dispute" to include amount of actual judgment appealed from, and to differ from "demand."

12 Cal. 280. NEWBERG v. HENSON.

Special Verdict is conclusive where no proper statement on appeal, p. 280.

Cited, Everett v. Buchanan, 2 Dak. Ter. 254, as to conflict between general and special verdict; and In re Weber Furn. Co., 13 Bank. Reg. 563, 29 Fed. Cas. 538, holding that court will presume evidence to have justified decision, in absence of proof to contrary.

12 Cal. 281-282. FISK v. CREDITORS.

Appeal Lies in Insolvency Cases from order made on opposition to discharge, p. 281.

Cited to same effect, People v. Shepard, 28 Cal. 117, denying certiorari from decree of discharge; and People v. Rosborough, 29 Cal. 418, allowing new trial of opposition.

12 Cal. 283-286. SWAIN v. CHASE.

Justice's Courts.—Jurisdiction must be affirmatively shown and is not presumed, p. 285.

Cited to same effect, Rowley v. Howard, 23 Cal. 403, where return of service of summons was defective; Paul v. Armstrong, 1 Nev. 98 deny-

ing right of such court to enter judgment in forcible entry action where no demand shown; and *Mallett v. Uncle Sam, etc. Co.*, 1 Nev. 198, 90 Am. Dec. 489, holding necessary affirmative proof of service of summons within territorial jurisdiction of justice on default judgment. Cited, also, in *McDonald v. Katz*, 31 Cal. 169, where rule applied to publication of order to show cause in insolvency proceedings; and *Ex parte Kearny*, 55 Cal. 216, where applied to judgment of police court.

12 Cal. 286. COMSTOCK v. BREED.

Consideration for Bond must be an advantage to promisor or injury to promisee, p. 288.

Cited in *Wright v. Byrne*, 129 Cal. 617, holding note to have been without consideration; concurring opinion, *McDonald v. Randall*, 139 Cal. 252, holding wife's mortgage based on sufficient consideration.

12 Cal. 291-295. PEOPLE v. MILLER.

Indictment.—Time of act must appear when offense subject to statute of limitations, p. 294.

Cited to same effect, *Vaughn v. Congdon*, 56 Vt. 115, 48 Am. Rep. 759, holding further committing magistrate liable where bar appears in complaint; *Sledd v. Commonwealth*, 19 Gratt. 818, holding that allegation of commission "within two years" bad at common law, though not under local act when statute as to offense enacted within that time; *State v. Ball*, 30 W. Va. 386, holding, however, allegation of commission within statutory period unnecessary, and further as to remedies when bar appears from indictment. Approved in *United States v. Owen*, 13 Sawy. 57, 32 Fed. Rep. 537, on point that indictment should negative exception to statute. Denied, *United States v. Cook*, 17 Wall. 179, as to last point, holding that plea of statute cannot be raised on demurrer where act defining offense has no exception nor proviso (see *Owen case*, supra); and *State v. Sammons*, 95 Ind. 28, holding that time of act need not be pleaded, though practice criticised, and that "188—" as date was mere imperfect statement not invalidating indictment; *Packer v. People*, 26 Colo. 316, holding that bar of statute need not be negated in indictment.

12 Cal. 298-299. RITTER v. PATCH. S. C. Berri v. Patch, 12 Cal. 299-300.

Taxes.—Injunction will not lie to restrain collection unless irreparable injury shown, although tax void, p. 299.

Cited to same effect, *Insurance Co. v. Bonner*, 7 Colo. App. 101, holding further that complaint must allege issuable facts showing such injury; *Frost v. Flick*, 1 Dak. Ter. 132, where technical irregularities and errors were asserted; *Youngblood v. Sexton*, 32 Mich. 408, 20 Am. Rep. 664 (cited, *Williams v. County Court*, 26 W. Va. 498), where rule

applied to tax on business, even where prevention of multiplicity of suits was alleged; *Coulson v. Harris*, 43 Miss. 759, where tax collector was alleged to be collecting more than assessed tax; dissenting opinion in *Hallenbeck v. Hahn*, 2 Neb. 438, main opinion excepting taxes void or on exempt property; and holding further that if tax is partly good, that portion must be tendered before rest enjoined; *Wells v. Dayton*, 11 Nev. 169, where insolvency of assessor held not to show irreparable injury; and note to *Holland v. Mayor*, 69 Am. Dec. 203, on injunction against tax collections. Cited, also, in *Delphi v. Brown*, 61 Ind. 37, holding that where same courts administer law and equity injunction will issue at once when tax is illegal and void, though not when merely irregular.

12 Cal. 299-300. *BERRI v. PATCH*.

Taxes.—Injunction will not lie to restrain collection unless injury irreparable, p. 300.

Cited to same effect, *Bucknall v. Storey*, 36 Cal. 71, where tax claimed to be void; *Tallassee etc. Co. v. Spigener*, 49 Ala. 264, holding, however, that injunction will lie when tax illegal, but not when partly legal unless payment as to this is made before suit; and *Youngblood v. Sexton*, 32 Mich. 408, 20 Am. Rep. 664, *Williams v. County Court*, 26 W. Va. 498, and note to *Holland v. Mayor*, 69 Am. Dec. 203, on same points as in *Ritter v. Patch*, 12 Cal. 298, 299.

12 Cal. 300-301. *PEOPLE v. SUPERVISORS*.

Supervisors cannot control treasurer as to payment of sinking fund, p. 300.

Cited, *Forstall v. Consolidated Assn., etc.*, 34 La. Ann. 777, holding unconstitutional an act directing investment in state bonds of funds of insolvent corporation properly applicable to its debts.

12 Cal. 301-305. *HUNT v. WATERMAN*.

Vendor's Lien waived by taking mortgage, though latter defective, p. 304.

Cited to same effect, *Tripp v. Duane*, 74 Cal. 92, where rule applied to resulting trust from deed taken in name of A where price paid by B; *Avery v. Clark*, 87 Cal. 624, 22 Am. St. Rep. 274, holding, further, generally as to nature of lien; *McKeown v. Collins*, 38 Fla. 290, where vendor took vendee's worthless note; *Partridge v. Logan*, 3 Mo. App. 520, where mortgage taken was valueless on foreclosure and there was great delay in asserting lien; and *Pease v. Kearny*, 3 Oreg. 419, where note and mortgage were taken.

12 Cal. 306-308. *STEVENS v. IRWIN*.

Impeaching Witness may testify he would not believe other under oath, p. 308.

Cited to same effect, *Wise v. Wakefield*, 118 Cal. 111; *State v. Johnson*, 40 Kan. 270; and note to *Allen v. State*, 78 Am. Dec. 772, on general subject. Cited, also, in *Hamilton v. People*, 29 Mich. 187, where, on cross-examination, witness who had testified to good reputation was asked if he had not said he would not believe other under oath.

12 Cal. 308-311. **BEEBE v. BROOKS.**

Indorser after Maturity is entitled to demand on maker and notice, p. 310.

Cited to same effect, *Beer v. Clifton*, 98 Cal. 326, 35 Am. St. Rep. 174, holding further as to time of such demand and notice; *McMonigal v. Brown*, 45 Ohio St. 503, holding, however, agreement between indorsee, indorser, and maker extending time of payment was waiver; *Smith v. Caro*, 9 Oreg. 281, holding further parol evidence inadmissible to vary indorser's liability on blank indorsement; and note to *Ecfert v. Des Coudres*, 12 Am. Dec. 611, upon indorsement after maturity.

12 Cal. 311-315. **BARRINGER v. WARDEN.**

Statute of Limitations may be raised by general demurrer, but only when bar appears on face of complaint, p. 314.

Cited to same effect, *Mason v. Cronise*, 20 Cal. 217, holding further that exception to statute must be pleaded where bar otherwise appears from complaint; *Kelley v. Kries*, 68 Cal. 213, holding plea waived when not taken by demurrer or answer; *Cameron v. San Francisco*, 68 Cal. 391, holding demurrer proper when bar appears on complaint; and conversely, *McGehee v. Blackwell*, 28 Ark. 30; and note to *Sleeth v. Murphy*, 41 Am. Dec. 234, as to propriety of demurrer. Distinguished, *De Uprey v. De Uprey*, 23 Cal. 353, holding form of demurrer improper.

Promise to Pay Money owed by one party to another need not be in writing, p. 315.

Approved in *Casey v. Miller*, 3 Idaho, 571, where G. owes C. and M. owes G., and G. gives C. order on M., which is accepted, and M. pays C. part on account, M. accepts C. as his creditor and is released as G's debtor.

12 Cal. 315-316. **STOCKTON v. GARFRIAS.**

Boundary Agreement made after trespass does not estop party from showing title prior to agreement, p. 315.

Cited to same effect, *Stinchfield v. Gillis*, 96 Cal. 38, applying rule to bulkhead erected by consent between mines upon question of priority of title to minerals.

12 Cal. 317-325. **GRIFFITH v. GROGAN.**

Payment of Note does not extinguish debt unless specially so agreed, p. 321.

Cited in *Bank v. Central Market Co.*, 122 Cal. 33, holding no agreement to extinguish shown. *Higgins v. Wortell*, 18 Cal. 333, holding further right to sue on original debt when note not paid; *Welch v. Arlington*, 23 Cal. 322, holding surrender of old note when new one given not sufficient as agreement for payment; *Mitchell v. Hockett*, 25 Cal. 542, 85 Am. Dec. 154, holding judgment not satisfied by such payment; *Brown v. Olmstead*, 50 Cal. 166, where draft was taken for note; *Comptoir d'Escompte v. Dresbach*, 78 Cal. 20, holding facts to show acceptance of check as payment, and that thereon creditor takes all risks as to payment; *Tolman v. Smith*, 85 Cal. 287, holding foreclosure on original mortgage suspended but not extinguished where second mortgage taken in conditional payment; *Steinhart v. National Bank*, 94 Cal. 366, 28 Am. St. Rep. 135, even where original note was mutilated and marked canceled; *Knox v. Gerhauser*, 3 Mont. 275, where applied to acceptance of order; dissenting opinion in *Bautz v. Bosnett*, 12 W. Va. 801, main opinion holding express agreement as to payment shown by facts; and see *Jenne v. Burger*, 120 Cal. 447; *In re Hurst*, 13 Bank. Reg. 462, where note of third persons taken, applying rule to composition proceedings; and *Alferitz v. Ingalls*, 83 Fed. Rep. 970, holding first note and mortgage not merged in second unless so agreed.

12 Cal. 325-327. PEOPLE v. URIAS.

Indictment.—Malice aforethought must be alleged for assault with deadly weapon, p. 326.

Cited in *People v. Mendenhall*, 135 Cal. 348, but holding such malice not synonymous with "express malice"; *People v. Schmidt*, 63 Cal. 28, in indictment for murder; and *People v. Arnold*, 116 Cal. 686, on point of admissibility of evidence where charge was intent to kill and verdict assault with deadly weapon. Cited, also, in *Territory v. Layne*, 7 Mont. 230, as overruled by *People v. Villarino*, 66 Cal. 229, and holding the words unnecessary in indictment for assault with intent to murder.

12 Cal. 327-330. LIES v. DeDIABLAR.

Homestead.—Conveyance of by husband alone is ineffectual, not being in statutory mode, p. 329.

Cited to same effect, *Galiardo v. Dumont*, 54 Cal. 499, holding homestead not alienable under power of attorney from husband; *Merced Bank v. Rosenthal*, 99 Cal. 49, where acknowledgment of mortgage was defective; *Larson v. Reynolds*, 18 Iowa, 583, 81 Am. Dec. 447, holding husband's mortgage alone defective and right of second wife to homestead not barred by foreclosure when not made a party; *Thompson v. New England etc. Co.*, 110 Ala. 406, 55 Am. St. Rep. 31, where insanity of wife held not to dispense with her joinder in deed; and note on same point to *Poole v. Gerrard*, 65 Am. Dec. 468; *California etc.*

Co. v. Anderson, 79 Fed. Rep. 406, where applied to mortgage by wife for husband's antecedent debt, cited, also, in Roode v. State, 5 Neb. 176, 25 Am. Rep. 476, where applied to deed (not of homestead) defective in wife's acknowledgment. Cited, also, in Gimmy v. Doane, 22 Cal. 638, holding that homestead on common property may be partitioned or set apart on divorce; and Johnston v. Turner, 29 Ark. 290, holding actual residence of wife on property not necessary to creation of homestead by husband, where she has not abandoned him.

12 Cal. 345-348. **PEOPLE v. AH FONG.**

Oral Charge in criminal trial is error, p. 347.

Cited to same effect, People v. Woppner, 14 Cal. 438, where applied to oral further instructions to jury after retirement; People v. Chares, 26 Cal. 79, also, as to further instructions holding further defendant's consent not presumable, from presence and failure to object; People v. Trim, 37 Cal. 276, where further instructions were given in absence of and without notice to defendant's attorney; People v. Sanford, 43 Cal. 35, where defendant did not consent; People v. Hersey, 53 Cal. 575, under section 1093 of the Penal Code, where oral further instructions were given in absence of reporter; Territory v. Duffield, 1 Ariz. Ter. 63, where written charge filed after verdict; State v. Porter, 35 La. Ann. 536, holding court cannot refuse request for written charge because made at unreasonable time, where time not fixed by statute or rule; and State v. Harkin, 7 Nev. 384, where applied to remarks as to weight of testimony. Cited, also, in Bradway v. Waddell, 95 Ind. 175, where applied to civil cases, and distinguishing directions to reject evidence or as to form of verdict or the like; Swaggart v. Territory, 6 Okla. 347; Boggs v. United States, 10 Okla. 447. Distinguished, State v. Potter, 15 Kan. 316, as to answer to question of juror upon return of jury; and State v. Bennington, 44 Kan. 585, where oral instructions were taken down by reporter and copied and delivered to jury with others upon return.

Motion for New Trial in criminal cases may bring up any ruling denying defendant statutory privilege, p. 348.

Cited to same effect, Rakes v. People, 2 Neb. 164, where applied to objection not made in time at trial.

12 Cal. 348-351. **BOWEN v. MAY.**

Foreclosure cannot be had of joint property where only one defendant served, p. 351.

Cited, note to Wood v. Watkinson, 44 Am. Dec. 573, on validity of joint judgments where all defendants not served. Distinguished, Goodlet v. St. Elmo etc. Co., 94 Cal. 299, as to suit against association by common name and deficiency judgment therein.

12 Cal. 352-362. WHIPLEY v. McKUNE.

Elections.—Irregularities of officers at, will not invalidate when result not charged thereby, p. 357.

Cited in *McCarthy v. Wilson*, 146 Cal. 328, ineligibility of election officers who were in fact appointed and served cannot, in absence of fraud, disfranchise voters of precinct; *Packwood v. Brownell*, 121 Cal. 480, *People v. Prewitt*, 124 Cal. 12, and *Abbott v. Hartley*, 143 Cal. 486, holding election not nullified by malconduct of board; *Kenworthy v. Mast*, 141 Cal. 271, quoting *Atkinson v. Lorbeer*, 111 Cal. 419; *Ferguson v. Allen*, 7 Utah, 269, holding rejection of entire poll allowable only where actual legal vote not ascertainable; *Atkinson v. Lorbeer*, 111 Cal. 421, 422, where held malconduct of election board not shown; dissenting opinion in *People v. Cicott*, 16 Mich. 324, holding statutory requirements directory; *Farrington v. Turner*, 53 Mich. 29, 51 Am. Rep. 90, where polling places was changed for convenience of voters; *Taylor v. Taylor*, 10 Minn. 112, 113 where oath not taken by election officers, not list of electors kept, and an election judge was candidate, holding, further, burden of proof to show result affected, on contestant, and certificate of canvassing board prima facie evidence of result; *Wells v. Taylor*, 5 Mont. 208, as to irregularities in appointment and qualification of officers and in returns; and note to *People v. Bates*, 83 Am. Dec. 750, upon conduct of elections. Distinguished, *Schneider v. Bray*, 22 Nev. 279, holding ballots primary and controlling evidence as to result of election. Commented on, also, in *Saunders v. Haynes*, 13 Cal. 150, as to jurisdiction of district court in election contests.

12 Cal. 363-377. HUNTER v. WATSON. S. C. 73 Am. Dec. 543, and note 549.

Unrecorded Deed is good as to subsequent purchasers not bona fide or without notice, p. 373.

Cited, note to *Voorhis v. Westerfelt*, 3 Am. St. Rep. 319, as to effect of failure to record; *Middle Creek etc. Co. v. Henry*, 15 Mont. 575, holding subsequent appropriator of water not a "purchaser" under recording act; *Vaughn v. Schmalsle*, 10 Mont. 197, ruling similarly as to judgment creditor; *Murray v. Beal*, 23 Utah, 554, where corporate officers executed deed to secure loan, but did not make oath that they were corporation's officers as required by statute, deed was good as against bankruptcy trustee of corporate estate.

Notice.—Possession under unrecorded deed is, as to subsequent purchaser from same vendor, p. 374.

Cited to same effect, *Woodson v. McCune*, 17 Cal. 304, where extended to any other title consistent with possession; *Havens v. Dale*, 18 Cal. 367, 368, holding necessary, however, actual bona fide possession evidenced by actual inclosure or its equivalent; *Lestrade v. Barth*, 19 Cal. 676, holding such possession sufficient to put second vendee (from original owner's heirs) on inquiry as to occupant's interest; *Dutton*

v. Warschauer, 21 Cal. 628, 82 Am. Dec. 773, holding tenant's possession sufficient for purpose as to landlord's title and overruling as to this *Smith v. Dall*, where main case was distinguished (13 Cal. 512); *Daubenspeck v. Platt*, 22 Cal. 335, where possession by mortgagor, where mortgage was deed absolute in form with defeasance, was held notice of his title to purchaser from mortgagee; *Landers v. Bolton*, 26 Cal. 419, following also *Dutton case*, supra; *Fair v. Stevenot*, 29 Cal. 490, where applied to interest in mining claim and holding further as to character and rebuttal of such notice and that possession was merely evidence of such notice; *Pell v. McElroy*, 36 Cal. 271, where vendor remained in possession after formal conveyance, and holding also as to rebuttal of presumption of such notice; *Scheerer v. Cuddy*, 85 Cal. 272, case of unrecorded lease, holding, further, lack of purchaser's knowledge of lessee's possession immaterial as to his rights; *Emeric v. Alvarado*, 90 Cal. 472, explaining main case as modified by *Fair v. Stevenot*, supra, and holding possession by tenant merely evidence of his landlord's title as against subsequent purchaser; and notes to *Blankenship v. Douglas*, 82 Am. Dec. 613; to *Barney v. McCarty*, 83 Am. Dec. 435; to *Smith v. Yule*, 89 Am. Dec. 171, and to *Riley v. Quigley*, 99 Am. Dec. 519, as to effect of possession as notice of title.

Deed to Dead Man and heirs is void, p. 376.

Cited to same effect, *Morgan v. Hazelhurst Lodge*, 53 Miss. 675, where deceased alone was grantee in parties to deed; *Wehl v. Robinson*, 97 Tenn. 464, applying rule to fictitious grantee, but holding that deed by latter in same name conveys title as against him; *United States v. Southern Colo. etc. Co.*, 5 McCrary, 569, where patent to fictitious person and holding doctrine of bona fide purchasers not to apply; *Neal v. Nelson*, 117 N. C. 406, 53 Am. St. Rep. 595, holding deed bad if to X and heirs, aliter if to X or heirs, when latter can be identified; and distinguished as to this exception in *Ready v. Kearsley*, 14 Mich. 225. Distinguished, also, in *Lyles v. Lascher*, 108 Ind. 384, holding deed to heirs of living person good when property conveyed to bona fide purchasers, and, further, as to construction of such deed by contemporaneous acts; and see *Oliver v. Forbes*, 17 Kan. 129, holding warranty of deed of heirs of deceased allottee before patent to convey title as against their grantee after patent issued.

Power of Attorney held sufficient to include execution of deed, p. 376.

Cited to same effect, as to power to insert conditions in lease, *De Rutte v. Muldrow*, 16 Cal. 512.

Bona Fide Purchaser.—Judgment creditor purchasing at own sale without notice, is, p. 377.

Cited to same effect, *Foorman v. Wallace*, 75 Cal. 554; *Riley v. Martinelli*, 97 Cal. 583, 33 Am. St. Rep. 213; and note to *Boos v. Morgan*, 30 Am. St. Rep. 246, on same subject. See, also, as to vendee of purchaser at execution sale, *Eldridge v. See Yup Co.*, 17 Cal. 56.

Knowledge of Agent in course of agency is knowledge of principal, p. 377.

Cited to same effect, *Watson v. Sutro*, 86 Cal. 516, where applied to notice to attorney of defects in title; *Wittenbrock v. Parker*, 102 Cal. 101, 41 Am. St. Rep. 176, where notice was to one of firm of attorneys; and notes to *Little Pittsburg etc. Co. v. Little Chief etc. Co.*, 7 Am. St. Rep. 246. *Atlantic Mills v. Indian etc. Mills*, 9 Am. St. Rep. 708, *Trentor v. Pothén*, 24 Am. St. Rep. 228, 232; *Singly v. Warren*, 63 Am. St. Rep. 906, and *Hacker v. White*, 79 Am. St. Rep. 948, on general subject.

Attorney.—Privileged communications need not be revealed by, but rule does not extend to information acquired elsewhere, p. 377.

Cited to same effect, *Gallagher v. Williamson*, 23 Cal. 333, 83 Am. Dec. 116, and note 117; *Stanhilber v. Graves*, 97 Wis. 518, holding communication not privileged; note to *O'Brien v. Spalding*, 66 Am. St. Rep. 220, on general subject; in note to *DeWolf v. Strader*, 79 Am. Dec. 373, restricting such communications only to those received by the attorney while acting as such; and notes to *Whitney v. Barney*, 86 Am. Dec. 394, and *Gray v. Fox*, 97 Am. Dec. 418, as to privileged communications to attorneys.

12 Cal. 378-394. PEOPLE v. BURBANK.

Statutes.—Unconstitutionality.—Courts may declare, though not unless repugnancy to constitution is clear, p. 384.

Cited to same effect, *Cohen v. Wright*, 22 Cal. 308; dissenting opinion in *Bourland v. Hildreth*, 26 Cal. 229; and *Stockton etc. Co. v. Common Council*, 41 Cal. 160.

Constitutional Construction.—Decisions of other states on similar contents are to be considered, p. 387.

Cited to same effect, *Cohen v. Wright*, 22 Cal. 311, holding, however, such constructions not conclusive.

Judges.—Term of office when fixed by constitution cannot be changed by legislature, p. 386.

Cited to same effect, *People v. Templeton*, 12 Cal. 402; dissenting opinion in *Robertson v. State*, 109 Ind. 110; dissenting opinion in *State v. Ware*, 13 Oreg. 406, main opinion holding that election to fill vacancy caused by death or resignation is for unexpired term only (and same rule as in main opinion is applied in *Church v. Colgan*, 117 Cal. 688, where appointment to vacant office was held to be for unexpired term only); dissenting opinion in *Burks v. Hinton*, 77 Va. 44, 48, main opinion, however, distinguishing main case (p. 38) under local constitution and overruling *Ex parte Meredith*, where main case was approved, 33 Gratt. 124, 130, 36 Am. Rep. 775, 779.

Term of Office of officer elected to fill vacancy is for full constitutional period, p. 387.

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Cited in *Smith v. Cosgrove*, 71 Vt. 202, construing local statutes.

Term of Office is period for which officer is elected, p. 392.

Cited in *State v. Guinotte*, 156 Mo. 517, defining "during."

Constitutional Law.—Statute may be bad in part only, where such provisions are separable, p. 393.

Cited in *Ex parte Gerino*, 143 Cal. 420, noted under *People v. Hill*, 7 Cal. 103.

12 Cal. 394-402. **PEOPLE v. TEMPLETON.**

Term of Office, when fixed by constitution, cannot be diminished by legislature, p. 401.

Cited to same effect, *Westbrook v. Rosborough*, 14 Cal. 187, holding act good, however, as to the election. Distinguished, *Halsey v. Gaines*, 2 Lea, 329, holding that legislature may abolish court during term for which judge appointed, and deprive him of salary for rest of term; but see dissenting opinion at p. 350.

General citation: *People v. Compton*, 123 Cal. 408.

12 Cal. 402. **RITTER v. STOCK.**

Appeal from Verdict will be affirmed when evidence conflicting, p. 402.

Cited to same effect, *Duff v. Fisher*, 15 Cal. 382, applying rule to verdict on special issues in equity case; and *Wilson v. Cross*, 33 Cal. 68, where trial had by court, holding, however, findings not sustained by evidence.

12 Cal. 403-409. **BURKE v. TABLE MOUNTAIN ETC. CO.**

Answer.—Denial, when negative pregnant, held insufficient, p. 407.

Cited, *Morrill v. Morrill*, 26 Cal. 292, and *Randolph v. Harris*, 28 Cal. 567, 87 Am. Dec. 142, holding like answers not to put in issue assignment of note before maturity; and *Landers v. Bolton*, 26 Cal. 418, as to allegation of fact of conveyance.

Admission in Answer is conclusive evidence of fact admitted, p. 407.

Cited to same effect, *Lillienthal v. Anderson*, 1 Idaho, 678, holding plaintiff need not prove fact admitted by failure to deny; and dissenting opinion in *Burke v. McDonald*, 2 Idaho, 319, holding that plaintiff cannot deny his allegation when admitted by defendant.

Secondary Evidence of writing is admissible on nonproduction after notice, when within party's power, p. 407.

Cited in *Harloe v. Lambie*, 132 Cal. 136, holding copy admissible under facts stated.

Ejectment.—Defendant.—One not in possession is improper defendant, pp. 407, 409.

Cited to same effect, *Hawkins v. Reichert*, 28 Cal. 536.

Res Adjudicata.—Reasons given for judgment are not, p. 408.

Cited to same effect, *Butt v. Herndon*, 36 Kan. 372, as to findings when no judgment rendered, and holding further no appeal lies from such findings.

12 Cal. 400-411. *PEOPLE v. MARTIN*.

Special Election to Fill Vacancy held invalid for want of governor's proclamation, p. 410.

Cited to same effect, *Westbrook v. Rosborough*, 14 Cal. 187, 188; *Kenfield v. Irwin*, 52 Cal. 169 (cited, dissenting opinion in *People v. Hoge*, 55 Cal. 620), as to proclamation of time of special election; *George v. Oxford Township*, 16 Kan. 80, when bond election held invalid for defect in notice; *People v. Palmer*, 91 Mich. 290, when special election held invalid because notice not given by proper persons, although electors voted; *Morgan v. Gloucester*, 44 N. J. L. 143, holding that when time and place not fixed by law notice necessary of special bond election; and distinguishing case of general election; note to *People v. Weller*, 70 Am. Dec. 769, as to necessity for proclamation in such elections; *State v. Martin*, 83 Mo. App. 58; note to *People v. Bates*, 83 Am. Dec. 750, 751, as to necessity of notice or proclamation in special elections.

12 Cal. 414-424. *PICO v. COLUMBET*. S. C. 73 Am. Dec. 550.

Tenant in Common is not liable to cotenant for profits from use and occupation while in exclusive possession, p. 419.

Cited in *Plass v. Plass*, 122 Cal. 11, denying recovery under facts stated; *McCord v. Oakland etc. Co.*, 64 Cal. 139, 49 Am. Rep. 696, refusing cotenant out of possession injunction to prevent other from working mine held in common; *Hamby v. Wall*, 48 Ark. 137, 3 Am. St. Rep. 219, holding tenant not liable for rent for exclusive working of cotton gin; *Bird v. Bird*, 15 Fla. 442, 21 Am. Rep. 299, holding mortgagee of crops grown by tenant in possession not liable as trustee for other; *Humphries v. Davis*, 100 Ind. 371, applying rule when no ouster of one tenant by other, but holding that occupant must account for rents received; *Reynolds v. Wilmeth*, 45 Iowa, 695; *Israel v. Israel*, 30 Md. 125, 127, 96 Am. Dec. 573, 575, and note 576, following principles in *Humphries v. Davis*, *supra*, and holding further occupant not entitled to allowances for expenditures made for own convenience; *Kean v. Connelly*, 25 Minn. 226, 33 Am. Rep. 461, where occupant allowed crops raised by him; *In re Tyler*, 40 Mo. Ap. 384, holding, however, that where occupant was guardian for other cotenants he is liable to account as trustee; *Coleman's Appeal*, 62 Pa. St. 276, as to *fructus industriales* and discussing liability of cotenants of mines under statute; *McGrady v. McRae*, 1 Tex. App. Civ. 584, holding remedy of nonoccupant to be

partition and accounting thereon; *Ring v. Smith*, 1 Tex. App. Civ. 628, and notes upon liability between cotenants for use and occupation to *Chambers v. Chambers*, 14 Am. Dec. 587; *Early v. Friend*, 78 Am. Dec. 666; *Billings v. Gibbs*, 92 Am. Dec. 589; *Bruce v. Hastings*, 98 Am. Dec. 595; *Graham v. Pierce*, 100 Am. Dec. 669 (collecting references to prior notes); *O'Connor v. Delaney*, 39 Am. St. Rep. 603, and *Ward v. Ward*, 52 Am. St. Rep. 926. Explained and distinguished in *Goodenow v. Ewer*, 16 Cal. 471, 76 Am. Dec. 548, and note 550, holding occupant liable for rents of common property received by him from others; *Abel v. Love*, 17 Cal. 238, where same liability asserted as to moneys received from sales of water or profits derived from rents of ditch; and *Howard v. Throckmorton* (quoting opinion of lower court), 59 Cal. 86 (see p. 89), following principle stated in *Goodenow v. Ewer*, *supra*.

12 Cal. 426-432. M'GARRITY v. BYINGTON.

Nonsuit.—Ruling on, not considered unless grounds of motion appear in record, p. 429.

Cited to same effect, *People v. Banvard*, 27 Cal. 474, where observance of rule considered "a matter of much practical consequence"; *Coffey v. Greenfield*, 62 Cal. 609, approving denial of motion because made on general grounds; *Wright v. Fire Ins. Co.*, 12 Mont. 477, holding motion should be disregarded when made generally on insufficiency of complaint; *State v. Tamler*, 19 Ore. 533, where rule applied to motion to direct acquittal unless failure of proof is total; and *Mattoon v. Fremont etc. Co.*, 6 S. Dak. 198, when applied to motion to direct verdict for defendant. Distinguished, *Daley v. Russ*, 86 Cal. 117, where plaintiff's case not curable even if defects specifically enumerated.

Evidence Apparently Irrelevant must be accompanied with offer to connect with the other testimony, p. 430.

Cited to same effect, *People v. Clark*, 84 Cal. 578, when applied to evidence as to conspiracy.

Ejectment—Plaintiff's Title.—When action depends on priority of possession plaintiff need not show title in himself, p. 431.

Cited to same effect, *Richardson v. McNulty*, 24 Cal. 347, ejectment for mining claim.

Mining Claim.—Right to when attached not divested for mere failure to work with diligence, p. 431.

Cited to same effect, *Gore v. McBrayer*, 18 Cal. 588, where agent who had posted notices in name of A. tore them down and substituted others in name of B.

Mining Regulations.—Forfeiture does not follow noncompliance with unless they so provide, p. 431.

Cited in *Emerson v. McWhirter*, 183 Cal. 511, as to rule on posting of location notices; *Last Chance Min. Co. v. Mining Co.*, 131 Fed. 586,

failure of locator of lode claim to record location notice within fifteen days as required by Idaho statute does not invalidate location; *Bell v. Red Rock etc. Co.*, 36 Cal. 219, as to amount of work to be done; *Rush v. French*, 1 Ariz. Ter. 146; *Johnson v. McLaughlin*, 1 Ariz. Ter. 501; and *Jupiter etc. Co. v. Bodie etc. Co.*, 7 Sawy. 114, 11 Fed. Rep. 680, as to failure to record claim; and note to *McClintock v. Bryden*, 63 Am. Dec. 105, as to effect of nonobservance of such regulations. Cited, also, in same note at p. 104, as to validity of local regulations. Denied as to point in syllabus in *King v. Edwards*, 1 Mont. 241, holding no express penalty necessary to effect forfeiture for noncompliance as to amount of work and development.

Estoppel does not arise from merely making improvements on other's land, unless owner commits fraud therein, p. 431.

Cited to same effect, *Houser v. Austin*, 2 Idaho, 199, holding no estoppel in pais as to ore covered by lease, under facts; and note to *McClintock v. Bryden*, 63 Am. Dec. 107, as to estoppel by allowing another to improve mining claim.

Annual Labor.—Work outside claims may be considered as done on claim if necessary relation and proximity exist, p. 432.

Cited to same effect, *Lockhart v. Rollins*, 2 Idaho, 509, 512, holding labor of watchman and custodian of idle mine sufficient to exclude abandonment and within statute, as tending to show good faith.

New Trial.—Order denying not reversed when evidence conflicting, p. 432.

Cited, *Hall v. Bark*, 33 Cal. 525, on point that order granting new trial will be affirmed unless error affirmatively shown.

12 Cal. 433-437. *DECK v. GERKE*. 73 Am. Dec. 555.

Chancery Jurisdiction in Probate Matters held not to extend to case stated, p. 435.

Cited in *Toland v. Earl*, 129 Cal. 154, 79 Am. St. Rep. 104, sustaining exclusive jurisdiction of probate court to construe wills; *Brodrig v. Brodrig*, 56 Cal. 565, as to power of court of equity to open guardian's account after approval by probate court; *Rosenberg v. Frank*, 58 Cal. 400, affirming power of equity to construe will admitted to probate, and to same effect, *Williams v. Williams*, 73 Cal. 104; *Sanderson's Admr. v. Sanderson*, 17 Fla. 831, affirming like jurisdiction in suit of heirs against administrator for settlement of accounts not passed on in probate court, and for distribution; *Deans v. Wilcoxson*, 25 Fla. 1025, affirming jurisdiction of bill by heirs to set aside probate order of sale as void for want of jurisdiction; *Laddicoat v. Treglown*, 6 Colo. 51, holding, however, that equity will not oust jurisdiction of probate court unless latter cannot or will not act or to prevent multiplicity of suits, and denying relief in case of delay or mismanagement in administration. Cited, also, in notes to *Townsend v. Townsend*, 24

Am. Dec. 194, and *Bailey v. Bailey*, 48 Am. St. Rep. 832, as to equity jurisdiction over probate matters; *Hall v. Hall*, 94 Am. Dec. 715, as to its jurisdiction in guardianship matters; *Mix's Appeal*, 95 Am. Dec. 224, as to equitable jurisdiction of probate court; and *Clarke v. Perry*, 63 Am. Dec. 84, on limited and special character of probate court jurisdiction.

12 Cal. 437-438. STODDART v. VAN DYKE.

Partnership.—Where several sued as partners on note signed by one nonsuit is proper unless partnership or authority to bind is proved, p. 438.

Cited to same effect, *First Nat. Bank v. Simmons*, 98 Cal. 290, holding purchaser of partner's interest not liable for prior firm note unless assumption of obligation shown.

12 Cal. 438-440. THORNTON v. BORLAND.

Answer After Demurrer Overruled should not be allowed where no meritorious defense is asserted, p. 439.

Cited in *Williamson v. Joyce*, 140 Cal. 671, as distinguishing *Galagher v. Delaney*, 10 Cal. 410. Distinguished in *Green v. Underwood*, 86 Fed. 431, 57 U. S. App. 543, construing Colorado statute; *Smith v. Yreka etc. Co.*, 14 Cal. 202, sustaining judgment against plaintiff who refuses to amend after demurrer sustained; *Lord v. Hopkins*, 30 Cal. 78, holding erroneous refusal to allow plaintiff to amend after demurrer filed and before trial; and *McDonald v. Hope Co.*, 48 Fed. Rep. 594, upon point that right to answer after demurrer overruled is within discretion of court.

12 Cal. 440-449. BORLAND v. THORNTON.

Injunction to Stay Proceedings on judgment will not lie for neglect where relief obtainable by motion in original suit, p. 445.

Cited, in following cases denying relief in equity: *Ketchum v. Crippen*, 37 Cal. 227, foreclosure suit—as to subrogation of junior mortgagees and satisfaction of judgment; *Ede v. Hazen*, 61 Cal. 360, as to excusable neglect in failure to plead satisfaction; *Lyme v. Allen*, 51 N. H. 245, and *Morse v. Wafer*, 29 Kan. 282, where remedy existed by appeal from judgment complained of; *United States v. Throckmorton*, 98 U. S. 68 (cited *Brooks v. O'Hara*, 2 McCrary, 652, 8 Fed. Rep. 534), as to action to set aside for fraud decree confirming Mexican title; *Embry v. Palmer*, 107 U. S. 13, as to judgment where counterclaim was omitted through fraud, lack of diligence being shown; and note to *Payton v. McQuown*, 53 Am. St. Rep. 449, on setting aside of judgment because of attorney's neglect. Distinguished, allowing such relief, *Spencer v. Vigneaux*, 20 Cal. 449, where in action on judgment defendant was permitted to set up defense omitted in original action through ignor-

ance of its facts; *Laithe v. McDonald*, 12 Kan. 350, where relief allowed by independent bill to set aside judgment rendered in defendant's absence, under facts stated; *Baer v. Higon*, 26 Utah, 83, where, in foreclosure proceedings service made by publication and default entered and property sold to innocent purchaser, equity has no jurisdiction over suit to set aside proceedings brought one year after judgment.

Notice of Motion must be written unless given in open court, p. 448.

Cited to same effect, *Plateau v. Lubeck*, 24 Cal. 365; *Mallory v. See*, 129 Cal. 368, applying rule to notice of decision; *Killip v. Empire etc. Co.*, 2 Nev. 40, 45, applying rule to notice of intention.

Ex parte Injunction may be dissolved ex parte, p. 448.

Distinguished in main opinion, *Hefflon v. Bowers*, 72 Cal. 273 (followed in dissenting opinion, p. 276), holding ex parte dissolution improper under facts; approved in *Alpers v. Bliss*, 145 Cal. 572, where defendant in partition obtained ex parte order permitting filing of supplemental cross-complaint, court may strike it from files where relief against plaintiff limited to judgment for rents; *Sullivan v. Triunfo etc. Co.*, 33 Cal. 390, on point that appeal lies from order granting such injunction. Cited, also, in *People v. County Judge*, 27 Cal. 152, as to powers of county and district judges as to dissolution of injunction; and *Pueblo Lbr. Co. v. Dansiger*, 7 Colo. App. 151, as to effect of ex parte dismissal of appeal.

12 Cal. 450-456. FARRELL v. ENRIGHT.

Aliens.—Disabilities removed by constitution as to bona fide residents only, p. 456.

Cited to same effect, in *People v. Rogers*, 13 Cal. 165, holding constitutional act permitting nonresident aliens to claim in escheat proceedings; *Norris v. Hoyt*, 18 Cal. 219, restricting disabilities to title to real property by descent or operation of law; *Carrasco v. State*, 67 Cal. 386, holding, however, disabilities entirely removed by sections 671 and 672 of the Civil Code.

12 Cal. 457-466. BUTLER v. COLLINS. S. C. Collins v. Butler, 14 Cal. 227, and Lamott v. Butler, 18 Cal. 35.

Fraud.—Ownership of goods is not changed when claim is based on fraudulent representations, p. 461.

Cited to same effect, in *Amer v. Hightower*, 70 Cal. 443, holding right of seller to maintain conversion when no ratification by him; note to *Root v. French*, 28 Am. Dec. 487, holding further as to necessity of prompt disavowal by vendor. Cited, also, in *People v. Rae*, 66 Cal. 428, 429, as to distinction between obtaining goods by false pretenses and by larceny; *Mason v. Vestal*, 88 Cal. 397, 22 Am. St. Rep. 311, upon point that sale fraudulent as to creditors is void, and not merely voidable; note to *Orser v. Storms*, 18 Am. Dec., at page 554, on point that

constructive possession is sufficient basis for trespass de bonis asportatis, and at page 560 extending rule to case where owner has been wrongfully deprived of possession; and note to *Thurston v. Blanchard*, 33 Am. Dec. 711, upon point that demand not necessary before suit where original taking was tortious.

Fraud.—Evidence of subsequent acts is admissible to show intent and character first, p. 464.

Cited in *Maxson v. Llewelyn*, 122 Cal. 198, holding fraud shown by evidence adduced; *Flood v. McClure*, 3 Idaho, 597, following rule; *Ferbrache v. Martin*, 3 Idaho, 580, acts or declarations of party to fraudulent transfer of property are admissible in evidence, though he is not party to suit and not made in presence of purchaser; *Woolridge v. Boardman*, 115 Cal. 77, where applied to evidence of subsequent insolvency as showing fraudulent intent at time of gift; note to *Massey v. Gorton*, 90 Am. Dec. 299, applying rule to evidence in like proceedings on creditor's bill.

Conversion.—Damages cannot include prospective profits, when already for value of goods, p. 466.

Cited to same effect, in *Brown v. Allen*, 35 Iowa, 314, where damages held confined to market value, and not what property worth under particular contract unknown to defendants; *Aber v. Bratton*, 60 Mich. 363, where rule of damages in replevin stated.

12 Cal. 467-469. McMILLAN v. RICHARDS. S. C. 9 Cal. 365.

Judgment.—Entry in vacation upon remittitur held proper under facts, p. 468.

Cited, *Hutchinson v. Bowers*, 13 Cal. 52, holding such entry proper when verdict rendered and motion for new trial submitted in term time; *People v. Jones*, 20 Cal. 55, when trial was concluded during term and findings filed within prescribed time thereafter; *Casement v. Ringgold*, 28 Cal. 340, sustaining entry in judgment book during vacation of judgment regularly rendered, signed, and filed in term; *In re Cook*, 77 Cal. 225, 11 Am. St. Rep. 271, sustaining entry of divorce decree after death of party where regularly rendered before death. Cited, also, in *Leese v. Clark*, 28 Cal. 36, upon point that entry by clerk is ministerial act; *McMann v. Superior Court*, 74 Cal. 108, holding no order of superior court necessary for entry of judgment of supreme court on remittitur; *Kimpton v. Jubilee etc. Co.*, 22 Mont. 109, holding entry of judgment merely ministerial.

12 Cal. 469-476. WELLINGTON v. SEDGWICK.

Assignment for Creditors is incomplete without trust for assignor or third persons, p. 474.

Cited to same effect, in *Sabichi v. Chase*, 108 Cal. 87, discussing dif-

ference between such assignment and mortgage to creditor, and holding conveyance an assignment.

12 Cal. 476-478. **HART v. GAVEN.**

Street Improvements.—Legislature may compel owner to make in mode conformable to its discretion, p. 478.

Cited to same effect, in *Emery v. San Francisco Gas Co.*, 28 Cal. 352, where applied to street grading, and holding proper an assessment on lots fronting streets; and in same case, page 362, holding requirements as to equality and uniformity of taxation inapplicable to such assessment; *Asphalt etc. Co. v. Gogreve*, 41 La. Ann. 264, holding further that such assessments are not taxes within constitutional limitation as to their amount; *King v. Portland*, 2 Oreg. 158, holding further exercise of such legislative discretion not reviewable by courts.

12 Cal. 479-482. **ZIEL v. DUKES.**

Demand Before Suit not necessary on note payable on demand, p. 482.

Cited to same effect, in *Halleck v. Moss*, 22 Cal. 278, where applied to agreement to make good deficiency "on demand"; *Bell v. Sackett*, 38 Cal. 409, holding statute allowing days of grace applicable to such notes; *Hull v. Meyers*, 90 Ga. 680, holding such note payable immediately and discussing further necessity of protest; *Bartlett v. Rogers*, 3 Sawy. 65, 2 Fed. Cas. 978, holding further barred in four years from date when without interest.

Judgment will not be Annulled because entered by mistake, p. 482.

Cited in *Bond v. Pacheco*, 30 Cal. 534, applying rule to judgment entered by clerk on default.

12 Cal. 483-499. **PAIGE v. O'NEAL.** *S. C. Bridges v. Paige*, 13 Cal. 640, 643.

Instructions to Jury not considered unless embodied in bill of exceptions, p. 492.

Cited to same effect, in *People v. Pettit*, 5 Utah, 242, where oral instructions were taken by stenographer but not included in record.

Challenge for Cause is not good if general, p. 492.

Cited to same effect, in *State v. Squires*, 2 Nev. 231; *Estes v. Richardson*, 6 Nev. 129; *Southern Pac. Co. v. Rauh*, 49 Fed. Rep. 701.

Immaterial Errors will not justify reversal especially when no objection raised, p. 493.

Cited to same effect, in *Calderwood v. Tevis*, 23 Cal. 337, where trial was had without objection before demurrer to answer disposed of; *King v. Blood*, 41 Cal. 317, where rule applied to errors in form of summons.

Levy on Third Person's Property cannot be justified by sheriff under claim of fraudulent conveyance unless he prove the judgment as well as execution in the action, p. 495.

Cited in *Darville v. Mayhall*, 128 Cal. 618, holding justification not properly pleaded; *Knox v. Marshall*, 19 Cal. 622, where debtor had pledged his interest in wheat seized; *Ford v. McMaster*, 6 Mont. 241; *Fisher v. Kelly*, 30 Oreg. 10. Cited, also, in *Fuller Desk Co. v. McDade*, 113 Cal. 363, on point that sheriff can levy on any property in defendant's possession unless knowing it to be another's, and that not liable unless after conversion. Commented on in *Franklin v. Gumerseil*, 9 Mo. App. 88, holding that creditor of vendor may attack sale for fraud although transfer of possession made before levy.

Conversion.—Demand is unnecessary where original taking tortious, p. 495.

Cited to same effect, in *Sargent v. Sturm*, 23 Cal. 360; 83 Am. Dec. 119; *Boynton v. Faulk Co.*, 7 S. Dak. 425, where rule applied to action against auditor to recover moneys paid for land sold at illegal sale. Cited, also, in *Bonaparte v. Clagett*, 78 Md. 106, applying rule where defendant had obtained possession of plaintiff's goods through misrepresentations of plaintiff's tenant under facts stated; and holding conversion not waived by bringing action for price where amendment had before judgment.

Declarations of Vendor after sale are inadmissible to impeach its validity, p. 496.

Cited to same effect, in *Cohn v. Mulford*, 15 Cal. 52; *Jones v. Morse*, 36 Cal. 207, where error held cured under facts; *Garlick v. Bowers*, 86 Cal. 122; *Briswalter v. Palomares*, 66 Cal. 261.

Fraudulent Conveyances are valid as to bona fide purchaser without notice, from fraudulent vendee, p. 496.

Cited to same effect, in *Ricks v. Reed*, 19 Cal. 576, where applied to property originally sold in violation of trust; *Williams v. Borgwardt*, 119 Cal. 83; note to *Root v. French*, 28 Am. Dec. 487, as to title of such purchaser.

12 Cal. 500-533. **McCAULEY v. WELLER.**

Change of Venue.—Bias of judge is not ground for, p. 523.

Cited in *Patterson v. Conlan*, 123 Cal. 455, holding disqualification not shown by petition; *Bryan v. State*, 41 Fla. 658, and *Gaines v. State*, 38 Tex. Cr. App. 215, ruling similarly as to expressions of opinion by judge; denied in *State v. Board*, 19 Wash. 14, 67 Am. St. Rep. 710, construing local statute; *People v. Williams*, 24 Cal. 35, holding further no bias shown under facts; *Bulwer etc. Co. v. Standard etc. Co.*, 83 Cal. 617, where no issue of fact to be tried was raised by pleadings; *In re Jones*, 108 Cal. 398, holding presentation of affidavit as to bias on

such motion a contempt under facts; *Jones v. State*, 61 Ark. 97. extending rule to application for trial by special judge; *In re Davis*, 11 Mont. 19, where criticised but followed; *Allen v. Reilly*, 15 Nev. 455, where facts to be found by jury; *Johnson v. State*, 31 Tex. Cr. App. 461, excepting case of property interest of judge.

Forcible Entry and Detainer.—Questions of title or right of possession cannot be considered in such actions, p. 524.

Cited in *Kerr v. O'Keefe*, 138 Cal. 421, quoting *Voll v. Hollis*, 60 Cal. 569; *Tarpening v. King*, 60 Neb. 215, sustaining action against owner with present right of possession; *Gore v. Altice*, 33 Wash. 338, reaffirming rule; *Voll v. Hollis*, 60 Cal. 573, 574, holding erroneous the admission of deeds showing title in defendants; *Giddings v. Land etc. Co.*, 83 Cal. 100, as to admission of evidence as to title. Cited, also, in *Romero v. Gonzales*, 3 N. Mex. 8 (19), on point that force must appear to sustain action.

Eminent Domain.—Entry before means of compensation provided is illegal, p. 528.

Cited, to same effect, in *Bensley v. Mountain Lake etc. Co.*, 13 Cal. 314, 316, 73 Am. Dec. 577, 579, where petitioner had allowed decree of condemnation to lie dormant for four years; *Curran v. Shattuck*, 24 Cal. 435, where applied to condemnation for highway by supervisors, without tender of compensation; *San Francisco etc. Co. v. Mahoney*, 29 Cal. 117, holding further that entry might otherwise be enjoined or prosecuted as a trespass, and as to time at which values should be computed. Distinguished, *Fox v. Western Pacific etc. Co.*, 31 Cal. 547, holding act constitutional granting railroads right to entry pending condemnation proceedings and without compensation, if security for damages given. Cited, also, in *Jacksonville etc. Co. v. Adams*, 33 Fla. 612, upon point of validity of amendment of statute as to jury in condemnation proceedings; notes to *Gardner v. Newburgh*, 7 Am. Dec. 534, and *Bloodgood v. Mohawk etc. Co.*, 31 Am. Dec. 372, upon subject of syllabus.

12 Cal. 534-535. DUTCH FLAT ETC. CO. v. MOONEY.

Mining Claim—Forfeiture.—When defense in ejectment facts must be pleaded, p. 534.

Cited, to same effect, in *Johnson v. McLaughlin*, 1 Ariz. Ter. 502, holding further failure to comply with local rules no forfeiture, unless rules so provide; *Wulf v. Manuel*, 9 Mont. 287.

Mining Regulations.—Validity of discussed, p. 535.

Cited in note to *Colman v. Clements*, 23 Cal. 249, as to parol proof of such regulations; note to *Lanfear v. Mestier*, 89 Am. Dec. 665, on point that courts will not take judicial notice of such regulations.

12 Cal. 535-539. WATERS v. MOSS. 73 Am. Dec. 561.

Owner of Estray is not liable for its trespass though not inclosing his land, p. 538.

Cited, to same effect, in *Logan v. Gedney*, 38 Cal. 581, construing acts as to sheep herding; *Hahn v. Garratt*, 69 Cal. 147, holding rule modified, however, by special statute, as to Santa Clara County; *Merritt v. Hill*, 104 Cal. 185, holding defendants not liable unless instigating trespass or with notice thereof; *Morris v. Fraker*, 5 Colo. 432; *Chase v. Chase*, 15 Nev. 262; and in notes to *Tonawanda etc. Co. v. Munger*, 49 Am. Dec. 250; *Holden v. Shattuck*, 80 Am. Dec. 688; *Eames v. Salem etc. Co.*, 96 Am. Dec. 680; and to *Clarendon etc. Co. v. McClelland*, 59 Am. St. Rep. 84, upon general subject; note to *Barnes v. Chapin*, 81 Am. Dec. 711, as to liability of owner of horse running at large; *Union Pacific etc. Co. v. Rollins*, 5 Kan. 187, as to liability of railroad company for injury to estrays upon its tracks.

12 Cal. 539-542. SANFORD v. BORING.

Attachment.—Sheriff is liable for amount of debt for releasing property except in due course of law if debt is lost, p. 541.

Cited, to same effect, in *Roth v. Duvall*, 1 Idaho, 154, where rule applied to failure to make return in proper time and for releasing property under belief of its exemption; *Hartlieb v. McLane's Admr.*, 44 Pa. St. 514, 84 Am. Dec. 469, where property stolen from sheriff between levy and sale. Cited, also, in note to *Franklin Bank v. Bachelder*, 39 Am. Dec. 609, on dissolution of attachment lien by officer's release of property; *Hawkins v. Roberts*, 45 Cal. 41, distinguishing same case and holding lien not dissolved under facts.

Instructions to Sheriff will not exonerate him unless in writing, p. 541.

Cited, to same effect, in note to *People v. Palmer*, 95 Am. Dec. 434, upon general subject.

12 Cal. 542-555. ELLISON v. JACKSON WATER CO.

"Ratification" is applicable only where contracting party acts or assumes to act for another, p. 551.

Cited, to same effect, in *Shepardson v. Gillette*, 133 Ind. 128, as to ratification by authorized board of tax levy by unauthorized board without prior request; *Wolf v. Michigan etc. Co.*, 108 Mich. 671, as to ratification by majority of board of trustees of act of minority thereof; *Moore v. Powell*, 6 Tex. Civ. App. 48, as to contract made by one joint owner void under statute of frauds. Cited, also, in *Frink v. Roe*, 70 Cal. 311, upon ratification of acts by agent, and distinguishing between void and voidable transactions; *Minnich v. Darling*, 8 Ind. App. 544, discussing requisites of ratification.

Guaranty.—Contract in suit held void under statute of frauds as collateral agreement, p. 552.

Cited in *Tevis v. Savage*, 130 Cal. 413, holding guaranty void; *Morningstar v. Stratton*, 121 Ala. 442, ruling similarly as to promise to pay another's mortgage of promisor's property; *Bestor v. Roberts*, 58 Ala. 334, holding collateral a promise to indemnify, under facts stated. Denied, *Board v. Cincinnati etc. Co.*, 128 Ind. 249, as "out of line with authority," holding original a promise by owner to pay subcontractor on contractor's default.

Statute of Frauds.—Requisites of form of contract stated, p. 552.

Cited in note to *Siemers v. Siemers*, 60 Am. St. Rep. 434, upon necessity of expressing consideration in such contracts.

Mechanic's Lien—Buildings.—Ditch is not subject to under the statutes, p. 553.

Cited, to same effect, in *Horn v. Jones*, 28 Cal. 203; note to *La Crosse etc. Co. v. Vanderpool*, 78 Am. Dec. 695, as to property subject to mechanic's lien.

Statutes.—Repeal of original act effects repeal of act extending original act, p. 553.

Distinguished, *Schwenke v. Union etc. Co.*, 7 Colo. 516, holding special act adopting procedure by reference to general act not necessarily repealed by repeal of latter.

Mortgage of ditches, etc., to be afterward constructed does not cover such as were merely in contemplation, p. 554.

Cited as dictum, but approved to same effect in *Mitchell v. Amador etc. Co.*, 75 Cal. 489.

12 Cal. 555-559. **FRALER v. SEARS ETC. CO.** 73 Am. Dec. 562.

Dam Owner.—Liability for overflow exists although injuries preventable by plaintiff's reasonable care, p. 558.

Cited in *Western Gas etc. Co. v. Danner*, 97 Fed. 888, sustaining recovery for injuries from fall of smokestack; *McCarty v. Boise City etc. Co.*, 2 Idaho, 228, where parties had equal means to prevent seepage; notes to *McCoy v. Danley*, 57 Am. Dec. 692, *Wabash etc. Canal v. Spears*, 79 Am. Dec. 446, *Bassett v. Salisbury Mfg. Co.*, 82 Am. Dec. 188, and to *Casebeer v. Mowry*, 93 Am. Dec. 768, upon dam-owner's liability; note to *Lancey v. Clifford*, 92 Am. Dec. 565, as to the right of littoral owner to build dams and mills; and *Central Trust Co. v. Wabash etc. Co.*, 57 Fed. Rep. 448, upon point of liability of railway for flood resulting from insufficient culvert, and holding railway not liable under facts. Cited, also, in *Oil Co. v. King*, 6 Tex. Civ. App. 96, where rule of contributory negligence in headnote applied to erection of building next to oil works which catch fire through defendant's negligence; *Union Pacific etc. Co., v. McDonald*, 153 U. S. 278, where same

rule applied to father who allows child to wander into lime-pit negligently left unfenced; and *Marine Ins. Co. v. St. Louis etc. Co.*, 41 Fed. Rep. 653, where applied to delivery of cotton at sheds, where accumulation of property has caused nuisance likely to occasion loss by fire.

12 Cal. 560-561. **BALDWIN v. SIMPSON.**

Ejectment.—Constructive possession under facts stated held insufficient to maintain, p. 560.

Cited, *Kile v. Tubbs*, 23 Cal. 437, on point that entry in good faith under color of title and actual occupation of part with claim to all is equivalent to possession of whole tract; to same effect, *Hicks v. Coleman*, 25 Cal. 138, 85 Am. Dec. 116; and *Walsh v. Hill*, 38 Cal. 487, 488; *Polack v. McGrath*, 32 Cal. 22, holding fences described not substantial inclosures for prior possession under facts; *Kendrick v. Latham*, 25 Fla. 837, where theory of constructive possession for purposes of adverse claim held to apply to forty acre tract; *Probst v. Trustees*, 3 N. Mex. 377 (267), holding no sufficient proof of such possession; note to *Plume v. Seward*, 60 Am. Dec. 604, as to necessity of actual possession where action is based on prior possession. Distinguished, *Cannon v. Union Lumber Co.*, 38 Cal. 675, where referred to as "upon the extreme verge of the rule" holding theory of constructive possession not to apply when entry and claim not made in good faith and under deed.

12 Cal. 561-563. **MORLEY v. DICKINSON.**

Sureties are Discharged by release of levy had on sufficient personal property of principal upon judgment on the contract, p. 563.

Cited, to same effect, in *Mulford v. Estudillo*, 23 Cal. 100, holding such levy alone sufficient as satisfaction of judgment as to third persons liable collaterally or as sureties; note to *Trapnall v. Richardson*, 58 Am. Dec. 357, upon effect of release of levy as to sureties and others. Distinguished, *Mitchell v. Hackett*, 14 Cal. 666, holding return of satisfaction not conclusive as to parties involved.

12 Cal. 564-580. **INGOLDSBY v. JUAN.** *S. C. Hihn v. Courtis*, 31 Cal. 400, 403, 405.

Wife's Deed of Separate Property before act of April 17, 1850, did not need joinder of husband as a grantor, p. 573.

Approved, *Bodley v. Ferguson*, 30 Cal. 516, 517, and applied to wife's contract to convey her separate estate; *Racouillat v. Sansevain*, 32 Cal. 383, as to wife's executory contract made by husband under her power of attorney. Distinguished and explained in *Morrison v. Wilson*, 13 Cal. 497, 73 Am. Dec. 595, where property acquired after act; *Macley v. Love*, 25 Cal. 383; 85 Am. Dec. 143, where marriage was after act; *Meagher v. Thompson*, 49 Cal. 192, under act of 1862, holding concurrence insufficient where husband has given his wife general power of

attorney in advance. Cited, also, in *Douglas v. Fulda*, 50 Cal. 80, holding wife's power of attorney under act of 1863 sufficient when signed by her alone.

Sealed Instrument is not necessary for conveyance of interest in land, p. 577.

Cited, to same effect, in *Owen v. Frink*, 24 Cal. 176, as to transfer of equitable right to conveyance of real estate, and holding, further, unsealed transfer of land good as contract to convey; approved as to same deed in *Hihn v. Curtis*, 31 Cal. 400, 403, 405.

Husband's Concurrence in Wife's Deed is shown by his written approval subscribed to it, though not a party, p. 577.

Cited, to same effect, in *Merrill v. Nelson*, 18 Minn. 374, where husband signed wife's deed; *Newton v. Emerson*, 66 Tex. 146, holding that name in body of deed is sufficient "signing," and intent to convey shown by acknowledgment and delivery; note to *Payne v. Parker*, 25 Am. Dec. 227, on subject of when deed binds one not named as party.

Distinguished in *Hart v. Church*, 126 Cal. 477, 77 Am. St. Rep. 201, as to alienation of homestead; cited in *Morgan v. Snodgrass*, 49 W. Va. 394, but holding acknowledgment by both necessary.

Separate Contemporaneous Papers are to be construed together, p. 577.

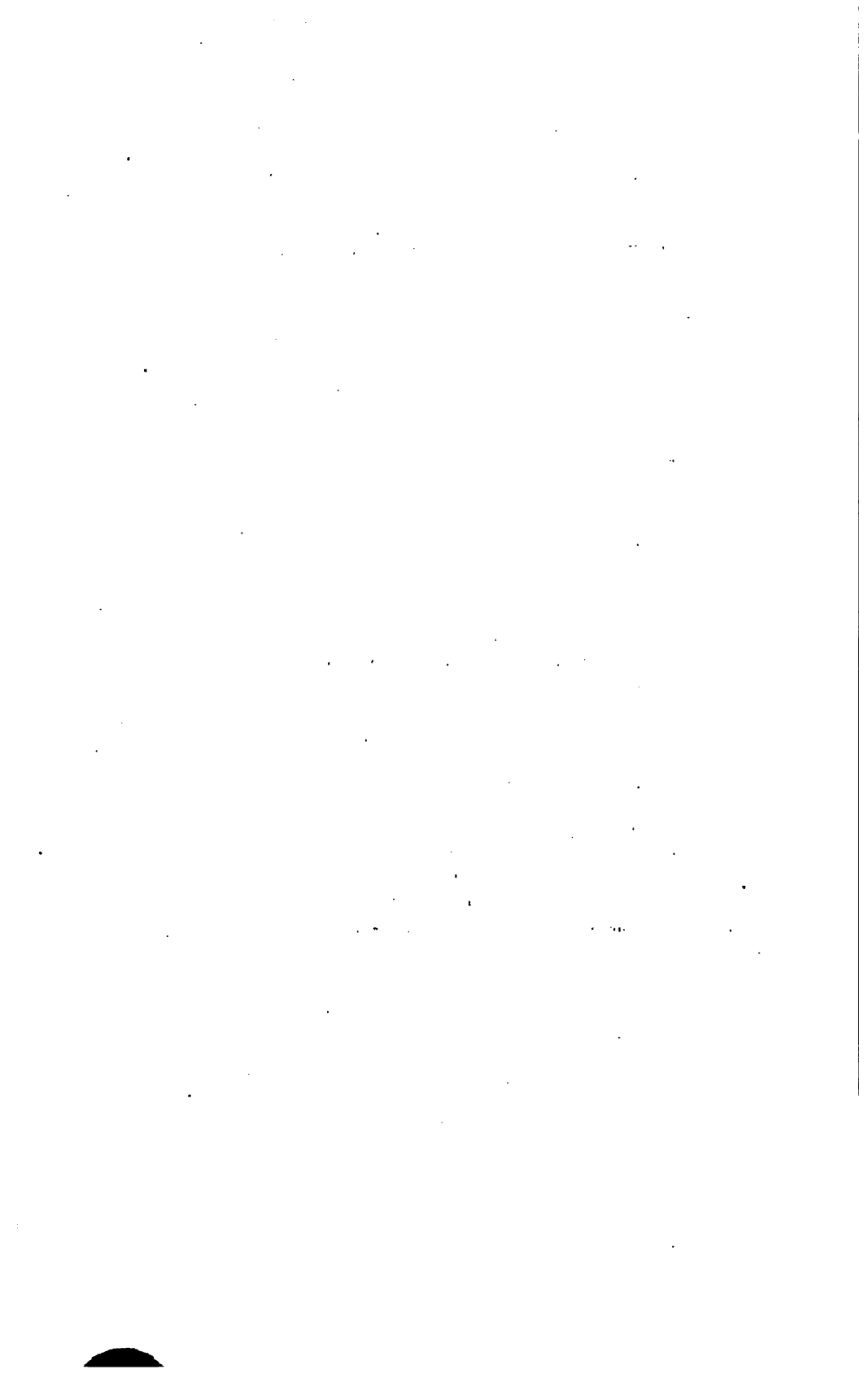
Distinguished in *Uhlhorn v. Goodman*, 84 Cal. 189, as to deed by agent in own name as owner's grantee, and agreement by owner to sell to agent.

Acknowledgment.—County clerk may take and certify though having no seal of office, p. 579.

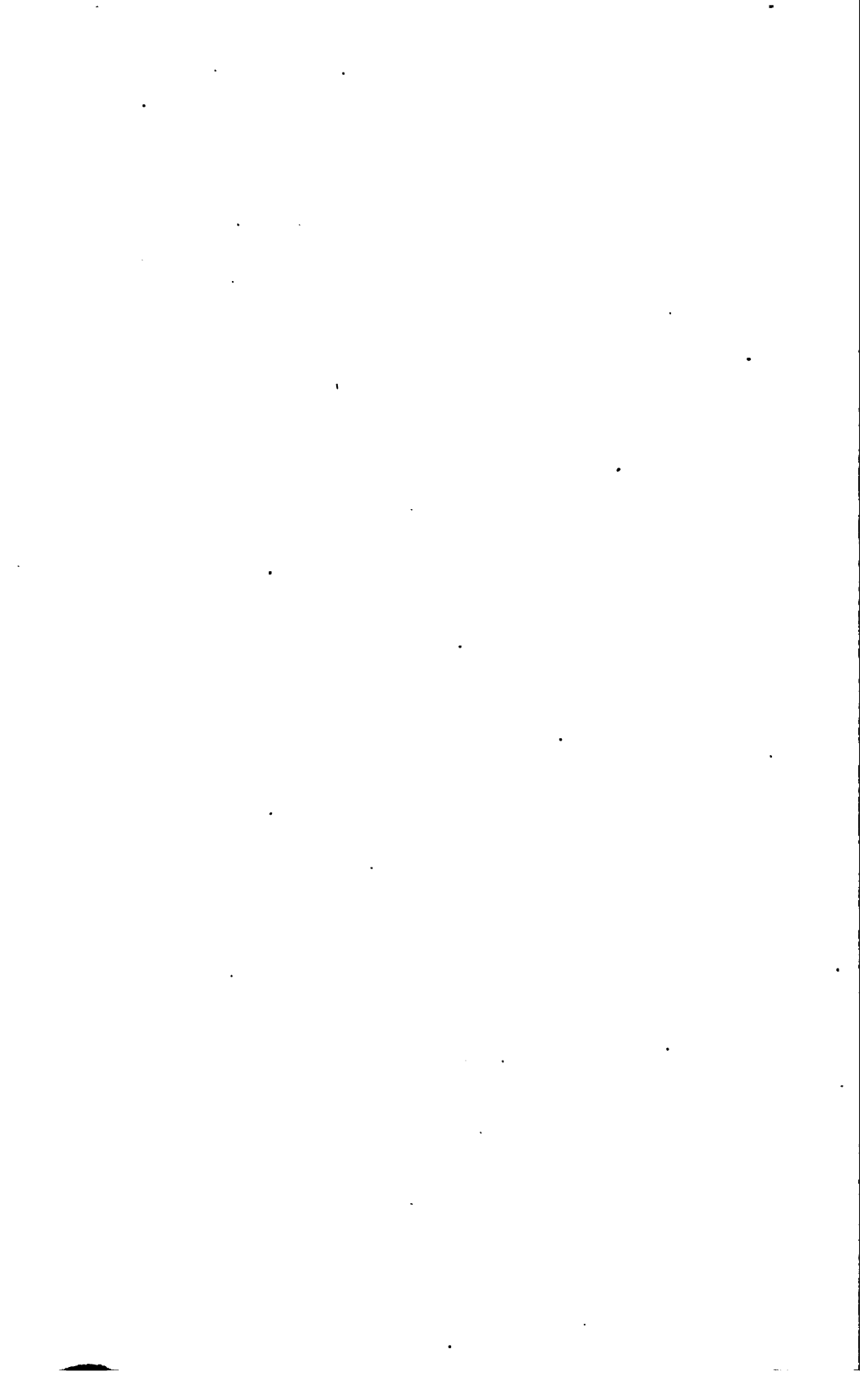
Cited, *Emmal v. Webb*, 36 Cal. 203, as to mistake in recording seal to certificate of acknowledgment; *Summer v. Mitchell*, 29 Fla. 218; 30 Am. St. Rep. 122, holding unnecessary to insert public seal in record, and absence does not overcome presumption of its presence in original.

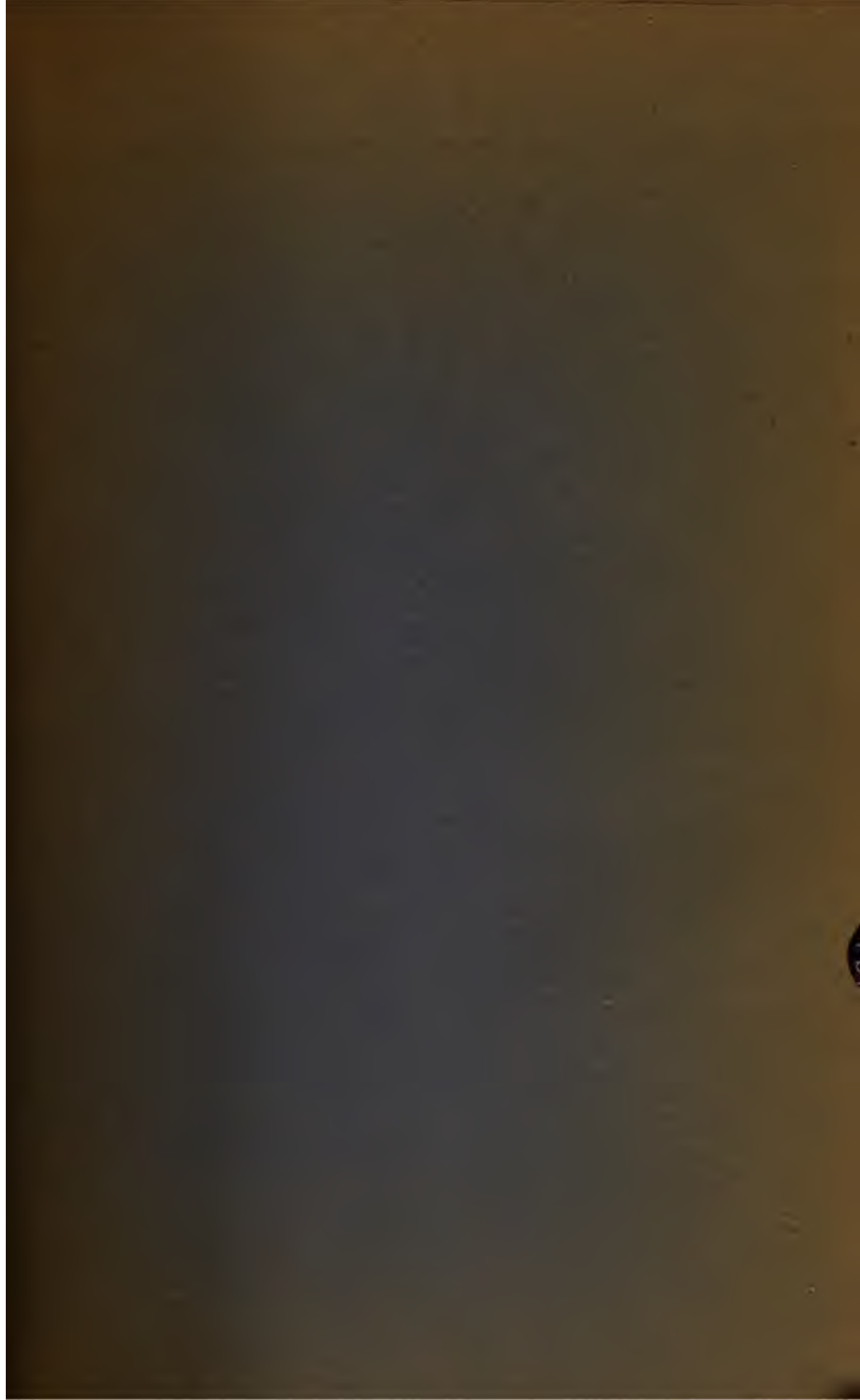
Statute.—Retrospective construction will not be given to, p. 579.

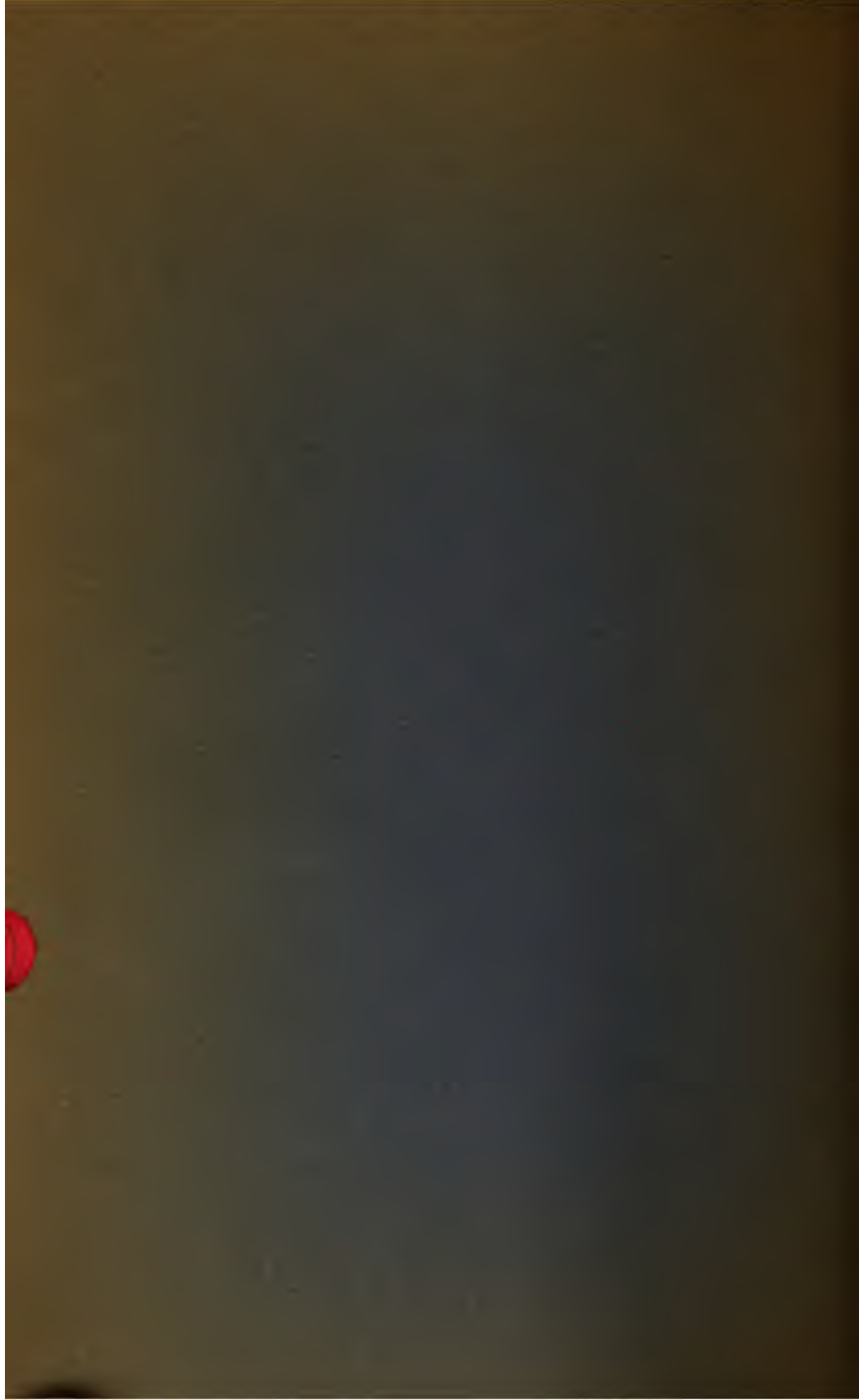
Cited on the same subject in note to *Grime's Estate v. Morris*, 65 Am. Dec. 547.











REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

JOHN B. HARMON.
REPORTER.

VOLUME 13
WITH
NOTES ON CAL. REPORTS

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JUDGES
OF
THE SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

HON. DAVID S. TERRY.....CHIEF JUSTICE.

HON. STEPHEN J. FIELD*.....

HON. JOSEPH G. BALDWIN.....

} JUSTICES.

*FIELD, J., was absent from the State, by permission of the Legislature, during a portion of the April Term, and the entire July Term.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

APRIL TERM, 1859.

BARKER *v.* KONEMAN *et als.*

- ▲ **SAID** by a husband of his separate real estate to a Trustee, for the benefit of his wife, whether executed in compliance with an ante-nuptial contract, or by way of settlement upon his wife independent of any previous contract, the husband being at the time free from debts and liabilities, is valid.
- ▲ nominal consideration stated and the operative words of transfer — grant, bargain, sell, and convey — do not change the character or object of the deed.
- ◊ **SEEM** that the husband, being free from debts and liabilities, may convey his separate property, as a gift, directly to his wife, without the intervention of a Trustee.
- ◊ **THE** law allows, and even regards with favor, provisions made by the husband, when in solvent circumstances, for his wife and family, against the possible misfortunes of a future day, by setting apart a portion of his property for their benefit.

APPEAL from the Sixth District.

Ejectment to recover a lot situated in the city of Sacramento. The plaintiff claimed under a deed from Wm. M. Carpenter, executed on the 16th of December, 1857.

On the 15th of June, 1853, said Carpenter executed a deed of the lot in controversy to John Brannan, as Trustee, for the benefit of his wife, Mary Ann Carpenter. This deed recites that on the 9th of July, 1852, a marriage was solemnized between said Wm. M. Carpenter and wife, and "that upon the treaty of said marriage, and in consideration thereof, it was stipulated and agreed between the said parties, that the sum of ten thousand dollars out of the real property of the said Wm. M. Carpenter

Barker v. Koneman.

should be secured to the said Mary Ann and her heirs, in order to form a separate and independent competency for her, not subject to the authority, disposal, control, or management, of her said husband;" and purports to be executed "in order to carry the said agreement more effectually into execution, and to make the same valid in law and to secure the said sum of money to the said Mary Ann and her lawful heirs, so that the same shall not be in the power or disposal of her said husband," and for the further consideration of ten dollars, received from Brannan, the Trustee. The words of transfer used by the grantor in the deed are, that he "hath granted, bargained, sold, and conveyed, and, by these presents, doth grant, bargain, sell, and convey," the premises to the Trustee, etc. In December, 1854, Badlam, one of the defendants, was substituted Trustee in place of Brannan, by consent of all parties to the deed and by order of the Sixth District Court.

The plaintiff was a nominal party to the suit. He never gave any consideration for the property, and took the deed at the request of his Attorney, with an agreement, in case of recovery, to convey the property to such party as the Attorney might name. It was admitted that Wm. M. Carpenter, on the 15th of June, 1853, was the owner of the lot. It was his separate property, and at the time of executing the deed to the Trustee he was free from debts and liabilities. Mrs. Carpenter received the rents of the lot from December, 1853, to September, 1856, and Badlam, as Trustee, was in possession from his appointment. The defendants, Kone-man and Murray, were tenants under the Trustee. The defendants relied on the trust deed and recovered judgment, and the plaintiff appealed.

Moore & Hermance, for Appellant.

Jos. W. Winans, for Respondent.

FIELD, J. delivered the opinion of the Court — BALDWIN, J. concurring.

The deed of Carpenter, bearing date in June, 1853, recites that the marriage between himself and wife was solemnized in July of the year previous; and that by the treaty of marriage, and in consideration thereof, it was stipulated that the sum of ten thousand dollars should be secured to her out of his real

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property, in order to give her a separate and independent competency, not subject to his disposition or management; and purports on its face to be executed to the Trustee designated therein for the purpose of carrying into effect this stipulation. The nominal consideration of ten dollars and the operative words of transfer — grant, bargain, sell, and convey — do not change the character or object of the conveyance. Nor is it material whether it was executed, as it purports, in compliance with the ante-nuptial contract. It would be equally valid if made by way of settlement upon the wife, without reference to any antecedent stipulation. The husband was at the time free from debts and liabilities. The property was his separate property, in which the wife possessed no interest, and over which he had the absolute power of disposition. He could even have conveyed it as a gift directly to his wife, without the intervention of a Trustee. (Act defining the Rights of Husband and Wife, Sec. 1.) The law allows, and even regards with favor, provisions made by the husband, when in solvent circumstances, for the wife and family against the possible misfortunes of a future day, by setting apart a portion of his property for their benefit.

The deed to the Trustee, Brannan, passed upon its delivery the estate of Carpenter, and the plaintiff took nothing by, as he paid nothing for, the deed, subsequently executed to him.

Judgment affirmed.

WAUGH v. CHAUNCEY *et al.*

THE Board of Supervisors of a county is a special tribunal with mixed powers — administrative, legislative, and judicial — and jurisdiction over roads, ferries, and bridges, is given to it by Statute. Its judgments or orders cannot be attacked collaterally, any more than the judgment of Courts of Record. The Statute, (Wood's Dig. 460,) gives such Board discretionary power over the location of new bridges and ferries within a mile of those previously established. And if, in the opinion of the Board, public convenience requires, such new bridges and ferries may be so located. It is doubtful whether an appeal lies from the exercise of this discretion. But if it does, it must be made direct to some superior tribunal.

APPEAL from the Ninth District.

For case see opinion.

Isaac Baggs, for Appellant, cited: 6 Cal. 590; 3 Cal. 458-460; 8 Id. 58.

Waugh & Chauncey.

R. T. Sprague, for Respondent, cited: 6 Cal. 590; 8 Id. 58; Wood's Dig. 460, Sec. 6.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This is a bill filed to enjoin the erection of a toll-bridge on the Sacramento River.

The defendants had procured a license and order from the Board of Supervisors of Shasta County. The plaintiff complains that he is the owner of a ferry legally established, situated near the site of the proposed bridge, and that the effect of the building of the bridge will be to injure his franchise and property. He asserts that various irregularities in the action of the Board, in granting the bridge license, occurred; and, among other things, that the Board acted upon insufficient proof in granting the bridge license.

On demurrer, the Court held that the plaintiff was not entitled to an injunction.

Hence, this appeal.

The opinion of the learned Judge of the Ninth Judicial District is in the record, and states the law in reference to this case with clearness and accuracy.

The Board of Supervisors is a special tribunal, with mixed powers — administrative, legislative, and judicial — and jurisdiction over roads, ferries, and bridges, is given it by the statute. Its judgments or orders cannot be attacked in a collateral way any more than the judgments of Courts of Record. (1 Black. 68; 6 Cal. 590.)

By the sixth section of the Act concerning ferries and toll-bridges, (Wood's Dig. 460,) it is provided that no ferry or toll-bridge shall be established within one mile immediately above or below a regularly established ferry or toll-bridge, unless it be required by the public convenience, or where the situation of a town or village, etc. It is thus seen that the mere fact of proximity is no bar to the establishment of a ferry or toll-bridge; but the meaning of this section is, that the Board shall be governed, in cases of such application, by its sense of the public convenience. Its discretion is trusted on that subject, and its judgment is conclusive. We do not see that any appeal would lie from a fair and proper — if, indeed, from any — exercise

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of this discretion. But if any appeal does lie, the appeal must be made directly to some superior tribunal. Its judgments or orders cannot be collaterally impeached, whether it acted upon sufficient or insufficient proof, regularly or irregularly. (Norris v. Farmers' & Teamsters' Company, 6 Cal. 598; 17 Ala. 576.)

Judgment affirmed.

HAFFLEY v. MAIER.

- A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the Chattel Mortgage Act. That act gives a new remedy, but does not take away the old.
- The mortgagor having mortgaged the land as his own property is estopped, as are his privies in estate, from saying it is public land.
- A mortgage is a mere security for a debt, and does not pass the fee, nor give a right of entry. Hence, if land mortgaged is sold, the vendee of the mortgage cannot be ousted from possession by a purchaser under the decree of foreclosure and sale, unless such vendee was made a party to the foreclosure suit.

APPEAL from the Fifteenth District.

Ejectment for premises situated in Butte County. In June, 1857, one Schiller and his wife executed a mortgage upon the premises in controversy to the plaintiff. This mortgage is in the usual form. The plaintiff foreclosed the mortgage, and on the sale had under the decree, became the purchaser and obtained the Sheriff's deed. Under this deed he claimed.

In September, 1857, Schiller, the mortgagor, conveyed the mortgaged premises to one Geer, under whom the defendant, Maier, through mesne conveyances, claimed the property; Maier was not made a party to the foreclosure suit. Schiller and wife were alone made parties to that suit. The decree of foreclosure and sale was entered on the 5th of May, 1858, and the Sheriff's deed was executed to the plaintiff on the 3d of the following December.

The Court below found that the land mortgaged was public land of the United States, and that the mortgage not being made in pursuance of the provisions of the Chattel Mortgage Act, was of no legal force or effect against any person not a party to it, and that the defendant by a subsequent purchase of the premises in controversy, was not affected by the mortgage, and that the foreclosure and sale gave the plaintiff no right of possession as against him.

Haffey v. Maier.

Judgment was rendered for the defendant, from which the plaintiff appealed.

Burt & Rhodes, for Appellant. 1. The Chattel Mortgage Act changes the common law, by permitting chattels to be mortgaged without delivery, on certain conditions, and by taking away the right to mortgage possessory claims to lands, except with certain formalities. Hence this act must be strictly construed and limited to the species of property named therein. By the act the claims are confined to lands of the State. (*Melody v. Reab*, 4 Mass. 471; 15 Id. 205; 9 Pick. 496; 13 Id. 284; *Lock v. Miller*, 3 Stew. & Port. 13; Sedg. Const. and Stat. L. 313-334; 1 Blac. Com. 59; 6 Cal. 172; 5 Id. 408; *Smith Const. and Stat. Com.* 786.) 2. Defendant deriving title and possession from the mortgagor, after the mortgage, cannot set them up to defeat the recovery.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

1. The Court below erred in holding that the mortgage executed on the public land, or improvements thereon, was void, because it did not follow the provisions of the Chattel Mortgage Act. That Act gave a new remedy, but did not take away the old; but, on the principle of estoppel, the mortgagor having mortgaged the land as his own property, was estopped, as are his privies in estate, from saying this is public land. The fact of his ownership, for all purposes of such foreclosure and title, is concluded by the deed, and is not admissible of dispute or question.

2. The mortgage was made by one Schiller. Afterwards, Schiller sold, subject, of course, to the mortgage, to another, and this last to another, who sold to Maier, the defendant in possession, who is now resisting the plaintiff's claim. The plaintiff foreclosed the mortgage of Schiller, and bought at the sale. But, though Schiller, the mortgagor, was made a party, Maier, the subsequent vendee of his interest, was not.

According to repeated decisions of this Court, (see *McMillan v. Richards*, 9 Cal. 365) a mortgage is held in this State to be merely a security for a debt. It does not pass the fee to the mortgagee, nor give him a right of entry. It only gives him a right to sell

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in a certain event, and the title comes from the sale. Until the sale, the fee is in the mortgagor. Before the sale in this case, the fee or legal estate, clogged only with the incumbrance of the mortgage, passed to Maier.

It could not be divested by a sale of Schiller's interest; indeed, at the time of the sale, Schiller had no interest. What is sold is not the interest of the mortgagee, but the estate of the mortgagor; if the mortgagor has parted with his estate, the holder, to be affected by a decree, must be made a party. If he is not, his rights remain as they were before, and, having the legal estate, with a right of possession until that legal estate is sold, *this* is a good defense to an action at law, brought to oust him of the possession.

The judgment was right on the undisputed facts, though a wrong reason was given for it. But we do not reverse for what we regard as bad logic, but for what we consider bad law.

The judgment is affirmed. But, of course, neither this affirmation, nor the judgment below, affects the right of the plaintiff to foreclose the title of Maier, and then maintain his ejectment.

Ordered accordingly.

CRANDALL v. BLEN.

Query: Whether a chose in action, as a note or judgment, and the like, calling for a definite sum without condition, is the subject of levy and sale? And if so, then *query*: Whether such levy and sale can be made without actual possession of the chose by the officer?

Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose be given by the levy and announced at the sale.

APPEAL from the Eleventh District.

Bill in equity to compel defendant to deliver to plaintiff a certain contract or agreement between defendant and the Bear River and Auburn Water and Mining Company, set forth in the opinion of the Court. Complaint alleged plaintiff to be the owner of said agreement by virtue of the Sheriff's sale and return, also named in the opinion; that he had demanded of defendant the delivery to him, plaintiff, of the same, which demand was refused.

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Plaintiff further averred, that defendant had, previous to said sale, brought suit on said agreement in said Court against said company, which suit was then pending; that defendant was insolvent, and if he were permitted to collect the money due on said agreement, plaintiff would be irreparably injured.

The prayer was for the delivery of the agreement, substitution of plaintiff in the place of defendant in said suit, and an injunction against any further proceedings by defendant therein.

The answer denied most of the allegations of the complaint, and averred that the Bear River and Auburn Water and Mining Company had broken said agreement, to the damage of defendant, in the sum of thirteen thousand dollars, and that suit therefore was pending; that plaintiff is, and has been, for three years past, Secretary of the company and a large stockholder therein. The answer further charges, in substance, fraud and conspiracy on the part of plaintiff and the company, in breaking said agreement and in the issuance of the execution and the sale referred to, the object being to cheat defendant out of his rights by litigation and a secret sale of his property, of which sale neither he nor his Attorneys knew anything until after it was over. The case was tried by the Court, and defendant had judgment. Plaintiff appeals.

E. B. Crocker, for Appellant.

I. Choses in action are liable to sale on execution under the statute.

Section 124 of Practice Act provides that "all debts due the defendant and all other property" may be attached.

Section 217 — "Debts and credits and other property *not capable of manual delivery*" may be levied upon by execution.

Section 220 — Directs the Sheriff to "collect or sell the things in action" levied upon.

Section 227 — Provides that the purchaser of personal property capable of manual delivery shall receive the possession, and also a certificate of sale if he desires it; but

Section 228 — Provides that the Sheriff "shall execute and deliver to the purchaser of personal property *not capable of manual delivery* a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title, and interest, which

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the debtor has in and to such property on the day the execution was levied."

This Court has already decided that judgments, notes, and other choses in action, are liable to sale on execution under these provisions of the statute. (*Adams & Co. v. Hackett et al.* 7 Cal. 187; *Johnson v. Reynolds*, Jan. T. 1857.)

In Louisiana they have a similar law. (Louis. Code of Practice, 272, Secs. 642-647.)

The interest of a party in a note may be sold on execution without the Sheriff taking possession of it. (*Brown v. Anderson*, 4 Martin N. S. 426.)

The seizure of the choses in action is not required, as they are not tangible, the note being the mere evidence of the debt, and not the debt itself. (*Wilson v. Munday*, 5 Louis. 486.)

An execution may be levied on a sum of money directed by the Legislature to be paid to the defendant. (3 Martin N. S. 180.)

II. Defendant objects that the levy was not properly made; that the Sheriff should have taken possession of the note, and that the note is not sufficiently described, etc.

The foregoing authorities in the Louisiana Reports are sufficient to show that it is not necessary for the Sheriff to take actual possession of the piece of paper which is the mere evidence of the debt. Section 217 of the Practice Act speaks definitely of "debts and credits" as property not capable of manual delivery, and Section 228 provides that the certificate of sale shall be sufficient to transfer the title in such cases without any manual delivery.

As to the description required, it is sufficient if it will enable one to identify the property intended, even though in some particulars it may be false or inconsistent. (*Wing v. Burgess*, 1 Shepley, 111; 29 Maine, 62; 6 Green. 162; 3 N. H. 525; 19 Vt. 334; *Stamford Bank v. Ferris*, 17 Conn. 259.)

As against the judgment defendant, no great strictness or form is necessary in making a levy upon personal property; the mere entering of the property upon the execution will conclude the defendant, though the property is not present and the officer does not know where it is, though such a levy would not be good against third persons. (*Crocker on Sheriffs*, Sections 427-429; 9 Barb. S. C. 620-629.)

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The failure of the officer to comply with the law respecting levies and sales on execution will not vitiate the sale, but the remedy of the party injured is by action against the officer. (Smith v. Randall, 6 Cal. 47.)

III. Alleged fraud in the sale.

We object that the sale cannot be attacked in this collateral action, but can only be done by a direct motion, in the action in which the sale was made, to set it aside.

But even if it can be done in this collateral way, still defendant's answer does not show sufficient to authorize a Court of Equity to set aside the sale and cancel plaintiff's certificate of sale. If he claims that the property was sold for an inadequate price, he must first do equity before he can claim equity, by tendering to plaintiff the amount that is justly due him, or at least, the amount of the purchase money; and this he has not done or offered to do.

In 4 J. C. R. 118, cited by defendant, the sale was set aside upon proof of actual fraud, but only upon payment of the whole debt due on the judgment, all incumbrances paid by the purchaser, and all improvements made on the property by him. (6 J. C. R. 205.) This Court has held, after a thorough and most able examination of the authorities, that mere inadequacy of price is never of itself sufficient to annul a sale on execution, but there must be circumstances showing fraud in the officer making the sale. (Smith v. Randall, 6 Cal. 47.)

The case of *Argenti v. San Francisco*, was one of actual fraud, and was a peculiar case in itself, and does not conflict with *Smith v. Randall*.

Tuttle & Hillyer, for Respondent.

The Court properly dismissed the bill. The complaint does not state facts sufficient to constitute a cause of action. Under the common law, a chose in action could not be sold on execution. (9 Johns. 96; 4 Id. 41; 17 Id. 351; Allen on Sheriffs, 161; 17 Mass. 263.)

The contract or debt which the Sheriff professed to sell was not for the payment of money absolutely. Blen's demand is for unliquidated damages, for failure to comply with the contract. These damages cannot be ascertained except by a verdict.

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They are a question of fact, and their amount rests on proof. No one, can, therefore, say what was sold. As well might an officer sell a demand of A against a stage company, or steamboat company, for failure to comply with a contract of affreightment or passage.

The return of the Sheriff shows that he made no levy. He did not have possession of the contract, and only levied on the indebtedness, as mentioned in the contract, without describing what was mentioned. To constitute a levy, goods must be in the immediate view of the Sheriff. (19 Wend. 495; 2 Hill, 666; 9 Barb. 619; 16 Id. 585.)

The property must be present and in the view of those attending the sale. (4 Barbour, 484, 485; 14 John. 352.) Our statute provides a way in which the Sheriff may have a chose in action in view of those attending the sale. He must return an inventory of the property attached, and if the person owing the debt refuse to give a memorandum he may be taken before a Judge and compelled to return it. The debtor may, also, in the same way be compelled to deliver up any notes or evidences of the debt.

The Sheriff, when he did not receive bids anything proportioned to the value of the property, should have adjourned the sale. (Crocker, Sheriff, p. 201, paragraph 474; 5 Sewell, 253.)

A chose in action cannot be assigned without an assignment of the writing; if so, can a Sheriff sell without possession of the contract? (Palmer v. Merrill, 6 Cushing, 282; Howe v. Glenkworth, 17 Mass. 243.)

A demand for fourteen thousand dollars is sold for one hundred. It is bought by a man, too, out of whose property a large proportion of it must be collected, if collected at all. Inadequacy of price alone is sufficient to authorize a Court to set aside a sale. (See 12 Wend. 253; 6 Wend. 522; 18 Wend. 611; 1 Story's Eq. Sec. 185, Notes 6, 7; Neilson v. McDonald, 6 John. Ch. R. 205; Howell v. Baker, 4 Ib. 118.)

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring.

The main question in this case is, can a chose in action, like that in evidence, be sold by the Sheriff under execution, by

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virtue of a general levy, so that the title of it passes to the vendee. Plaintiff had judgment and execution against Blen for some seven hundred and fifty dollars, and issued execution thereon, which the Sheriff returns, levied as follows:

"I hereby certify that I received this annexed execution March 23d, 1858, and by virtue of its commands, I, on said day, levied upon all right, title, interest, and claim, of Joshua Blen, of, in, and to, a certain contract or agreement executed by the Bear River and Auburn Water and Mining Company, by James Neall, President, to the said Joshua Blen, dated the fourteenth day of February, 1856, for the payment of the sum of fourteen thousand five hundred dollars, in the manner specified therein, and also, indebtedness and liability of the said Bear River and Auburn Water and Mining Company to the said Blen, under said contract, or in any other way by delivering personally to H. W. Brouse, Esq. Managing Agent of said Bear River and Auburn Water and Mining Company, at the office of said company, in the town of Auburn, county and State aforesaid, a copy of this annexed execution, with notice upon said execution of my levy upon said interest, right, title, and claim, of said Joshua Blen, of, in, and to, said contract, and also upon all indebtedness and liability of the company to said Joshua Blen, under said contract, or in any other way.

And, after giving public and lawful notice for seven days, by posting notice of sale in three public places in the town of Auburn, in said county and State, I, on the 29th day of March, A. D. 1858, sold at public auction, in front of the Court-House, in said town of Auburn, county and State aforesaid, said right, title, interest, and claim, or any indebtedness or liability under the mentioned contract, or in any other way, of Joshua Blen from the Bear River and Auburn Water and Mining Company to J. R. Crandall, for the sum of one hundred dollars, cash in hand to me paid, it being the highest and best bid made for said property. And I also, on said 29th day of March, A. D. 1858, made out and gave to said J. R. Crandall a certificate of sale of said property. And on this 30th day of March, A. D. 1858, I have applied the one hundred dollars as a credit on this annexed execution, for the part satisfaction of the same. March 30th, 1858.

CHARLES KING, Sheriff

By L. BULLOCK, Under Sheriff."

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The agreement claimed to have been made is in these words: "The Bear River and Auburn Water and Mining Company, for and in consideration of the ditch, known as the Tracy Ravine and Mississippi Bar Ditch, by them this day purchased of Joshua Blen, and in consideration of the interest claimed and held by the said Blen in the Beals' Ditch, which interest in said last named ditch the said Blen has this day assigned to said company as value received, promise to pay to said Blen fourteen thousand five hundred dollars, as follows: Two thousand five hundred dollars in cash, and twelve thousand dollars in the manner following, to wit: First, the expenses of keeping said ditches in good working order, and the expenses of employing agents to attend to said ditches, are paid out of the proceeds of the sale of the water from said ditches; the revenues and profits arising from the sales of water from said ditches, over and above said charges, are to be applied to the liquidation of said sum of twelve thousand dollars, until the whole sum is paid; and to hasten and make certain the timely and early payment of said sum as aforesaid, said company promise to furnish from their ditch, to be used in the above named ditches, so much water, which, added to the water supplied to said ditches from their other sources, shall be sufficient to effect sales to the amount of one thousand dollars per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen interest at the rate of ten per cent. per annum on the said monthly deficiency until met by receipts by sales over and above the one thousand per month.

Given this 10th day of February, 1856.

JAMES NEALL,
President, B. R. & A. W. & M. Co.

Test, C. W. Langdon."

There were some two or three persons at the sale, and the agreement was struck off for one hundred dollars to plaintiff. The agreement was not present at the sale, nor fully explained to the bystanders. The plaintiff was a stockholder of the Bear River Company, against which company a suit was pending by Blen at the time of the sale, and the question of liability of the company on this agreement was in controversy.

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The contract was not read to the few persons present at the Sheriff's sale, nor was any more particular description made than that given in the levy. Section 124 of the Practice Act provides that all debts due the defendant and all other property may be attached. Section 217 — debts and credits and other property not capable of manual delivery, may be levied upon by execution. Section 220, directs the Sheriff to collect or sell the things in action. Section 227 — the purchaser of personal property capable of manual delivery, shall receive the possession, and also a certificate of sale if he desires it. Section 228, provides that the Sheriff shall execute and deliver to the purchaser of personal property not subject to manual delivery a certificate of sale and payment.

It is contended by the Appellant that choses in action are subject to levy and sale as other property, and certainly some countenance seems to be given to this idea as well by the provisions of the statute as the cases of *Adams & Co. v. Hackett & Co.* (7 Cal. 187,) and *Johnson v. Reynolds*. No statute could be more impolitic or more unnecessary, if this be its true interpretation; for the exercise of the right must necessarily lead to the most enormous sacrifices and the grossest frauds; and effectual modes are already provided by which these rights of property can be reached by the creditor, and for their full value, as well as by a levy and sale of them. It is contended that this levy may be made, not upon the chose in action, that is, upon the written contract note, etc. but upon the debt — that is, upon a mere guess of indebtedness, and that this levy at once changes the property from the debtor to the Sheriff, and, by the sale, from the sheriff to the purchaser. Of course, the Sheriff sells in every such case, neither knowing himself, nor could the purchaser know, where the note was — whether assigned or not — whether there were any defenses or not — or, probably, where the title of the note was, or what its value. The purchase would, in such instances, be a mere gambling speculation, in which one man would probably be ruined if the chose was for a large amount, for the benefit of some speculator having secret information as to the facts. It is contended, further, that this applies not only to liquidated claims, but to unliquidated — to every sort of chose in action — we presume to executory contracts — to contingent contracts — to ev-

ery sort of contract whereby one man is or may become indebted to another; that a covenant of warranty may be thus sold and assigned, bonds of indemnity, open accounts, partnership balances, and in fine, every sort of remote or contingent interest, in suit, or however complicated. According to this theory, a chancery suit may be sold out, or, perhaps, even a claim for damages in slander or assault and battery. Before we give our sanction to so sweeping and destructive a construction of the statute, we must be very thoroughly convinced the terms of it require this interpretation. The common law recognized no such notions, and this statute, so far derogating from it, is to receive a strict construction.

If we concede that a chose in action is the subject of levy, are we authorized to hold that the chose itself need not be levied on? To decide that there may be a mere ideal levy? There need be nothing tangible and physical, or a reduction to actual possession and dominion of the thing itself which is the subject of the levy? If this were so as to notes, judgments, etc. can we hold that contingent and complicated contracts are embraced by the act, and not only a chose in action, calling for a definite sum without any condition?

But, not passing on these points, we hold when the paper evidencing the debt is not present to be assigned to the purchaser, and exhibited to the bystanders, that at the very least, a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts which determine the value of such instrument or contract, must be given by the levy and announced at the sale. If a sheriff could sell a piece of property — as a horse running loose in the woods — we suppose no one would doubt that he must so describe it as to give some idea of its character, qualities, and value; and the reason is not less for requiring such a description in a case like this — the whole value and motive to purchase depending upon this description and these facts — and, certainly, if a bill were filed to enforce such a purchase as the one just supposed, the defendant might set up, if a horse worth a thousand dollars were sold by the Sheriff, in the presence of three persons, for a dollar — that the sale should not be enforced. It is of the essence of every public sale that there be a descrip-

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tion sufficient to apprise the bystanders, with reasonable accuracy, of what is sold or offered. It will be seen by reference to the levy and agreement before fully set out, that the Sheriff did not pursue this course; and, therefore, no title whatever passed by this sale.

Judgment affirmed.

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THE Legislature cannot require the Supreme Court to give the reasons of its decisions in writing. The constitutional duty of the Court is discharged by the rendition of its decisions.

The practice of giving the reasons in writing for judgments is of modern origin. And it is discretionary with the Court whether it give an opinion upon pronouncing judgment; and if given, whether it be oral or in writing.

A decision of the Court is its judgment, the opinion is the reasons given for that judgment. The former being entered of record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the Judges, subject to their revision, correction, and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be the subject of change, except through regular proceedings before the Court by petition.

The records of Courts are under the control of the Judges so far as essential to the proper administration of justice, and this control is beyond the reach of legislation.

The Clerk of a Court, though a constitutional officer, is subject to its orders in the control of the records. The Court cannot, without great abuse of its powers, take from the Clerk, in any way, the perquisites of his office for copies of opinions and papers on file.

APPEAL from the Third District.

This was an action of ejectment. The defendant recovered judgment in the District Court. On appeal, the judgment was reversed by the Supreme Court from the bench — no opinion in writing being delivered. The reasons for the decision were stated orally. The counsel for plaintiff afterwards presented a petition asking the Court to file a written opinion.

William T. Wallace, for Petitioner.

Spencer & Rhodes, for Respondent.

FIELD, J. delivered the opinion of the Court — TERRY, C. J. : concurring.

At the present term the judgment in this case was reversed without any opinion being given setting forth the reasons for the

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reversal. The Appellant now moves the Court to file an opinion, and cites Section 69 of the statute of May 15th, 1854, amending the Practice Act, which provides that "all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court," except in cases tried in the County Court, on appeal from a Justice's Court.

The provision of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the Judiciary department of the government has been attempted by legislation. To accede to it any obligatory force, would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled, are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations. (See, by way

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of illustration, Cases in 1 Day's Conn. Reports; in 1 Brockenborough's Va. cases; and in 4 Harris & McHenry's Maryland Reports.)

The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand. (1 Blackstone, 71.)

In the judicial records of the King's Courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary service of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*; and this is also worthy for learned and grave men to imitate." (Coke's Rep. Part 3, Pref. 5.)

The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases — when the pressure of other business will permit — will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion, the authority of the Court is absolute. The legislative department is incompetent to touch it.

With the expression of these views, we might close this opinion, by denying the motion, but it will not be impertinent to the matter under consideration, to say a few words as to the control of the Court over its opinions and records. There are some mis-

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apprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of Government to each other, and the entire independence in its line of duties of the Judiciary. The terms "opinions" and "decisions," are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion, has been sometimes regarded as a mutilation of a record. A decision of the Court is its judgment, the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the Court, upon a petition for a re-hearing, or a modification. The latter is the property of the Judges, subject to their revision, correction, and modification, in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. In the haste of composition, some errors will occur; in the copying, several; in the printing, many. There will also be at times, expressions of opinion on incidental questions, too strong and unqualified. All these errors, whether in language, form, or substance, should be corrected before a publication is permitted, as an authoritative exposition of the law, and, as such, binding upon the Court. The power of enforcing a correct publication, when the publication is authorized, cannot reasonably be denied. In no civilized State, except in California, has the existence of this power ever been doubted. Every Judge, from the Chief Justice of the Supreme Court of the United States, down, claim and exercise, without question, the right of revision, including thereby modification and partial suppression of his opinions. In the recent case in relation to the Sutter grant, we are informed that application was made for a copy of the opinion delivered, and that the application was refused, on the ground that Mr. Justice Campbell, who delivered it, wished to revise it before it left the Clerk's office. When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change. They then become like judgment records, and are beyond the interference of the Judges, except through regular proceedings before the Court by petition.

The records of the Courts are necessarily subject to the con-

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trol of the Judges, so far as may be essential to the proper administration of justice. The Court hears arguments upon its records; it decides upon its records; it acts by its records; its openings, and sessions, and adjournments, can be proved only by its records; its judgments can only be evidenced by its records; in a word, without its records, it has no vitality. Legislation, which could take from its control its records, would leave it impotent for good, and the just object of ridicule and contempt. The Clerk, it is true, is a constitutional officer—not subject to appointment or removal by the Court—but subject, in the control of the records, to its orders. It is true the Court cannot, without great abuse of its powers, take, directly or indirectly, from the Clerk, the perquisites of his office for copies of opinions, and papers on file, nor authorize the destruction or mutilation of any of the records, but, subject to these limitations, it must necessarily exercise control that justice may be done to litigants before it.

The power over our opinions and the records of our Court we shall exercise at all times while we have the honor to sit on the Bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the State. We cannot possibly have any interest in the opinions except that they shall embody the results of our most mature deliberation, and be presented to the public in an authentic form, after they have been subjected to the most careful revision.

Motion denied.

DUMPHY & HILDRITH *v.* GUINDON *et al.*

THE words "matter in dispute" in section 4 of Article 6 of the Constitution, conferring jurisdiction on the Supreme Court, mean the subject of litigation—the matter for which suit is brought.

Costs of suit form no part of the matter in dispute. The appellate jurisdiction of this Court in cases of mere money demands, not involving the legality of any tax, toll, impost, or municipal fine, can be exercised only when the amount for which suit is brought exceeds two hundred dollars. *Gordon v. Ross*, 2 Cal. 156, overruled.

APPEAL from the County Court of Tuolumne County.

Action in a Justice's Court on a note and account amounting to ninety-eight dollars and ninety-one cents. Judgment for de-

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defendant for costs, seventy-six dollars and fifty-five cents. Plaintiff appealed to the County Court, where the judgment below was reversed and a new trial ordered in that Court. In the County Court a nonsuit was first granted, and afterwards, on motion to set it aside, judgment final was rendered for defendants for costs, ninety dollars and ten cents, which includes a part of the costs in the Justice's Court. Plaintiffs appeal to the Supreme Court.

H. P. Barber, for Appellants.

This Court has jurisdiction. The note sued on in the Justice's Court being ninety-eight dollars and ninety-one cents; the costs paid by plaintiffs, seventy-six dollars and fifty-five cents; and the costs in the County Court, ninety dollars and ten cents; in all two hundred and sixty-five dollars and fifty-six cents, constitute the amount in dispute. (*Gordon v. Ross*, 2 Cal. 156; 7 Peters U. S. 647; 16 Peters U. S. 97.)

L. Quint, and Robinson, Beatty & Heacock, for Respondents, argued:

First — That in estimating the amount in dispute, the item of seventy-six dollars and fifty-five cents, costs in the Justice's Court, should not be included, because when the County Court ordered a trial *de novo* the judgment for costs became a nullity. (*Campbell v. Howard*, 5 Mass. 378; *Keen v. Turner*, *Ib.* 265.) And that as the original demand, ninety-eight dollars and ninety-one cents, added to the costs in the County Court, ninety dollars and ten cents, fell below two hundred dollars, this Court had no jurisdiction.

Second — That the true rule was for this Court not to entertain jurisdiction except in cases where two hundred dollars, over and above costs, are involved.

FIELD, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This action was brought originally in a Justice's Court, where the defendant obtained judgment for seventy-six dollars and fifty-five cents costs. The demand claimed in the complaint is ninety-eight dollars and ninety-one cents. On the trial upon appeal in the County Court the plaintiff was nonsuited and judg-

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ment was entered against him for ninety dollars and ten cents costs. From this judgment the appeal is taken, and the proposition presented is, whether this Court possesses any appellate jurisdiction to entertain it; and the solution of the proposition depends upon the question whether costs can properly be considered as forming any part of the matter in dispute between the parties.

Section 4 of Article 6 of the Constitution provides that "the Supreme Court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll, or impost, or municipal fine, is in question, and in all criminal cases amounting to felony, on questions of law alone;" and in *Conant v. Conant*, (10 Cal. 253,) we construed this section to mean that the Court possesses appellate jurisdiction in all cases; *provided*, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless the legality of a tax, toll, impost, or municipal fine, is drawn in question. By matter in dispute, is meant the subject of litigation. It can have no other rational meaning. It is the matter for which suit is brought—the matter upon which issue is joined, and in relation to which witnesses are examined, juries are called, and the verdict is rendered. The costs are merely incidental to the suit. It is not for them the action is brought or defended, or upon them the witnesses are examined or the jury pass. We are aware of the decision in *Gordon v. Ross*, (2 Cal. 156,) and if any reason were wanting for overruling it as authority, aside from the inherent defect in the reasoning of the opinion, it is to be found in the practical operation of the decision, which has been, to a great extent, to destroy the limitation expressly imposed by the Constitution upon appeals to this Court, in cases under two hundred dollars. It has led to appeals in cases of money demands where the amount claimed was less than one hundred dollars, as in the present case, to the manifest departure from the intention and language of the Constitution. That instrument allows appeals when the legality of a tax, toll, impost, or municipal fine, is in question, without reference to the actual amount claimed, but in money demands under two hundred dollars, in-

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volving no such question, it leaves, and we think, wisely, the remedy of the parties to their own appeal to the County Court.

Our conclusion, then, is that the costs of a suit form no part of the matter in dispute; that to the exercise of the appellate jurisdiction of this Court in cases of mere money demands not involving the legality of any tax, toll, impost, or municipal fine, the amount for which suit is brought must exceed two hundred dollars, and, as a consequence, that no appeal lies in the present case.

Appeal dismissed.

BRADY v. REYNOLDS.

WHERE a promissory note was made payable to S. and previously to its delivery to the payee, was indorsed for the accommodation of the maker, by H. and brother and defendant, upon an agreement of the indorsers with each other that each would become surety if the other would; *Held*, that the indorsers were guarantors and were jointly and not severally liable, in a suit by the payee, or a third person taking the note after maturity.

To create a several liability, express words are necessary.

The decision of this Court in *Riggs v. Waldo*, 2 Cal. 485, only goes to the extent of holding that a notice of protest is an essential to charge a guarantor as an indorser.

Quere: Whether the intimation of the Court in that case as to there being no distinction between the undertaking of an indorser and that of a guarantor, is correct. The contract of indorsement is, primarily, that of transfer; the contract of guaranty is that of security.

A judgment against one or more joint guarantors of a note bars the action against the others. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment.

APPEAL from the Fourth District.

Plaintiff had judgment below, and defendant appealed.

The facts appear in the opinion of the Court.

Heydenfeldt and *Papy* for Appellant.

Charles H. S. Williams, for Respondent.

FIELD, J. delivered the opinion of the Court—TERRY, C. J. concurring.

This action is brought to charge the defendant as indorser upon a promissory note of one Minier. The note is payable to one William Smith, and previously to its delivery to the payee, was indorsed by Harper and brother and the defendant. These parties were accommodation indorsers; they placed their names on the paper to assist the maker in obtaining money upon it.

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The indorsement was made by them upon an agreement with each other that they would each become surety if the other would, or, in other words, that they would become sureties together. The indorsement is not evidence of any title in the parties, or of any transfer thereof; it is of an irregular character, not made in the usual course of business, and is, in fact, nothing more than a guaranty. It is of no consequence whether the name of Reynolds was in fact signed before or after that of the Harpers, as the undertaking of all must be regarded as joint, as much so as if they had signed the contract on a distinct and separate instrument. Had they signed a promissory note, their contract would, of course, have been regarded as joint, and not several, and it is only by overlooking the fact that they are not regular indorsers, but guarantors, that any doubt can be suggested of their joint liability. Over their names a contract of guaranty could have been written in terms, and its construction would necessarily have been that it was joint, and not several, for it is a settled principle that there must be express words to create a several liability. (Chitty on Contracts, 96; 1 Chitty's Plead. 41.) The decision of this Court in *Riggs v. Waldo*, (2 Cal. 485,) only goes to the extent of holding that a notice of protest is as essential to charge a guarantor as an indorser. It does not change the previous rule in relation to guarantors in any other respect. There are words, it is true, in the opinion which lead to the inference that the distinguished Judge, who delivered it, considered the distinction between the undertaking of an indorser and that of a guarantor, more nice and subtle than solid and just. In this we may differ from him, for we are disposed to regard the undertaking of the two as materially different. The contract of both is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. It is unnecessary, however, to question the language or reasoning of the opinion — the case only decides that notice of protest is equally necessary to fix the liability of a guarantor as to fix that of an indorser.

The undertaking of the Harpers, and the defendant being then regarded as joint, the principal question raised upon the appeal is susceptible of a ready solution. The payee sued the Harpers upon the guaranty, and recovered judgment. The en-

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ture contract was merged in that judgment. The defendant was not made a party to the suit, and as he was only liable jointly with the Harpers, the effect of the judgment was to relieve him of all responsibility. The payee could not have maintained a suit subsequently against the defendant, and the assignment of the note gave to the plaintiff no greater rights than the payee possessed. There is no rule better settled than that a judgment against one on a joint contract of several, bars the action against the others, even though the latter were dormant partners unknown to the plaintiff when the original action was brought. (*Smith v. Black*, 9 Seargt. & Rawle, 142; *Ward v. Johnson*, 13 Mass. 148.) When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment has passed, being gone, their entire liability is extinguished. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already rendered against the latter, who would otherwise be subject to two suits for the same matter. (See, also, *Pierce v. Kearney*, 5 Hill, 86; *Taylor v. Claypool*, 5 Black. 557.)

The views we have taken go to the marrow of the case, and render it unnecessary to consider the other positions urged upon our attention.

Judgment reversed and cause remanded.

ORTMAN et al. v. DIXON et al.

QUERY: Whether a water right, to pass the legal title from grantor to grantees, the premises being in adverse possession, must be conveyed by deed?

Any contract executed which passes the equitable right to a ditch and the use of the water appurtenant to, or connected with, the ditch, as the property of the grantees, is enough to insure to him the rights for which he stipulated as against an adverse claimant.

The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason. By the common law, the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; and this equitable title, accompanied by possession, is sufficient under our system to give the right of possession.

Under our system, probably, an action can be maintained upon any title legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant.

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In a proceeding in equity an equitable title is as good as a legal title, either for defense or recovery.

A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other purpose. But the extent of the right depends on the nature and uses of the appropriation. If he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right.

No distinction can be drawn between a mill owner and a miner as to their rights in appropriating water.

Query: Whether a party, by erecting a mill and dam, becomes entitled to the water *in specie*, and whether he is entitled to anything more than the use of the water as a motive power — whether there may not be an appropriation of a mere use of the water as well as an appropriation of it as property for sale?

In equity cases, where the proofs are conflicting, the findings will not usually be disturbed.

APPEAL from the Tenth District.

The facts appear in the opinion. The Court below decreed:

1st. That defendants were first entitled to the water flowing in Mill Creek for the use of their saw-mill.

2d. That plaintiffs were entitled to the use of a sufficient quantity of the water of the stream to fill and supply their Ditch No. 2, at such times as the defendants were not using the same to propel their mill.

3d. That plaintiffs were entitled to the water to fill their Ditch No. 2, in preference to the ditch of defendants, No. 3.

4th. That when plaintiffs' ditch is filled according to its capacity to contain water, then, if there remain any surplus of water flowing in the stream, the defendants are entitled to have such surplus.

Defendants appeal.

E. D. Wheeler, for Appellants.

1st. Can the legal title to a water right pass by a bill of sale not under seal? As a legal proposition, this is too clear to need much argument. A water right is a thing lying in grant, and can be conveyed only by deed under seal. The authorities all agree on this point. It is a rule as firmly established as any principle of the common law. The common law rule upon this subject was expressly adopted in this State in *Hill v. Newman*, 5 Cal. 445. The same rule is laid down in *Bullen v. Runnels*, 2 N. H. 261, 262; *Fentiman v. Smith*, 4 East, 107; *Carson v. Blazer*, 2 Binney, 490; *Thompson v. Gregory*, 4 Johns. 83; *Angell on Water Courses*, Secs. 168-171.

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Defendants had a right to change the point of diversion from the main stream, provided only such change did not impair the rights of others. In this case the same quantity of water was taken, and hence no one was injured. The fact that defendants did not always use all the water they were entitled to at their mill amounts to nothing. (Angell on Water Courses, Sec. 230.) That a party may change the *mode*, *object*, and *place*, of using a water right, so that the quantity be not increased. (See Whittier v. Coch. Man. Co. 9 N. H. 458; Bullen v. Runnels, 2 N. H. 255; Johnson v. Rand, 6 N. H. 22; Saunders v. Newman, 1 Barn. & Ald. 258; Bigelow v. Battle, 15 Mass. 313; Kelly v. Natoma Water Co. 6 Cal. 105; Maeris v. Bicknell, 7 Cal. 261; Angell on Water Courses, Sections 227, 228, 229; 14 Mees. & Wels. 789; Tyler v. Wilkinson, 4 Mason, 397; Palmer v. Mulligan, 3 Caines, 307.)

Reardan & Smith, for Respondents.

The question whether a water right can pass, except by deed, does not arise in this case, because there is no issue as to the ownership of the ditch. Besides, if no writing at all had been executed the respondents are in possession, and had been for years prior to the commencement of this action, and certainly, their possession will enable them to maintain an action against a trespass.

The authorities cited by the Appellants' counsel are not applicable to a case of this kind. In those cases the right to use the water followed the ownership of the soil over which it ran, and was an incident thereto; but in this State, and particularly in the mountains and mineral regions, the right to the use of the water is acquired by prior appropriation and *user* only, and this is the only notice that third parties can have of such a right in any one.

Appellants' second point amounts to this, that one who happens to be the first appropriator, no matter at what point on a stream, has the right at any time, by virtue of his naked appropriation and possession, to abandon his original location and divert the water at any point higher up the stream, notwithstanding others may have, in the meantime, at intermediate points, erected improvements and appropriated the water to useful purposes, and thus completely cut off such intermediate parties; this cannot be done.

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The authorities cited by Appellants have no bearing upon the case, so far as we have been able to discover; they only go to the extent of deciding that one may turn the water out of the stream at a point below his original place of diversion, provided he injure no one else. This, so far as our case is concerned, we are willing to admit.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Bill filed for an injunction against the defendants, to restrain them from turning the waters of a stream, called Mill Creek, into a ditch constructed by them, known as Ditch, No. 3, as marked on the map accompanying the pleadings.

Two main questions arise on the record: 1st. Can a water right be conveyed by a bill of sale not under seal? and, 2d. Has the prior locator of a water privilege the right to change the point of diversion from the main stream under the facts hereafter stated?

First — We do not consider that it is at all necessary to hold that a water right, so as to pass the *legal* title from grantor to grantee (the premises being in adverse possession), must be conveyed by deed; for here the right of the water was appurtenant to, or connected with, a ditch. Any executed contract which passed the equitable right to the ditch, and the use of the water as the property of the grantee, is enough to assure to him the rights for which he stipulated as against an adverse claimant. Possession itself would be enough, and surely that possession is no worse for being associated with an equitable right. The difference between instruments sealed and unsealed is at least, at this day, a mere arbitrary and unmeaning distinction made by technical law, unsustained by reason; and, though the Courts may have no right to abrogate what the law has established, even when the rule be senseless, yet we will not go out of our way to give effect to such distinctions, when the law does not clearly so require. But this distinction between sealed and unsealed papers has no force, as a general rule, except in a particular class of cases to which this does not belong. Where an instrument touching title to the realty is not under seal, the strict legal title, at common law, was not conveyed; but the equitable

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title might be conveyed by an instrument not sealed, if otherwise sufficient; and this equitable title, if accompanied by possession, is sufficient, under our system, to give a right of possession. Indeed, we do not see, under our system of practice, which recognizes none of the old forms of action, but which was designed to afford a plain, unembarrassed remedy upon the particular facts of each case, why an action cannot be maintained upon any title, legal or equitable; or upon an instrument sealed or unsealed, which entitles the plaintiff to the possession of the property in dispute as against the defendant. But this is a proceeding in equity, and in that form an equitable title is as good as a legal title, as a matter for defense or recovery.

Second — The second question is of more difficulty; it involves the necessity of an examination of the particular facts in connection with which it is made. In the fall of 1851, the first ditch was constructed, designated on the map filed as Ditch No. 1, for the purpose of conveying the water flowing in Mill Creek to Atchinson's Bar. Ortman first commenced the building of the ditch, and constructed it only a few rods. It was afterwards extended by the miners in that locality to the claims on Atchinson's Bar. It appears, when first located, to have been used as common property. No charge was ever made for the waters it conveyed, and the miners indiscriminately repaired the ditch and took the water as they required it to wash their dirt. It was not reputed or known to be the exclusive property of any particular person, though, from the testimony, Ortman was the first to commence its excavation. Ortman and all others have long since abandoned the use of the first ditch.

In January, 1852, the defendants took up the waters of the creek for milling purposes, and erected a saw mill, which they have owned ever since, and used the same from time to time. In 1853, Louis Duhamel, with two others, commenced the construction of a second ditch, marked Ditch, No. 2 on the map, at a point above defendant's mill-pond, and higher up the stream, by means of which they diverted water of the creek to the same mining claims as the first ditch did. Duhamel & Co. used the water which their ditch afforded at such times as the defendants were not engaged in running their mill, but desisted whenever the defendants had use for the water. The evidence shows that

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Duhamel & Co. recognized and acquiesced in the prior rights of defendants to the water of this creek. Sometime in the year 1853, Duhamel & Co. sold the ditch to the plaintiffs, by which they acquired all the rights and privileges possessed by Duhamel & Co. and have since that time used the water for mining. The defendants, in the fall of 1856, constructed a third ditch, still higher up the stream, and above the last mentioned Ditch, No. 2 of the plaintiff, through which they diverted all the water ordinarily flowing in the creek, and conveyed it to near the same mining claims as the other two ditches, which water they disposed of to the miners.

We presume that it is not to be doubted that the defendants, having first appropriated the water for their mill purposes, are entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other use. We hold the absolute property in such cases to pass by appropriation as it would pass by grant.

But another and different question arises, and that is, to what extent does this power or right go? The measure of the right, as to extent, follows the nature of the appropriation, or the uses for which it is taken. The intent to take and appropriate and the outward act, go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises; what did he choose to take? And this depends upon the general and particular uses he makes of it. If, for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water, would qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or to so much as necessary for it. So, if A erects a mill on a running stream, this shows an appropriation of the water for the mill; but, if he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. The truth is, he only appropriates so much as he needs for the given purpose. It may be true, as the counsel has ingeniously argued, that he may change the

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use, and even the place of using; but this concession does not help the argument, for the question is not how he may use his own, but what is his own?

The principle is not materially different when applied to the fact that the ditch of defendant was built above plaintiff's mill, and the water diverted so as to be carried out of the old channel or course; for, upon the ground suggested, plaintiff was only entitled to the water for the purposes of the mill. He was entitled to all, whenever all was necessary for the mill; but whenever the mill did not need or could not use it for its operations, the defendant could use it for his purposes. It is not a question of priority, as to two classes of appropriators; for we cannot draw any distinction between the mill owner and the miner. But it is a question between claimants of the same article — each claiming a part. There is no real conflict of title — the latter only claiming what is left by the former, and what the former has not taken. The mistake of the argument of Appellants' counsel is, in assuming that the mill owner had appropriated all of this water, and, therefore, could use all for any other purpose. But the finding is, and we assume the proof, that he only appropriated so much as was needed for running his mill. It is as if the paramount proprietor had made him a grant of so much water as was so needed. When the Respondent's predecessor located his ditch, this was the beginning of his right. The Appellant could not impair this right.

It might be argued with great force that the mill owner was not entitled by erecting his mill and dam to the water *in specie*, and as a commodity to be taken out and sold; that he is only entitled to its use as a motive power; that it would lead to injurious consequences to hold that a man erecting a mill and dam on a large stream of running water, could use it as long as he chose and then divert it from the ditches below; that the right to water comes from the appropriation, and that appropriation is taking with the intent to apply to the uses of the person taking; and there may be as well an appropriation of a limited quantity, or for a limited purpose — an appropriation of a mere use as an appropriation of the water as property for sale. But it is not necessary to go to this length for any purpose of this decision. It is enough to hold that this appropriation, according to the find-

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ing of facts, was not an appropriation of all this water as the property of the Appellant; but only an appropriation of so much as necessary for the mill; and that the Appellant, after the claim to this residuum had attached by the plaintiff's appropriation, could not enlarge his right at the expense of the Respondent's rights already vested.

We take the facts as they are found by the Court below. It is admitted by the counsel that the proofs are conflicting; and we do not usually interfere in such instances.

Judgment affirmed.

FIELD, J. having been counsel in the Court below, did not sit in the case.

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It is in any case one partner can assign to another partner his interest in a firm claim and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the Practice Act.

The granting of a nonsuit on the facts is a question of law, and, if the proper exceptions be taken, may be reviewed on appeal without motion for new trial. Nonsuit not proper where there is any evidence tending to prove the indebtedness. In a bill of sale of goods sold and delivered a recital that the consideration was paid, is only *prima facie* evidence of that fact, which may be rebutted or explained by parol.

APPEAL from the Fifteenth District.

On the 25th of November, 1857, Goodwin & Cravens being indebted to defendant, Dewey, in the sum of five thousand three hundred dollars, agreed to sell to him their stock of goods, in their store at Spanish Ranch, together with their hogs, cows, mules, etc. The goods, etc. were inventoried and estimated at seven thousand dollars, which was agreed to be the consideration of the sale. A bill of sale was executed by Goodwin & Cravens to Dewey, in which the consideration is thus stated: "For the sum of seven thousand dollars to us in hand paid, in lawful money of the United States, the receipt whereof is hereby acknowledged." Defendant receipted, and delivered to plaintiffs their notes and accounts, amounting to about five thousand three hundred dollars, in part payment of the goods, etc.

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sold, but never paid anything more. Defendant took possession of the goods after the sale, and sold them to third parties.

Plaintiffs sue for the difference between the consideration in the bill of sale, seven thousand dollars, and the indebtedness receipted for, five thousand three hundred dollars.

The Court below nonsuited plaintiff on the ground

First—That he had failed to show any contract or agreement on the part of defendant to pay the difference; and,

Second—That the bill of sale was unimpeached, and being a contract in writing, could not be impeached unless uncertain in its terms.

Jas. L. English, for Appellant.

First—The Court below erred in sustaining the objection to the competency of Goodwin as a witness for plaintiff, and in excluding him from testifying in the case. The demand sued on was not “unliquidated” within Section 4 of the Practice Act as amended by the Act of May 7th, 1855, p. 303. (*Allen v. Citizens' Navigation Co.* 6 Cal. 402; *Gray v. Garrison*, 9 Cal. 325.)

Second—The Court below erred in sustaining the motion for and entering a judgment of nonsuit, the evidence adduced by plaintiff being sufficient in law to have entitled him to a judgment for the amount claimed.

The bill of sale, though reciting the consideration as paid, is merely *prima facie* evidence, and may be contradicted by parol proof. This is true even of a deed. (1 Green. Ev. Section 305; 3 Phillips on Ev. by Cowen & Hill, 384; 4 Ib. 583, 584, note 289; Shephard v. Little, 14 Johns. R. 210; Jordan v. Cooper, 3 Serg. & Rawle, 564, 580; Gulley v. Grubbs, 1 J. J. Marsh. 388, 389, 390; Belden v. Seymour, 8 Conn. 304; O'Neal v. Hodge, 3 Har. & McHen. 438; Hamilton v. McGuire's Exs. 3 Serg. & Rawle, 355; Weigley's Adm'r v. Weir, 7 Ib. 309; Wilkinson v. Scott, 17 Mass. 257; Bowen v. Bell, 20 Johns. 338; Hutchinson's Heirs v. Sinclair, 7 Monroe, 291-293; Lingan v. Henderson, 1 Bland Ch. R. 249; Watson v. Blaine, 12 Serg. & Rawle, 131, 137, 138; Hannah v. Wadsworth, 1 Root, 458; Cone v. Tracy, 1 Root, 579; Whitbeck v. Whitbeck, 9 Cowen, 566, 270; McCrea v. Purmont, 16 Wend. 460.)

Cravens v. Dewey.

Bryan & Filkins, for Respondent.

First — Goodwin was properly rejected as an incompetent witness for plaintiff, because he was the assignee of one-half of the account sued on. The suit was for the balance of an account for a stock of goods sold. Section — Practice Act as amended by Act of 1855. The complaint treats the demand sued on as an account, and plaintiff must abide by it. (4 Cal. 400.)

Second — The appeal must be dismissed, because no motion for new trial was made in the Court below. The Court will not look into the statement and review facts where no motion for new trial was made. (*Ingraham v. Guildemester et al.* 2 Cal. 161; *Garwood v. Simpson*, 8 Cal. 108; *Dewey v. Bowman*, *Id.* 148.)

English, in reply.

Where the plaintiff is nonsuited on the facts, no motion for new trial is necessary, the action of the Court in granting a nonsuit being a pure question of law. (*Pratt v. Hull*, 13 Johns. 335.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This action was brought to recover a sum of money due for goods sold by Goodwin and plaintiff, partners, to the defendant, Goodwin assigning his interest to the plaintiff. The case having been tried by the Court a nonsuit was ordered, from which plaintiff appeals. Two errors are assigned:

First — That Goodwin, who was offered as a witness for plaintiff, was rejected as incompetent. If in any case one partner can assign to another his interest in a firm claim and afterwards become a witness for him, he could not in this case, for the claim here sued on was clearly an unliquidated demand, within the meaning of the Practice Act.

Second — The second error assigned is in granting a nonsuit. A preliminary objection is taken that no motion for a new trial was made. Nor is any necessary. The granting of the nonsuit on the facts, being a pure question of law, which is properly raised on the record for review by exception taken.

The Court, we think, should not have granted a nonsuit. There was *some* evidence tending to prove an indebtedness, by

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express contract or implied, from defendant to plaintiff. The fact that the bill of sale recited the consideration as paid did not conclude the plaintiff as to that fact, for it is well settled that such recitals are only *prima facie* evidence, which may be rebutted or explained by parol proof.

Judgment reversed and cause remanded.

HOLVERSTOT v. BUGBY et al.

WHERE no grounds or reasons are stated on motions for nonsuit and new trial, and no exceptions taken to instructions of the Court, errors cannot be assigned.

APPEAL from the Sixth District.

Action by plaintiff, as sole trader, under the Act of 1852, to recover of defendants damages for the wrongful seizure and detention of certain personal property. About eight o'clock on the morning of December 5th, 1856, plaintiff made her declaration of intention to carry on business as a sole trader. This declaration, acknowledged before a Justice of the Peace, was filed in the Recorder's office, December 29th, 1856, and published January 18th, 1857. At nine o'clock in the morning of December 5th, 1856, J. B. Wilson executed and delivered to plaintiff a bill of sale of the furniture, fixtures, liquors, etc. of a restaurant owned by him, and delivered possession of the same, which possession was retained by plaintiff until noon of that day, when defendant, Bugby, as Constable, seized them under a writ of attachment in the suit of Greenbaum & Bucki v. Wilson. Plaintiff, however, carried on the restaurant for about two weeks, when the property was sold by Bugby.

On the trial plaintiff offered in evidence her declaration as sole trader, with the Recorder's certificate of filing, etc. indorsed; to the admission of which, defendant's counsel objected, on the ground that said declaration was recorded too late. The Court overruled the objection, and defendant excepted.

W. S. Long, for Appellant.

The declaration of intention to become a sole trader was not competent evidence, because it shows on its face that it was ac-

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knowledge on the 5th December, 1856, recorded on the 29th December, 1856, and was not published until January 18, 1857. Under the Act (Wood's Dig. 439, 490, Sections 2, 3,) plaintiff did not become a sole trader until the 18th January, 1857, and hence was incapable of contracting with Wilson on December 5th, 1856, for the goods in the restaurant, and they still remained liable to execution at the suit of any creditor of Wilson.

Winans, for Respondent.

The record discloses no error, nor could the defendant avail himself of it, if error there were, because he took no material exceptions, nor did he state the grounds of his motions for nonsuit and new trial.

BALDWIN, J. delivered the opinion of the Court — *FIND*, J. concurring.

We are not satisfied, from the examination of this record, that there is any substantial error to the prejudice of the Appellant. But we cannot consider the errors assigned, except that as to the admission of the declaration of plaintiff as sole trader, which is not well taken.

1. No grounds or reasons were given for the nonsuit asked.
2. No grounds were given for the motion for the new trial.
3. No exceptions were taken to the instructions of the Court.

We cannot, then, look into the evidence to see if the verdict is sanctioned by the proof, or the instructions by the law. The affidavits for new trial, for newly discovered evidence, are insufficient if we could consider them.

Judgment affirmed.

Haskell v. Cornish et al.

HASKELL v. CORNISH et al.

- A note stating, that "We, the undersigned Trustees of the First African Methodist Episcopal Church, in behalf of the whole board of Trustees of said Association, promise to pay," etc. and signed, without qualification, by two persons having authority, is the note of the church, and not of the signers.
- If, on the face of an instrument not under seal, executed by an agent, with competent authority, signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal, and not the agent, is bound.
- If, in the body of a note, it appear that the note is the note of the principal, or made by the signer for and as agent of the principal, it is the note of the latter even though the words "agent for," or the like, are not added to the signature.

APPEAL from the Twelfth District.

To the facts stated in the opinion it may be added, that the Court below refused the following instructions asked by defendant:

1. That if the jury believe, from the evidence, that the notes on which this suit is brought were given by defendants, *bona fide*, as "Trustees of the First African Methodist Episcopal Church," for work, labor, and material furnished by, and services due, Stokes by the Church, then the plaintiff is not entitled to recover in this action.
2. If the jury believe, that at the time the notes were signed the defendants had authority from the Trustees to execute notes to Stokes, and that these were given at the solicitation of Stokes, and with his knowledge and agreement, that they were not binding on the defendants, individually, then the defendant is not liable.

Plaintiff had judgment, and defendants appeal.

J. D. Creigh, for Appellants, cited: (Webster's Dictionary, "Behalf;" 1 Saunders' Evid. & Pl. 104; 3 Denio, 604; 4 Hill, 351; 10 Wend. 271; 9 Louisiana, 115; 9 Paige, 188; 11 Mass. 27; Chitty on Bills, 45, and Notes; 6 Harr. & Johnson Mry'd Rep. 60; refers to 23 Wend. 435, and 9 Mass. 335, and Am. Leading Cases, 449, Note; 8 Johnson, 120; 1 Cowen, 513; Theobald on Agency, 333; 17 Wend. 40; 4 Barb. 274-276; 3 Wend. 494; 22 Wend. 325; 10 Wend. 271; 5 Cranch, 299.)

H. Lee, also for Appellants.

This note differs very materially from those instruments in

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which it has been held that the words "Trustees," etc. is a mere *descriptio personæ*. (Hills v. Bannister, 8 Cow. 33; Aud v. Magruder, 10 Cal. 282.)

The legal effect of this note is, that the signers, in their capacity of Trustees of the Church, will pay. (6 Harris & Johns. 618.) The words "for value received by said association," make the agency of the makers apparent on the face of the note. (Maher et al. v. Overton, 9 La. 117, 118. See, also, Ten Eyck et als. v. Vanderpoel, 8 John. 120; Stanton v. Camp, 4 Barb. 274; Mott v. Hicks, 1 Cow. 515, 540.) The church being liable, the signers of the note are not. (Randall v. Van Vechten et al. 19 John. 59, 63.) Even if this be not so, still it does not follow that the defendant is liable. (Ogden v. Raymond, 23 Conn. 384-5.) The face of the note is sufficient to put a purchaser on inquiry. (1 Cow. 539.)

G. P. Fobes, for Respondent.

The defendants evidently intended to make themselves personally liable on said notes, for the reason, that it nowhere in said notes appears that they were officers of the Board of Trustees, they don't describe themselves as President and Secretary, but merely as Trustees, who promise in behalf of the whole Board of Trustees, not of the association; they don't say the notes are to be paid out of the association, but that they will pay them, themselves individually, and they execute the notes in their individual capacity; what is contained in the notes more than in an ordinary note is merely descriptive, going to show the consideration; evidently in compliance with the Statutes concerning Fraudulent Conveyances and Contracts. (Wood's Digest, p. 106, at 400, Sec. 12.) The addition of Trustees, etc. is a mere *descriptio personarum*. (8 Cowen's R. 33; 9 John. 33, 41; Sayer v. Nichols, 7 Cal.; 5 Cal. 458; Story's Promissory Notes, p. 70, Secs. 63, 70; Packard v. Nye, 2 Met. R. 47; Simmonds v. Heard, 23 Pick. R. 121; Tippet v. Walker, 4 Mass. R. 595.)

BALDWIN, J. delivered the opinion of the Court—FIELD, J. concurring.

Suit below on a promissory note in this form:

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“San Francisco, April 5, 1855.

Eight months after date, we, the undersigned, Trustees of the First African Methodist Episcopal Church, in behalf of the whole Board of Trustees of said Association, promise to pay to Darius Stokes, or order, four hundred and ninety-eight and seventy-five one hundredth dollars, with interest at three per cent. per month, payable monthly till paid, for value received by said Association.

(Signed,)

HENRY C. CORNISH,
JOHN C. LEWIS.”

The main question depends upon the construction of this instrument. Is it the note of the individuals signing it, or of the Board of Trustees of the Church, which was shown to be a corporation, or of the corporation?

The general rule which governs in such cases is, that although a party acts, in making an obligation of this kind, as an agent, yet he does not protect himself from liability unless the instrument shows that in executing it he is such agent, and meant only to contract for his principal. A person *being agent*, may as well bind himself personally to pay a note, as if he were not agent; and an agent, if he chooses, may bind himself for his principal as well as he may bind himself on his individual account. In instruments not under seal, or not required to be executed with any particular formality, it is not important in what form the obligation of the party executing as agent or principal, is expressed — if, from the entire instrument, the true character of it can be gathered. The essential thing is, that *the paper show* this fact. It has been held, that generally, the mere words “agent, trustee, guardian, administrator,” and the like, added to the name of the signer do not qualify the terms in the body of the obligation, when those terms import a duty of payment by such signer. These terms are considered as merely descriptive of, or as identifying, the person signing. But in cases of promissory notes, it is not necessary that the agent should add to his signature the words “agent for,” etc. or sign the principal’s name by himself as agent, as is the usual and proper way of executing deeds by Attorney. If, in the body of the paper, it appears that the note is the note of the principal, or made by the signer for, and as agent for, the principal, this is enough to

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make it the note of the principal. It has been held in many cases, that this is the rule even in respect to sealed instruments. The rule is thus stated in *Pentz v. Stanton*, (10 Wend. 277.)

"There is no doubt that a person may draw, accept, or indorse, a bill by his agent or Attorney, and that it will be as obligatory upon him as though it were done by his own hand. But the agent in such case must either sign the name of the principal to the bill, or it must appear on the face of the bill itself, in some way or another, that it was in fact drawn for him, or the principal will not be bound. The particular form of the execution is not material if it be substantially done in the name of the principal. (1 East, 434; 2 Id. 142; 3 Esp. 266; 2 Strange, 705; Comyn's Dig. Attorney, C. 14; 1 Camp. 485-6, 384; 6 T. R. 176.) This doctrine is very clearly stated in *Stackpole v. Arnold*, (11 Mass. R. 27,) and in *Arfredson v. Ladd*, (12 Id. 173.) * * * It is well settled that if a private agent draw a bill or enter into any other contract in his own name, without stating that he acts as agent, so as to bind his principal, he will be personally liable. (*Chitty on Bills*, 36, and cases there cited; 5 Taunt. 749; 2 Marsh. 454; 5 East, 148; 1 Bos. & Pul. 368; 1 T. R. 181.) It is not sufficient to charge the principal or protect the agent from personal responsibility merely to describe himself as agent, if the language of the instrument imports a personal contract on his part. (5 Mass. R. 299; 6 Id. 58; 8 Id. 103; 1 Gale, 630; *Chitty*, 52; 9 Cranch, 155.) But where the name of the principal appears on the face of the instrument or contract, and it is evident that the agent did not intend to bind himself personally, but acted merely on behalf of the principal, if he acted by competent authority, the principal, and not the agent, will be bound." (*Rathbone v. Budlong*, 15 Johns. R. 1; *Owen v. Gooch*, 2 Esp. R. 567; *Mott v. Hicks*, 1 Cow. 513, and the cases there referred to in the Opinion of the Judges; *Rossiter v. Rossiter*, 8 Wendell, 494.)

Let us apply this rule to the note before us. The defendants say: "We, the undersigned, Trustees of the F. A. M. E. C. in behalf of the whole Board of Trustees of said Association, promise to pay, etc. for value received of said Association." The defendants were two of this Board, and they promise on behalf of the whole Board, which it seems consisted of seven members, to

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pay so much money, for value received, of the Association. It is not the sole note of two signers. It imports, taken altogether, to be the note of the whole Board of Trustees of the corporation, and thus the note of the corporation itself. We think this is the fair and legitimate meaning of the instrument. If A says, "On behalf of B, and for value received by him, I, A, as agent for B, promise to pay C one hundred dollars," it would seem that this is the note of B. It is true A makes the note, but he makes it *on behalf* of B, which, especially in connection with the statement of the consideration passing or having passed to B, would imply very clearly that the note was signed by A as agent of B, the obligation to pay being his. We understand Mr. Parsons on Contracts, (1 vol. p. 119) to maintain, substantially, this doctrine. Speaking of corporations, he says: "If a conveyance, purporting to be the conveyance of a corporation, made by one authorized to make it for them, be in fact executed by the Attorney as his own deed, it is not the deed of the corporation, although it was intended to be so, and the Attorney had full authority to make it so. And if the deed be written throughout as the deed of the corporation, and the Attorney when executing it declares that he executes it on behalf of the corporation, but says in witness whereof I set my hand and seal, this is his deed only, and does not pass the land of the corporation. If, however, it was only a simple contract which was executed in this way, it might be inferred from the general principles of the law of agency that it would be valid as the contract of the corporation, for it would be a contract made by one as the agent of another, and containing the express declaration that it was so made."

This is even a stronger case, for here the note is given for the debt of the church by the Trustees, the proper officers of the corporation, reciting the consideration to have proceeded from the corporation. Such a note, so written, we think, should have put every purchaser upon inquiry as to the character and extent of the liability thereby incurred, if, indeed, it does not show a clear case of the liability of the corporation. It seems that this debt was incurred for building the church, and the note made in pursuance of a resolution of the Board of Trustees. If the defendants had no power to execute this note, a different question

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might arise as to their liability, but the Court erred in its rulings on the point noticed above.

Judgment reversed and cause remanded.

HUTCHINSON v. BOURS.

WHERE there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial.

A suspension of proceedings under the judgment will fully protect the losing party.

A Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for new trial were taken under advisement. Pending a motion for a new trial, taken under advisement for decision in vacation by consent of parties, another term of the Court intervenes, when, upon some incidental motion, the cause was continued and the Court adjourned: *Held*, that the continuance was only a continuance of the motion for new trial, and did not affect the power of the Court to act on the motion at its convenience.

The judgment, in pursuance of the verdict, is the act of law upon record facts, and follows as a matter of course, unless the Court intervenes.

A statement agreed on by parties should not, probably, be amended by the Court on motion, except under a very clear showing of mistake or fraud.

A statement on appeal, to be regarded, must be entire.
Statements and exceptions should be speedily settled.

APPEAL from the Fifth District.

For case see opinion.

Hall & Huggins, for Appellants.

The Court had no power to render judgment in vacation. (Smith v. Chichester, 1 Cal. 409; 5 Cal. 493; *Ib.* 406; Robb v. Robb, 6 Id. 21; Whippley v. Flower, *Id.* 630; People v. Talmadge, *Id.* 256; Phelps v. Peabody, 7 Id. 50; Morris v. Dopman & West, 3 Cal. 257; Turner v. McIlhany, 6 Id. 287; Stearns v. Aguirre *et al.* 7 Cal. 443; Feillett v. Engler, 8 *Ib.* 76.)

The agreement only extended to deciding the motion for new trial in vacation. Besides, the motion to amend the statement should have been decided before the motion for new trial.

D. W. Perley, for Respondent.

The law is, that when a District Court adjourns for the term it loses all control over cases where final judgment has been rendered, unless jurisdiction is retained by some motion or proceeding made during the term; but that where such motion or

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proceeding has been made during the term, the jurisdiction of the Court still obtains and the Court may, at any time after the determination of said motion, *render* or *amend* a judgment in that case *nunc pro tunc*, provided there is anything in the record to render a judgment upon or to amend by. The judgment to be rendered or the amendment to be made, must be based upon the minutes of the Court or upon some matter of record, and not resting merely in the memory of the Judge. And these principles govern this case for Respondent.

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring.

The main error assigned is that the judgment was entered in vacation. A verdict was found in the Court below, in January, 1857, and motion was thereupon made for a stay of proceedings, which was granted, to enable plaintiff to move for a new trial. No judgment was then entered. On the 26th day of January, plaintiff filed his statement on motion for new trial, and, on the following day, defendants filed their amendment. On the 31st January, plaintiff and defendants made an agreed statement and filed it, and on the same day, by consent, in open Court, waived all objections to having the motion for a new trial heard and determined before the Judge in vacation. The motion was not heard in vacation, but came up for hearing at the April Term, and plaintiff moved for leave to amend the statement, and upon filing motion and affidavits in support thereof, an order was made continuing the cause. The Court adjourned the next day. On the 27th May, 1857, plaintiff's motion for leave to amend came up for hearing before the Judge at chambers, and the motion was sustained and the amendment allowed. The Judge then overruled the plaintiff's motion for a new trial, and ordered judgment to be entered upon the verdict. This was done accordingly by the Clerk.

1. Before proceeding to consider the point made, we think it well, in order to secure uniformity of practice, to suggest that we consider it better, in all cases where there is no question as to the proper judgment to be entered on a verdict, for the Court to direct judgment to be entered at once, without waiting for a motion for a new trial or any proceedings to set aside the ver-

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dict. The judgment can as well set aside as the verdict, while there may be some embarrassments, as in this case, attending the postponement of the entry, and the plaintiff ought to have the benefit of the security, which is sometimes very important, afforded by the lien of the judgment. A suspension of all proceedings under the judgment fully protects the losing party from all loss or injury if, from any cause, the verdict be set aside or the judgment vacated.

2. The verdict having been rendered and appearing of record, the Court could, in term time or vacation, order the proper judgment when the motion was taken under advisement by it. The continuance of the case at the April Term was only a continuance of the motion, for there was no cause pending for trial in Court; but this order did not change the condition of things before existing, nor affect the power of the Court to act on the motion at its convenience. The judgment, in pursuance of the verdict, is the act of the law upon record facts, and follows as a matter of course, unless the Court intervene to prevent it. It is not necessary to pursue this matter, for we have, in effect, decided the point in the recent case of *McMillan and Richards*, at this term. The authorities cited by the Appellant apply to an entirely different state of facts from those in this record.

3. The statement having been agreed upon by the parties, probably the Court below should not, unless under a very clear showing of mistake or fraud, have permitted an amendment; but we cannot very well see how the plaintiff can complain that his amendment was allowed, whether with or without notice, when the Court, without his amendment, would have been justified in acting upon the motion.

4. The agreed statement is not in the record. We see no error in the matter presented by the amended statement, but we could not consider it if we saw apparent error, for we cannot act upon a piece of a statement. It is necessary for us to see the *entire* statement as settled before we can pronounce that there is error in any part, unless, indeed, the part is complete in itself, in its relation to a given exception.

The delays and confusion which have come to our knowledge, in this and other cases, suggests the propriety of a speedy settlement of statements and exceptions. They can be better settled

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soon after the trial than any other time, and there is seldom any necessity for a delay of more than a few days to make an accurate and entire record of the proceedings had at the trial. If the District Judges acted upon this suggestion, and compelled Attorneys to settle the bills of exceptions or statement immediately after the trial, it would save a good deal of delay, contention, and dispute, and insure a more faithful history of the facts, and a more accurate statement of legal propositions. Of course these remarks are not intended to reflect upon the parties here or their Attorneys, much less the Judge below, but are made in consequence of many evils illustrated by a contrary practice to that suggested.

The judgment is affirmed.

RICE v. GASHIRIE.

THE terms of new trial are peculiarly within the discretion of the Court, with the exercise of which, the Appellate Court will not interfere, except upon a clear showing of abuse, or grossly unreasonable terms.
For error of law, excepted to, an appeal lies, without motion for new trial.

APPEAL from the Tenth District.

Ejectment. The only fact upon which the decision turns appears in the opinion of the Court.

Reardon & Dunn, for Appellant, argued that the facts of the case show it was inequitable and unjust to impose costs as a condition of new trial. They are only imposed where a new trial is awarded for reason of some remote or indirect laches of the party applying, and not in any degree contributed to by the opposing party. But where the Court below erred in its rulings, or where the verdict is against evidence, costs are never imposed. In this case, the one or the other was conceded by the Court in awarding the new trial. (*Amsby v. Dickhouse*, 4 Cal. 102.)

Bryan & Filkins, for Respondent, cited *Battelle v. Conner*, (6 Cal. 140.)

BALDWIN, J. delivered the opinion of the Court — *TERRY, C. J.* concurring.

Crowell et al. v. Gilmore et al.

The defendant in this case moved the Court for a new trial. This motion was granted, on the payment of costs — such payment having been made by the order a condition precedent. The defendant did not, at the time, except to these terms; the plaintiff excepted. The defendant, some two or three months afterwards, gave notice of appeal.

The only thing from which the defendant could appeal, under these circumstances, is the annexing of this condition to the granting of his motion. The terms upon which a Court will grant a new trial are peculiarly a matter within its discretion. This must necessarily be so; for so many reasons relating to the conduct, management, and peculiar circumstances of the trial, may exist, that it would be impossible to prescribe any general rules on the subject. If error at law intervenes, a party may take his exceptions, and prosecute his appeal without motion for a new trial; but if he makes his motion, and relies upon that for redress against an improper verdict, he must subject himself to the equitable power of the Court. The verdict may have gone against him, in some degree, or wholly, by his own neglect or default, or even the rulings of law be chargeable to his own laches or want of diligence. In such cases it may be proper to grant him a new trial — yet, only upon equitable terms. We cannot interfere with this exercise of discretion unless upon a clear showing that it has been abused, or that the terms were grossly unreasonable. This record shows no such case.

Judgment affirmed.

CROWELL et al. v. GILMORE et al.

THE lien of mechanics for labor performed and materials furnished towards the erection or repair of a building attaches, even though the employer has but an equitable interest in the land and building.

The lien may be recorded within sixty days after the completion of the building, and, by relation, will attach from the date of the commencement of the work.

Persons dealing with the property during the progress of the work, are charged with notice of the claims of the mechanic.

APPEAL from the Ninth District.

In 1853, J. C. Spencer became, and has since been, the owner of a lot in Shasta, upon which the building referred to in this

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case was erected, excepting, however, a small fraction not material to be noticed. In 1854, John Ball leased the lot of Spencer, and, in 1855, erected a building thereon, Spencer agreeing to sell Ball one-half of the lot at a price agreed on, and to pay one-half the cost of the building. Ball completed the building without assistance from Spencer. In the fall of 1856, Ball, with the knowledge and consent of Spencer, began to enlarge this building by adding two stories and running it back thirty-five feet, at a cost of thirty thousand dollars, Spencer signing mortgages on the property, with Ball, to raise money. This enlargement began in November, 1856, and ended on or about April 1st, 1856. The plaintiffs were the carpenters and laborers employed by Ball at day's work during this time to enlarge the building. Ball was in possession ever since his lease in 1854. Defendants, with the exception of Gilmore, held mortgages on the property executed by Ball and Spencer jointly in November and December, 1856, but subsequent to the time when the enlargement of the building commenced. The liens claimed were all recorded according to law. Plaintiff Crowell brought suit against Gilmore, the assignee in insolvency of Ball, to enforce his lien. The other plaintiffs appeared, and proved their liens under the statute, and the mortgagees asked permission to intervene and defend. The Court below decreed that the intervenors be paid first, as the legal title to the land mortgaged was in Spencer. Spencer was not a party to the suit.

Crocker & McKune, for Appellant, argued, that Ball had an equitable interest in the land, sufficient to support the lien of the mechanics, which has priority over the mortgagees. (Wood's Digest, 538, Sec. 4; *Gaskill v. Trainor*, 3 Cal. 334; *Gaskill v. Moore*, 4 Cal. 233.)

That the mortgagees were estopped from denying the title of Ball, he being one of the mortgagors. (12 Wend. 65; 17 Id. 164; *Doe v. Clifton*, 4 Adolphus & Ellis, 809; *Doe v. Vickers*, Id. 782; 2 Cal. 263; 4 Id. 247.)

The acts of Spencer are sufficient to bind his interest in the land. (2 Cal. 489; 3 Id. 302; 4 Id. 97; 4 Barr, 194; 1 Bay. 239; 1 Johns. Ch. R. 354; 2 Johns. 589; 1 Story's Eq. Sec. 385; 2 Smith's Leading Cases, 537, 561, and Cases cited.) Spencer, however, does not controvert the rights of plaintiffs.

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Defendants had notice of Ball's equitable title, through his possession. (*Bird v. Dennison*, 7 Cal. 297; *Stafford v. Lick*, Id. 479; *Ellis v. Jeans*, 7 Cal. 409; *Bryan v. Ramirez*, 8 Cal. 461.)

Sprague & McMurtry, for Respondent, argued, that Ball was a mere tenant of Spencer, without title, legal or equitable.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

The record in this case shows that defendant, Ball, had an equitable interest in the premises which was subject to the liens of plaintiffs, and the contracts between Ball and plaintiffs having been made, and the work under such contracts being actually progressing at the time of the execution of Respondent's mortgages, the liens of the mechanics for labor performed and material furnished pursuant to such contracts, must, as to Ball's interest, be preferred to the mortgages, under the authority of *Soule v. Dawes*, (7 Cal. 576,) where it is held that: "By our statute, the lien of mechanics may be recorded within sixty days after the completion of the building, and by relation, the lien attaches from the date of the commencement of the work. All persons who deal with the property during the progress of the work, are charged with notice of the claim of the Contractor."

Judgment reversed and cause remanded.

KISLING v. JOHNSON *et al.*

THE authority of the Board of Commissioners, under the Act of May 1st, 1855, relative to a sale of the State's interest in the water line front of the city of San Francisco, as defined by the Act of March 26th, 1851, is limited to the property within the boundaries defined by the Act; and a sale by them of lots not within those boundaries is a nullity, and cannot constitute cloud of title. Hence an injunction against such sale will not lie.

APPEAL from the Twelfth District.

Bill in equity to restrain defendants from selling a certain lot of land in the city and county of San Francisco, bounded on one side by Mission Creek, and the other sides by Tracy Street, Harrison Street, and Thorne Street, on the ground that plaintiff was

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the owner and in possession; that the defendants, as a Board of Commissioners in behalf of the State, had advertised, and were about to sell, said lot; that such sale would involve plaintiff in numerous lawsuits with his tenants, and with the purchasers, who might be many, by a subdivision of the lot; that the sale by defendants would be unlawful, would greatly damage and irreparably injure plaintiff, and cast a cloud on his title.

Court below granted the injunction, and defendants appeal.

Thos. H. Williams, Attorney-General, for Appellant, cited: (4 Cal. 247; 8 Cal. 461, and cases cited; 9 Cal. 204; 14 Johns. 57; 12 Wend. 224; Wood's Dig. 519 to 525 inclusive; 4 Cal. 397.)

Wm. J. Shaw, for Respondent.

The *locus in quo* is not within the boundaries of the Act of March 26th, 1851, defining the water line front of the city of San Francisco, and the defendants had no power to sell under the Act of May 1st, 1855.

Such sale being unlawful may be restrained. (Story's Agency, Secs. 320, 321, Notes, 307, 307a; 1 Wilson's Rep. 328; 1 Bosanquet & Puller, 410; Story's Eq. Jurisp. Sec. 955a.)

TERRY, C. J. delivered the opinion of the Court — **BALDWIN, J.** concurring.

Defendants were by the Act of May 1st, 1855, authorized to dispose of the interest of the State in the property within the water line front of the city of San Francisco, as defined by the "Act to provide for the disposition of certain property of the State of California," passed March 26, 1851. Their authority was limited to the property within the boundaries defined by the Act, and it is clearly shown that the lots in question are not included within those boundaries. Any disposition of them by the defendants would be a mere nullity, and could vest no right in a purchaser, which would constitute a cloud upon plaintiff's title.

Plaintiff could receive no injury from such sale, and was not entitled to an injunction.

Judgment reversed.

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- WHERE the proofs are conflicting it is not error in the Court below to refuse a new trial.
- Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs.
- The fact that instructions given by the Court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion, or for new trial.
- The Judge below is presumed to know what instructions he gave the jury, and, if those written are out of the way, he may resort to other evidence, or his own memory.
- The Supreme Court cannot receive evidence otherwise than through the statement, or the record.
- A sale of personal property without delivery, is not absolutely void, but only so as to creditors and subsequent purchasers.
- A Court is not bound to give an instruction erroneous on its face, even though the error be insufficient to reverse the judgment, no injury being done.
- Where B put in a crop on land leased of D, the lease providing that D was to have one-half the crop after expenses paid, and, subsequently D, by written contract, sold to B all his right, title, and interest, in the crop which was then growing: *Held*, that the fact that D was on the premises and occupied a house there, shows no possession of the crop as against B, under the contract.
- The declarations of a vendor of personal property after the sale, not good to impeach the title of the vendee.
- To admit them as part of the *res geste*, clear and unequivocal possession by the vendor must be shown.
- The possession and ownership of the vendor, in such cases, after sale, may be shown by his acts, his dealing with the property, but not by his mere admissions.

APPEAL from the Fifth District.

To the facts in the opinion add, that, by contract under seal, dated September, 1854, Dennis leased to plaintiff a tract of land for one year, under the stipulation in the lease, that plaintiff was to put in the crop of grain, and, after the expenses of sowing, harvesting and threshing were paid, to give Dennis one-half, as rent. Plaintiff took possession, hired men, furnished provisions, and put in the crop of wheat, barley, and oats. Personally, however, he lived some eighteen miles from the land, and was there only once or twice a week. Dennis worked and slept on the ranch most of the time, plaintiff paying him the usual wages of fifty dollars per month. He slept under a tree, not in the house. When harvesting began, about June 1st, 1855, plaintiff came and lived on the ranch, going home each Saturday night. On the 31st day of May, 1855, Dennis, by a contract under seal, sold to plaintiff all his interest in the crop then growing. Thirteen hundred and sixty bushels of grain were harvested by plaintiff and put in the adobe house on the ranch. On the 6th day of October, 1855, the defendant, as Sheriff, levied on this

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grain in the adobe, under a writ of attachment against the property of Dennis. On the trial defendant offered to prove declarations made by Dennis as to the sale by him to plaintiff of his half interest in the crop. The declarations offered, were made five months after the sale, to the Sheriff's Keeper at the time of hauling the grain away, and were to the effect that he, Dennis, owned half the grain; that the Sheriff should not take it away without weighing it, so that he, Dennis, could know how much was his, and that, accordingly, the Sheriff divided the grain by taking a sack and leaving a sack. Defendant also offered these declarations to rebut the testimony of plaintiff's witnesses as to putting in the crop, and possession by plaintiff. The precise question put by defendant to witness was, "Why did he forbid you from taking it away? what reason did he give for his conduct?" The question was objected to; the Court sustained the objection, defendant excepting. Plaintiff had judgment and defendant appeals.

Baine & Bouldin, for Appellant, to the point, that the Court erred in refusing the instruction asked by defendant, that after a sale of personal property, the possession of the vendee must be exclusive and continued, cited: (2 Kent's Com. 517; 1 John. Ch. R. 483; 7 Paige R. 165; 2 John. Ch. R. 46; 4 Cal. R. 289.)

The Court erred in excluding Wheeler's evidence, at the point of our exception in relation to it, concerning the claim of Dennis to this grain, when the same was being removed under the authority of the Sheriff. This was an act of dominion on the part of Dennis which was a part of the *res gesta*. The grain was in sacks, on the ranch, undivided, and Dennis' assertion of ownership is an act of dominion, and not declarations made after a sale.

But this evidence was proper in another point of view. "Evidence may be admissible in one point of view and not in another." (1 Phillips' Ev. 199, 171, 200.) And this was competent to rebut the evidence tending to prove the plaintiff's exclusive possession.

D. W. Perley, for Respondent.

The declarations of a vendor made *after the sale*, cannot be given in evidence to defeat the title derived from him in a suit

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to which he is a stranger. (*Martin v. Kelly*, 1 Stewart, 198; *Landecker v. Houghtaling*, 7 Cal. 391; *Visher v. Webster*, Id.)

L. Sanders, Jr. also for Respondent.

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring.

Trespass against the Sheriff for seizing plaintiff's grain.

Defendant justified by process against one Dennis, and a claim that this was his property, or subject as his to the writ. The question was, whether there was fraud in a sale of this grain by Dennis to the plaintiff, and this question depended upon conflicting proofs.

1. The assignment of error which assails the refusal of the Court to grant a new trial, therefore, is not sustained.

2. There was a previous trial. Verdict and judgment for the plaintiff were had, which judgment was reversed in this Court. The Court below refused the motion of defendant to exclude the costs of this first trial from the bill of costs. We see no error in this refusal. No authority has been cited to show that it was the duty of the Court to allow the motion; and we think the law and the practice are the other way.

3. Some instructions given by the Court on the trial were lost or mislaid before the motion for a new trial was heard; and upon this ground the defendant moved to suspend the hearing of the motion until they should be found, and also to grant a new trial on account of the loss. The Court refused the motion.

The Judge must settle the statement. He is presumed to know what instructions he gave the jury. The best evidence is, undoubtedly, the written charge; but, if that is out of the way, other evidence, or his own memory, may be resorted to to enable him to make known the instruction. But we cannot receive evidence otherwise than through his statement or the record; and, if we could, the Appellant has not furnished it.

4. It is assigned as error that the Court refused to charge the jury that, after a sale of personal property by a vendor, the possession of the vendee must be exclusive and continued as against the vendor: and if the vendor remained in possession, in conjunction and in common with the vendee, then the sale is absolutely void. We do not so understand the law. The sale is

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good as between the parties, whether possession be delivered or not; and only void as to creditors and subsequent purchasers. A Court is not bound to give an instruction upon its face erroneous, though the error might not be sufficient to reverse the judgment if the charge were given. The error may be excused in some cases, on the ground that no injury was done; but the Court is never bound to charge bad law. Nor can we say that so broad a proposition had not a tendency to mislead the jury. Moreover, it is not at all certain that the rule invoked applies to a case like this. Here, by the terms of the contract of 1854, Visher was to have possession of the crop, reimburse himself for expenses, etc. the remainder to be divided. By the last contract, of 31st May, 1855, Dennis sold all his right, title, and interest, by deed, in the crop then growing, to plaintiff; and it seems Visher, if he did not have it before, took all the possession of the crop, of which it was susceptible, even supposing that this grain, then growing, was a mere chattel. Unless some fraud appeared in this first contract, we do not well see how or when Dennis ever had any possession of this grain. Nor do we see that any proof of possession of the grain itself, by Dennis, was made. The mere fact that he was on the premises, or in the occupancy of the house, shows no such possession in the face of a clear showing, by the deeds, that he had no right as against Visher.

5. The next error assigned is in excluding proof of Dennis' declaration in respect to the title of the grain, or his half interest in it. These declarations were made after his sale. They could not, therefore, affect the title he had parted with. Nor were they a part of the *res gesta*, for no such clear and unequivocal possession was shown as to admit them on this ground. Nor was it proper to rebut the testimony of Lombard and Putnam Visher, for this testimony could only rebut their statements by showing some interest or course of dealing with the property. This could be proved by his acts — and was — it could not by his mere admissions.

Judgment affirmed.

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HORN v. THE VOLCANO WATER COMPANY et al. DEFENDANTS, AND RAWLE, SHAFFER et al. INTERVENORS.

- A COPY of the note sued on being attached to, and made part of, the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment.
- In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim, is protection against the enforcement of the judgment to their prejudice.
- The interest which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.
- It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation.
- A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.
- But judgment creditors, being, as such, subsequent incumbrancers, may intervene. And a Court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention.
- Subsequent creditors cannot complain, that the note and mortgage of a common debtor were executed without consideration.
- As against subsequent creditors a conveyance, even if voluntary, is not void, unless fraudulent in fact—that is, made with a view to future debts; though the evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors.

APPEAL from the Fifth District.

Plaintiff brought suit against the Volcano Water Company on a note and mortgage executed by the Trustees of the company. The other defendants were the holders of a note and mortgage executed by said company, of even date with the plaintiffs, and with the agreement that the two mortgages should be paid *pro rata*.

The company filed a general denial in answer. Some of the other defendants answered, but it is not material to notice the answers. Certain creditors of the company intervened, alleging fraud in the execution of the note and mortgage to plaintiff, and that they were void as against the company and its creditors. Plaintiff gave in evidence his note and mortgage, and, with the admission that the same were properly executed and recorded, and the premises correctly described in the complaint, rested. The only further facts necessary are contained in the opinion of the Court. The Court below gave judgment for defendants, and plaintiff appeals.

W. W. Cope, for Appellant, argued: 1. That the decision of

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the Court below was not in writing, and that the case of *Walker v. Sedgwick*, (5 Cal. 192,) holding the statute to be inapplicable to chancery cases, is not law. (*Sands v. Church*, 2 Selden, 356; *Davis v. Mayor of New York*, cited in *Voorhies' Code*, 378.)

2. Plaintiff was entitled to judgment against the company on the pleadings. A copy of the note was a part of the complaint, and the answer was not verified.

The position of the other defendants was not antagonistic to the plaintiff, and presented no obstacle to his recovery. They could not avail themselves of the defense interposed by the intervenors. Even if their allegation as to the fraud in the note and mortgage were true, it could not affect the case as between the plaintiff and defendants. The instruments were not absolutely void, but only so as against creditors and purchasers impeaching them. (*Henriques v. Howe*, 2 Edw. Ch. R. 120; 18 Johns. 515; 5 Cow. 547.)

3. The petitions of intervention do not state facts sufficient to constitute a cause of action, or entitle intervenors to any relief as against the note and mortgage of plaintiff; because:

1st. The petition of Rawle shows that he is only a simple contract creditor of the Water Company, and it does not appear that payment of any portion of his demands is secured either by a lien or mortgage. (*Stow et al. v. Manning*, 2 Scam. 530; *Manchester et al. v. McKee*, 4 Gil. 511; *Crippen v. Hudson*, 3 Ker. 161.)

2d. The petition of Shaffer and others, shows that they are judgment creditors of the company, and that their judgments are liens upon the property mortgaged to the plaintiff; but it does not appear that an execution was ever issued on either of such judgments; or that the property is sufficient to satisfy the claims of all parties; or that there is not other property from which the intervenors could obtain satisfaction of their judgments; or that the plaintiffs' mortgage interferes in any manner with the enforcement of such judgments; or that an effort to enforce the same has been, or is now being, made.

The statute provides that, "any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both." (*Wood's Digest*, 176.) What is an "in-

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terest," within the meaning of this statute, is not quite clear. In legal parlance this word is always used to denote *property* in lands or chattels. (2 Burr. Law Dic. 628.) In this sense it certainly does not include a lien. "A lien is not in strictness either a *jus in re* or a *jus ad rem*; that is, it is not a property in the thing, nor does it constitute a right of action for the thing." (2 Burr. Law Dic. 684; 1 Story's Eq. Sec. 506; 2 Story's R. 144, 145.) In construing the statute this word should be deemed to have been used in its strict legal sense. (Sedg. Con. and Stat. Law, 261, 262). The remedy by intervention is unknown to the common law, and should not be extended to cases which are not clearly within the spirit and meaning of the statutes. (Sedg. Con. and Stat. Law, 313, 314.)

The provisions of the Civil Code of Louisiana, in reference to interventions, are very similar to our statute. (Greiner's Prac. 147, 148.) It has been decided in that State, that a stranger to the suit cannot intervene for the purpose of aiding the defendants. (Norris' Heirs v. Ogden, 11 Mar. R. 445.)

In the case of Gasquet *et al.* v. Johnson *et al.* (1 La. R. 425,) where several persons had attached the same property, the Court held that a subsequent attaching creditor could not intervene for the purpose of defeating the action of a person having a prior attachment. In regard to the *interest* entitling a person to intervene in an action, the Court said: "This we suppose must be a direct interest by which the intervening party is to obtain immediate gain, or suffer loss by the judgment which may be rendered between the original parties."

But admitting that the intervenors had an interest, within the meaning of the statute, sufficient to entitle them to intervene, still their petition does not state facts enough to constitute any ground for relief. The rule is firmly established in English and American jurisprudence that the right of a creditor to appeal to a Court of Equity for relief against the fraudulent acts and transfers of his debtor depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. (Manchester *et al.* v. McKee, before cited; Beck v. Burdett, 1 Paige Ch. Rep. 308; Wiggins v. Armstrong, 2 John. Ch. Rep. 144; Brown *et al.* v. McDonald, 1 Hill's Ch. Rep. 297; McKinley v. Coombs, 1 Mon. Rep. 106; Allen v. Camp, Id. 231; Halberts v. Grant, 4 Id. 580.)

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But even if it were not requisite that the intervenors should have pursued their legal remedies to the extent indicated in these cases, they should clearly and conclusively have shown in their petition that they could not obtain satisfaction of their judgments without the assistance of a Court of Equity. This they have utterly failed to do. They say that they are judgment creditors, having liens upon the property mortgaged to the plaintiff, and that the plaintiff's mortgage is a fraud upon their rights. This is their entire case. The extent or value of the mortgaged property is not shown, nor is it shown that there is not other property from which they could obtain satisfaction of their judgments. The allegation of the insolvency of the company is not an allegation that the company has no property, but that it has not sufficient property to pay all its debts. (2 Burr. Law Dic. 623.) The authorities upon these points are clear and conclusive. (Coop. Eq. Pl. 149; Screven v. Bostick, 2 McCord's Ch. R. 410; Harrison v. Battle, Dev. Eq. 537; Semple v. Fletcher, 3 Mar. Rep. N. S. 382; Wiggins v. Armstrong, and several other cases before referred to.)

I have already shown that the fact of a conveyance being fraudulent as to creditors does not render it absolutely void. Our statute provides that such a conveyance shall be void as against the persons hindered, delayed or defrauded, by it. (Wood's Digest, 107.) As to every other person it is valid. When, therefore, any creditor, or other person, shall resort to a Court of Equity for relief against such a conveyance, he must show that he is within the protection of the statute. Have the intervenors done that in this case? Have they stated a single fact tending to show that the plaintiff's mortgage stands in the way of the enforcement of their judgments? In the case of Dewey v. Latson, (6 Cal. Rep. 609,) the point was explicitly decided that a creditor cannot question the fraudulent acts of his debtor unless such acts are prejudicial to his interests.

It is not shown in the petition of Shaffer and others that the petitioners were creditors of the company at the time of the execution of the note and mortgage to the plaintiff, or that the company was then indebted to any other person, or had not sufficient property to pay all its debts, or that such note and mortgage were given with intent to defraud subsequent creditors.

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(Hovenden on Frauds, 2 vol. 74, 75, quoting Stat. 13th Eliz. Ch. 5; 1 Story's Eq. Section 356, Chancellor Kent; Reade v. Livingston, 3 Johns. Ch. Rep. 481; Sexton v. Wheaton, 8 Wheat. U. S. Rep. 229.)

It has been decided in England that a creditor who seeks to avoid a voluntary conveyance made by his debtor must allege in his bill that he was a creditor at the time of the execution of such conveyance. (*Ede v. Knowles*, 2 Younge & Coll. N. R. 172, 178.)

In the case at bar the intervenors allege in their petition "that at the time of the giving of said note and mortgage the company had before the execution of the same already become indebted to a much greater amount than the amount of the capital stock paid in." This is the only statement in the petition having any reference to the pecuniary condition of the company at the time of the execution of the note and mortgage to the plaintiff. This statement certainly does not amount to an allegation that the company was *then* indebted in any amount whatever, but is strictly compatible with an entire freedom from indebtedness on the part of the company. It is possible that the company had contracted debts to a large amount, and it is equally possible that these debts had been paid off. It is also possible that the company was largely indebted, but was at the same time in the possession and ownership of property sufficient to pay ten or twenty times the amount. The insufficiency of this allegation is too obvious to require further comment.

The last objection to the validity of this note and mortgage to which allusion is at all necessary is, that at the time they were given, the indebtedness of the company exceeded the amount of its capital stock actually paid in. The allegations of the petitions of intervention are not sufficiently specific to support this objection; but if they were, the conclusion arrived at does not follow. The statute was intended to operate only as between the corporation and its Trustees, as a check upon the latter and a security to the former against their reckless and improvident action. (Wood's Digest, 121, Section 14.) This is the only reasonable construction of which the statute is susceptible. If the debts of a corporation, contracted when its indebtedness already exceeds the amount of its capital stock paid in, are void and

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cannot be enforced, the provision in reference to the personal responsibility of the Trustees is idle and useless. The case of *Foster et al. v. The Oxford, Worcester, and Northampton Railway Company* (14 Eng. Law and Eq. Rep. 306) is in point.

But there is another view of the case, which is equally fatal to this objection. Sedgwick in his work on Statutory and Constitutional Law, (on p. 90,) says: "It must be borne in mind, that the invalidity of contracts made in violation of statutes, is subject to the equitable exception, that although a corporation in making a contract acts in disagreement with its charter, when it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity." In this case, the company, having received the benefit of its contract with the plaintiff, cannot question the validity of such contract, and the intervenors are in this respect in no better condition than the company, unless they can assail the contract on the ground of fraud.

P. L. Edwards, for Respondent.

1. The Court below did not err in withholding a written finding of the facts. (*Walker v. Sedgwick*, 5 Cal. R. 192.) Even where the Court has submitted issues of fact to a jury, it is not bound by this finding. It is, at most, advisory. (*Gray v. Eaton*, 5 Cal. R. 448; *Dominguez v. Dominguez*, 7 Id. 424; *Still v. Saunders*, 8 Id. 281.) A suit to foreclose a mortgage is peculiarly an equity proceeding. (*Ballow v. Rogers*, Admr. 9 Cal. 125.)

2. It is a sufficient answer to the second point submitted by the counsel, that the whole actual controversy was and is between the Appellant and the intervenors.

3. The intervenors do state facts sufficient to constitute a cause of action; but if not, the objection now comes too late. It should, in some form, have been raised in the Court below, and ought not to be raised for the first time in this Court. The proposition for the Appellant is, in substance, that the intervenor, Rawle, is but a simple contract creditor of the corporation, and that while the other intervenors show themselves to be judgment

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creditors having a lien, they fail to show that they have exhausted their legal remedy, or that they do not show that they might obtain satisfaction without the aid of equity.

But the authorities cited are in our favor, so far as analogous, and the others do not aid Appellant. (*Wiggins & Boreum v. Armstrong & Marshall*, 2 John. Ch. R. 144; *Brown et als. v. McDonald*, 1 Hill's Ch. R. 297; *Story's Eq. Jur. Sec. 506*; *Gasquet et al. v. Johnson et al.* 1 La. 432.)

The present, however, is not a case of the character presented in most of the cases cited by the counsel.

Here is an action already in Chancery, which, if successful, must wholly defeat the claim of the intervenors; for the corporation is insolvent.

The note and mortgage in suit are alleged to be fraudulent, and the plaintiffs and defendants are averred to be in collusion to defraud the intervenors.

But whether we are right or wrong in all this, our statute gives the remedy which we have sought, and that whether we are judgment creditors having a lien, or simple contract creditors. (Prac. Act, Sec. 659.)

This provision should be liberally construed, for it is not within the reason of the rules cited. It is purely remedial, and as such to be construed beneficially, so as to suppress the mischief and advance the remedy. (*Sedgwick on Stat. Constr.* 359.)

The Statute of 13 Eliz. has nothing to do with this case. It has been often held that the statute only declared and definitely ascertained the common law, and that the latter was always competent for every purpose within the purview of the former. This is a question of actual fraud, and whether present or prospective, is wholly unimportant. (4 Bac. Abr. 401; 2 Kent's Com. 440.)

This Court has already directly recognized this right of intervention. (*Brooks v. Hager*, 5 Cal. R. 281; *County of Yuba v. Adams & Co.* 7 Id. 35; *Dixey v. Pollack*, 8 Id. 570.)

FIELD, J., delivered the opinion of the Court — BALDWIN, J. and TERRY, C. J. concurring.

It was error to render judgment for the defendants. A copy of the note in suit is attached to the complaint, and the answer

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of the company is simply a general denial, without verification; and thus, by force of the statute, the genuineness and due execution of the note by the company, are to be regarded as admitted. The claims asserted by the other defendants are not inconsistent with a recovery by the plaintiff. In the judgment their rights could have been fully protected. Upon the pleadings, therefore, as between the original parties to the action, the plaintiff was entitled to judgment. Admitting that the matter set up by the intervenors constituted a fraud, and was fully established, we do not perceive how it could affect the right of the plaintiff to a judgment as against the company. The most that the intervenors could claim, was protection against the enforcement of the judgment to the prejudice of their rights; and this could have been effected by its postponement to their claims in the disposition of the proceeds arising from the sale of the mortgaged premises. As between the parties, the note and mortgage were valid; they were void, if at all, only as against creditors and subsequent purchasers. (*Henriquez v. Hone*, 2 Edw. Ch. Rep. 120; *Ander-son v. Roberts*, 18 John. 514.)

But, without resting the case upon this, we pass to a consideration of the merits of the intervention: The petition of the creditor, Rawle, does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company — but it does not show that any portion of them were secured by any lien upon the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor — a proceeding which can find no support, either in principle or authority. The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. The provisions of our statute are taken substantially from the code of procedure of Louisiana, which declares, that, “in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit;” and the Supreme Court of that State, in passing upon the term *interest*, thus used, held this language: “This, we suppose, must be a direct interest, by

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which the intervening party is to obtain immediate gain, or suffer loss, by the judgment which may be rendered between the original parties; otherwise, the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained, or enter into the imagination of subsequent plaintiffs, that a defendant against whom a previous action was under prosecution might not have property sufficient to discharge all his debts. For, as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors, down to the last, would have an indirect interest in defeating the action of the first." (*Gasquet et al. v. Johnson et al.* 1 Louis. Rep. 431.) To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. No such claim or lien is asserted in the petition of Rawle, and his right to intervene must, in consequence, fail. (*Brown & Sons v. Saul et al.* 4 Martin, N. S. 434.)

The petition of Shaffer and others, stands upon a different footing. It shows that they were judgment creditors, having liens, by their several judgments, upon the mortgaged premises at the time of the institution of the present suit. As such, they were subsequent incumbrancers and necessary parties to a complete adjustment of all interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment, the Court would have been justified in ordering them to be brought in, either upon their own petition, as in the present case, or by an amendment to the complaint. (*Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Cal. 296; *Montgomery v. Tutt*, 11 Cal. 307.)

It would probably be the better course for the Court to direct, in a case like the present, an amendment to the complaint. No question, however, as to the form in which these parties assert their right is made, and we could not regard the point, if it were made, as essential to the determination of the priorities of the several liens. Looking, then, to the petition of these judgment creditors, and treating it as an answer to the complaint, and the

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parties as asserting a priority in the liens of their several judgments over the lien of the mortgage, we find its allegations insufficient, if established, to justify a decree postponing the mortgage to the judgments. These judgments were all rendered long after the execution of the note and mortgage;— with one exception, more than a year afterwards. It is not averred that these intervenors were creditors of the company when the note and mortgage were executed, or that the company was *then* indebted to any other person, or that the note and mortgage were given with intent to defraud subsequent creditors. It only avers that they were not executed by the Trustees by any authority from the company, or to pay or secure any of its debts, or for any consideration received by it; but were given to pay, or to secure the payment of, a debt of certain stockholders of the company, contracted to meet the assessments levied upon their shares. If these averments were true, the subsequent creditors are not in a position to complain. It rests only with the company to question the authority of the Trustees, or the validity of the note and mortgage for want of sufficient consideration. Subsequent creditors have nothing to do with them. The Statute of 13th of Eliz. (Ch. 5,) is the foundation of the acts on the subject of conveyances to hinder, delay, or defraud, creditors in the several states, and has been substantially incorporated into our law. (Act concerning Fraudulent Conveyances and Contracts, Sec. 20.) "This statute," says Hovenden, "declares all gifts, conveyances, and alienations, of real or personal estate, whereby creditors may be delayed or defrauded, void as against such *creditors*; but judicial interpretation has determined that creditors at the time of the transaction are, alone, intended by the statute. Thus, a settlement made after marriage, and therefore considered voluntary, will be maintained against subsequent creditors, provided the settler was not indebted at the time he made it. This general rule must, however, be qualified, so as to exclude cases of positive fraud. It is not necessary that a man should be actually indebted, at the time he enters into a voluntary settlement, to make it fraudulent; if he do so with a view to his being indebted at a future time, it is equally a fraud, and ought to be set aside." (2 Vol. 74.)

As against subsequent creditors, then, a conveyance, even if

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voluntary, is not void, unless fraudulent in fact; that is, unless made with the view to future debts, though evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors. (Sexton v. Wheaton, 8 Wheat. 229; Bennet v. Bedford Bank, 11 Mass. 421; Benton v. Jones, 8 Conn. 186; Carlisle v. Rich, 8 N. Hamp. 44; Miller v. Thompson, 3 Porter, 196; Bogard v. Gardley, 4 Smedes & M. 302; Wadsworth v. Havens, 3 Wend. 411; Elliott v. Horn, 10 Ala. 348; Edwards v. Coleman, 2 Bibb, 204; Smith v. Lowell, 6 N. H. 67; Parkman v. Welch, 19 Pick. 231.)

The only statement in the petition of the creditors in reference to any indebtedness of the company is that *before* the execution of the note and mortgage the company had become indebted to a much greater amount than the amount of the capital stock paid in. This statement may be strictly true, and yet the fact exist that the company was not at the time indebted in any amount whatever. The indebtedness may have been contracted, and have been entirely canceled, or the company may have been in possession of property greatly exceeding its existing obligations, and with which such obligations were afterwards entirely satisfied.

The views which we have expressed dispose of the case upon the pleadings and petitions of intervention, and render it unnecessary to pass in review the questions raised upon the testimony. The judgment must be reversed, and the Court below directed to enter a judgment against the company for the amount due on the note described in the complaint, and to decree a sale of the mortgaged premises, and the application of the proceeds of the sale: first, to the payment of such judgment and the amount due the other defendants, such payment to be made to the parties *pro rata*; and, second, to the payment of the several judgments of the intervenors, Shaffer and others, in the order in which they became liens upon the mortgaged premises; and to dismiss the petition of the intervenor, Rawla.

Ordered accordingly.

Speer v. See Yup Company — Rhine v. Bogardus et al.

SPEER v. SEE YUP COMPANY.

PEOPLE v. Hall, (4 Cal. 339,) excluding Chinese witnesses in suits to which white persons are parties, affirmed.

APPEAL from the Fourth District.

Suit on notes of Defendant.

No brief on file for Appellant.

Stanley & Hayes, for Respondent.

TERRY, C. J. delivered the opinion of the Court — **FIELD**, J. concurring.

The only error assigned in this cause is the exclusion of a Chinese witness offered by plaintiff.

Section 394, of the Civil Practice Act, provides "that no Indian or Negro shall be allowed to testify as a witness in any action in which a white person is a party;" and in the *People v. Hall*, (4 Cal. 399,) it was held that the term "Indian," as used in the statute, included the Chinese or Mongolian race; and upon the authority of that decision, the judgment is affirmed.

RHINE v. BOGARDUS et al.

WHEREAS no motion for new trial is made, the finding of facts by the Court below is conclusive.

APPEAL from the Eleventh District.

Suit on two notes, before the Court, a jury being waived. The issue was as to the authority of Bryant to execute the notes sued on, so as to bind a certain Quartz Company. The finding was as follows:

J. M. Bryant, by whom the notes sued on were made, had no authority, as Superintendent of the Cosumnes Valley Quartz Mill Company, to make notes in the name of, or binding upon, said company.

Thomas H. Hewes, for Appellant.

Nelson & Doble v. Highland.

There is no finding of facts in the case. (*Estell v. Chenery*, 3 Cal. R. 467; *Burger v. Baker*, 4 Abbott, 11; *Swift v. Muygridge*, 8 Cal. 445.)

Sanderson & Newell, for Respondent.

The finding is sufficient and conclusive. (7 Cal. 38; *McEwen v. Johnson*, Id. 258.) But where plaintiff obtains judgment, no finding is necessary; otherwise, when judgment is for defendant.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

No motion for a new trial having been made in this case, the finding of facts by the Court below is conclusive, and as this finding fully sustains the judgment, it is affirmed.

NELSON & DOBLE v. HIGHLAND.

It is no ground of demurrer to a complaint, that the christian name of one of the plaintiffs does not appear.

APPEAL from the First District.

Complaint avers that "Thomas Nelson and — Doble, whose christian name is unknown, partners doing business under the firm name, and style, of Nelson & Doble," etc.

Demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that there is a defect of parties plaintiff in this — that the christian name of plaintiff, Doble, is not given.

Demurrer sustained; plaintiffs refuse to amend; judgment final, dismissing the complaint; plaintiffs appeal.

George Cadwalader, for Appellant.

The demurrer should have been overruled, because the plaintiffs were really the firm of Nelson & Doble. The balance of the averment may be rejected as surplusage. (17 Pick. 87; 14 Pick. 87; 14 Pick. 156; 12 Mass. 434.)

Demurrer was not the remedy. A motion to render the com-

McHendry v. Reilly and Wife.

plaint more certain, or a plea in abatement would have been proper. (Barnes v. Perine, 9 Barb. 202.)

A mistake in the name of plaintiff is not ground of nonsuit. (Brashear v. Stothard, 4 Bibb, 265; 1 Monroe, 175; Bacon Ab. Title "Misanomer.")

P. L. Edwards, for Respondent.

1. The demurrer of the Respondent was rightfully sustained. Plaintiffs are bound to know their own names, and to sue by them. (See *Revis v. Lamme & Brother*, 2 Mo. 168.)

2. The Appellants having refused to amend, and rested on their complaint and the demurrer, cannot now complain that the Court rendered final judgment.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

We do not think it was a good ground of demurrer that the christian name of one of the plaintiffs does not appear in the record. We cannot judicially know that one of the plaintiffs had either a christian or heathen name, or that it is necessarily untrue that he has forgotten it if he had.

Judgment reversed and cause remanded.

McHENDRY v. REILLY AND WIFE.

LAND on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. And after this right has attached, the husband cannot, without the assent of the wife, charge the land by an agreement to pay interest in addition to the purchase money.

APPEAL from the Twelfth District.

L. Sanders, Jr. for Appellant.

Wm. W. Crane, Jr. for Respondent.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Bill filed to enforce a vendor's lien for balance due of purchase money. For this balance (some three hundred dollars) defend-

Scales et al. v. Scott et al.

ant gave his due-bill in 1854, payable four months after date, with three per cent. interest per month. It seems no interest was due on this balance until the giving of the note. The premises had become the homestead of the defendant before the giving of this note. The decree of the Court was for a sale of the land, for some seven hundred dollars and upwards, being for this balance and the agreed interest.

We do not understand that land on which purchase money is due may not become impressed with the character of a homestead; but only that the homestead right is subordinate to the lien, when such lien exists, for the purchase money. But having acquired this character, it was not competent for the husband to charge the land further by agreement of this sort, without the wife's assent, as provided by statute, any more than to bind it by an entirely new contract. For this error the decree is reversed, with leave, however, as the point does not seem to have been taken below, and may be varied by other proofs, to both the parties, to try the case *de novo* if desired.

SCALES et al. v. SCOTT et al.

IN a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices.

Heyneman v. Dannenberg, (6 Cal. 376,) affirmed.

A slight mistake in the computation of interest, the date being given, is no evidence of fraud.

Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors.

McKenty v. Gladwin, Hugg & Co. (10 Cal. 227,) affirmed.

APPEAL from the Third District.

Wm. Blanding, for Appellant.

The bill should have been dismissed, because it shows that the plaintiffs were neither judgment nor execution creditors. (Wiggins v. Armstrong, 2 John. Ch. R. 144; Brinkerhoff v. Brown, 4 John. Id. 671; McDermot v. Strong, 4 John. Id. 687; Newstadt v. Joel, 2 Duer, 530; Rubens v. Joel, 3 Kern. 488; Crippen v. Hudson, Ib. 161; McIlwain v. Willis, 9 Wend. 548.)

Scales et al. v. Scott et al.

The case of *Heyneman v. Dannenberg* differs from this in the circumstance, that actual fraud was shown there.

The fact that plaintiff was an attaching creditor of Scott does not aid. The principle is not that a party has a lien merely, but that he has exhausted his remedy at law. (*Russell v. Clarke's Ex'rs*, 7 Cranch, 89; *Crippen v. Hudson*, 8 Kern. 161.) In *Thornburg v. Hand*, (7 Cal. 554,) the principle is admitted, but an exception made where a party has a *lien*. Now, a lien of attachment is not a lien in the proper sense. (Practice Act, Sec. 120; *Ex parte Foster*, 2 Story, 181; *Fisher v. Vose*, 3 Rob. La. 457.) Besides, under Section 132, Practice Act, plaintiffs could not resort to the property seized in this case, it having been already levied on. Hence, there was no lien.

The fact, it is said, apparent from the answer, that the various amounts loaned have been united into one note, with interest from date, instead of bearing interest only from the dates of the several loans, is proof of fraud. But suppose the various loans, bearing a certain rate of interest, are consolidated into one note, dated as of the first loan, and by a calculation, known as the equation of payments, the rate of interest is so adjusted that a lesser rate charged on the aggregated loans from the earliest date just equals a higher rate charged on the several loans from their respective dates. What fraud would there be in this? This is an ordinary occurrence among merchants, making mutual advances in settling their accounts.

Wm. T. Wallace, for Respondents, cited *Heyneman v. Dannenberg*, (6 Cal. 376,) as to their right to maintain the suit, and upon the point that the judgment in favor of Scott was for too much, even conceding it to have been *bona fide* in fact, *Tasffe v. Josephson*, (7 Cal. 352;) 12 Pick. 388; 3 Met. 44; (10 Cal. 227.)

Plaintiff was entitled to a decree on the admission in the answer that the note for which judgment was confessed drew interest from date, although it was given for money loaned at different times, some of them being subsequent to the date of the note.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

Seales et al. v. Scott et al.

This is a proceeding by an attaching creditor to set aside a judgment confessed by Scott in favor of Place, on the ground of fraud.

Judgment was confessed on the 12th of August, 1858, by Scott, in favor of Place. Upon this judgment execution was issued, and levied upon certain property. Subsequently, plaintiffs sued out an attachment against Scott, which was levied upon the same property, in the hands of the Sheriff, and plaintiffs then instituted this proceeding. The Court below gave judgment, postponing Place's judgment to plaintiffs, and defendant appeals.

The errors assigned are:

1. The bill should have been dismissed, because it shows that plaintiffs were neither judgment nor execution creditors of Scott.
2. That there was no evidence of fraud.

The first point is sufficiently answered by the opinion in the case of *Heyneman v. Dannenberg*, (6 Cal. 376,) in which the question is discussed with some care.

Upon the question of fraud, the principal evidence is found in the answer of defendants; for we are disposed to give no weight to the fact that a slight mistake was made in the computation of interest, included in the judgment. The data for the computation are given, and the miscalculation is clearly the result of mistake, and not a design to defraud.

The judgment purports to be for the amount of two promissory notes — one for three thousand dollars, dated 1st of March, 1858; the other for two thousand five hundred dollars, dated June 5th, 1858 — each bearing two per cent, interest per month. The consideration of the notes is stated to have been money loaned, at the respective dates of the notes. In the answer of defendants, filed in this case, it is stated that the consideration of the first note was money loaned, at its date, and that the consideration of the second was money loaned at the time of its date, "*and at various times subsequently.*" What portion of the sum advanced subsequently does not appear.

The confession of judgment includes interest upon the whole amount of two thousand five hundred dollars, from the date of the note; when it is clear, from the sworn answer of defendants, that interest on a portion only was due from that time. This fact must have been known to the parties at the time judgment was confessed.

 McCarty v. Christie et al.

In the case of McKenty v. Gladwin, Hugg & Co., 10 Cal. 227, we held, "if any portion of the consideration of a note be fraudulent, the entire note is void, as against creditors. It must also be conceded that the *interest* included in the note sued upon in this case, is as much a part of the sum for which the note was given as the principal sum itself. The interest would enter into and swell the amount of the judgment to be rendered upon the note. It is clear that if there was no consideration for a part of the principal sum for which the note was given, the whole note would be void. And we cannot see why the same rule would not justly apply to the interest. If a party, by ante-dating a note, and making it draw interest from date, secures to himself a certain sum of money not justly due to him for any past or present consideration, he takes that much from the other creditors; and they are just as much injured as if that amount had been included as part of the principal sum itself. The result is the same, though the mode of accomplishing it be different."

These remarks are directly applicable to the cause under consideration.

Judgment affirmed.

McCARTY v. CHRISTIE et al.

A note for five hundred dollars by an insolvent, to the order of Alfred McCarty, is insufficiently described where the schedule simply states, "Alfred McCarty, borrowed money, April, 1855, \$500;" and a discharge in such case is no bar to a suit on the note.

The payment by a judgment debtor of the judgment, after a Sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the Sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment.

APPEAL from the Eleventh District.

Suit on a note and mortgage executed jointly by defendants, Christie and Mitchell. The note was to the order of plaintiff, and dated April 3, 1855. On the 8th day of May, 1854, defendants had executed a note and mortgage on the same property to one Gallagher to secure the payment of \$700. A judgment on this note and mortgage to Gallagher was had in the District Court of the Eleventh Judicial District, on the 19th of November, 1855. The property was sold under said judgment on the 25th

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of December, 1855; Gallagher was the purchaser, and the certificate was issued by the Sheriff to him. The defendant, A. J. Christie, about the expiration of the time of redemption, purchased Gallagher's title to the property, took an assignment of the certificate of sale, and received a deed from the Sheriff upon the expiration of the six months. In May, 1855, defendant, Christie, married, and since that time resided on the property and occupied it as a homestead. In December, 1855, the defendant, Christie, as an insolvent, was discharged from his debts, the note sued on being on his schedule under the following description, to wit: "Alfred McCarty borrowed money, April, 1855; \$500." Defendant, Christie, answered, admitting the note sued on, but setting up his discharge in insolvency, his claim of homestead, and asking that his wife be made a party. Judgment for plaintiff on the note, and that the property mortgaged be sold. Defendant appealed.

Sanderson & Newell, for Appellant.

The record presents the question: Did the title of Gallagher (purchased by Christie) inure to the benefit of the present plaintiff by virtue of his mortgage on the premises? If it did, the decree upon this point is correct. If it did not, the decree is erroneous. We hold that the title did not inure to the benefit of plaintiff, and in support of that position, cite the case of *Clark v. Baker et al.* (Oct. Term, 1858.)

The proceedings in insolvency were regular, and the note is sufficiently described.

Thomas H. Hewes, for Respondent, to the point, that the discharge of Christie was no bar to the action, cited *McAllister v. Strode*, (7 Cal. 428;) *Judson v. Atwill*, (9 Cal. 477.) But conceding the discharge to have been regular, the lien by mortgage was not affected by it. (*Cummings v. Brady*, Oct. Term, 1858.)

The purchase by defendant, Christie, of Gallagher's interest in the property, simply extinguished the lien of his judgment. After the sale under this judgment, and before the Sheriff's deed, the title still remained in Christie. (*McMillan v. Richards*, 9 Cal. 365; *Cummings v. Coe*, 10 Id. 529.) And the effect of Christie's purchase was to buy a demand against himself. In

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short, he paid off the prior mortgage, and left plaintiff's lien intact.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

There is no error in the judgment. The insolvent proceedings constituted no bar to plaintiff's claim, for the reason, that defendants' schedule contained no sufficient description of plaintiff's demand.

The payment of Gallagher's judgment operated to extinguish the prior lien, and the fact that the judgment debtor took a transfer of the certificate of sale and a Sheriff's deed, instead of a certificate of redemption, could not operate to divest plaintiff's lien.

Judgment affirmed.

GOODE v. SMITH AND WIFE.

IN acknowledgments to deeds, substantial conformity with the statute is sufficient.

The words "undue influence" being omitted in the acknowledgment of a wife, does not render it invalid.

A Justice of the Peace can take the acknowledgment of the wife to a deed of the homestead.

If a party permits his antagonist to prove a fact by secondary evidence, he cannot afterwards object that it was not proved by the best.

In chancery cases the Court below may disregard the verdict of a jury.

In chancery cases the Appellate Court will not notice minor errors, if on the whole record the decree be right.

APPEAL from the Eleventh District.

To the case stated by the Court, add, that the defendants set up in their answer that the property was their homestead at the time of the execution of the instrument sued on, and that it was obtained from them under threats of a criminal prosecution. Defendants appeal.

Horace Smith, for Appellants.

The deed is void because executed under duress and fear excited by threats of a criminal prosecution. (*Forshay v. Ferguson*, 5 Hill, 154; *Story's Eq. Jur. Sec. 239*.) Upon the other points discussed by counsel, the Court do not pass.

Goode v. Smith and Wife.

E. B. Crocker, for Respondent, argued that the acknowledgment of the wife to the deed was sufficient, though the words "undue influence" were omitted; and that a Justice of the Peace was authorized to take the acknowledgment of the wife to a deed of the homestead. This being joint, and not separate property, does not come within the case in 9 Cal. 591. (See Wood's Dig. 100, Sec. 4; p. 102, Sec. 21.)

A homestead cannot be claimed out of lands held in joint tenancy, or by tenancy in common. (5 Cal. 244; 6 Id. 165.)

As to duress, the jury found against defendants. They appeal.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Bill filed, alleging that in 1853, plaintiff bought of Smith and Brown a tract of land, known as the "Kentucky Ranch," for three thousand two hundred dollars, which sum vendees received and divided; that, at the time of the purchase, Smith and Brown represented that there were no incumbrances on the land; but plaintiff, in 1855, discovered the premises had been mortgaged by S. and B. to one Kidd for one thousand eight hundred dollars, to secure a note due at sixty days, with interest at five per cent. per month from date, (23d April, 1853;) that this debt was for money borrowed of Kidd, which S. and B. used in the purchase of another ranch. That, on the 10th April, 1855, it was agreed, in consideration of the premises, between the plaintiff and Smith, that if plaintiff would pay or satisfy this demand of Kidd's, or get an assignment of it, the amount paid or expended for the purpose, (eight hundred dollars,) should be repaid to plaintiff by Smith by the 10th October afterwards; and that this last ranch — called the "Randolph Ranch" — should be held by plaintiff as security for the sum. An absolute deed was made to the plaintiff by Smith and wife for the Randolph Ranch, and an instrument of defeasance executed by the plaintiff. The bill is brought to foreclose the mortgage thus made.

Brown was not made a party to the proceeding, nor was it necessary.

The defendants answered, denying the allegations of the bill. A jury was empaneled, and rendered a verdict for the plaintiff.

Goode v. Smith and Wife.

The Court decreed in favor of the plaintiff upon the verdict and evidence.

The deed to the Randolph Ranch was executed by Smith and wife. It was acknowledged before a Justice of the Peace. The deed was objected to on the ground of defective acknowledgment on the part of the wife. The acknowledgment is as follows:

"STATE OF CALIFORNIA, }
Placer County. }

On this 10th day of April, A. D. 1855, before me, a Justice of the Peace for said county, personally appeared P. H. Smith and Elizabeth Smith, his wife, to me personally known to be the individuals named in and who executed the foregoing instrument of writing, who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned, and the said Elizabeth Smith being examined by me separate and apart from her husband, P. H. Smith, and without his hearing, acknowledged to me that she executed the same freely and voluntarily, and for the uses and purposes therein mentioned, without fear or compulsion, and that she did not wish to retract the same, well knowing the contents thereof, after due explanation by me made.

D. V. MASON, J. P.
For Township No. 2, Placer County, Cal."

The Court held that the acknowledgment — the property being a homestead — was not sufficient as to the wife, but the deed was admitted as against the husband. The jury, however, found that the property was owned jointly by Smith and Brown; and the Court, therefore, held that no homestead rights attached.

1. We think that the acknowledgment was sufficient as to the husband and wife. It is true, that it does not follow the words of the statute, but this is not necessary. Substantial conformity is enough. The certificate shows a privy examination of the wife — that the deed was freely and voluntarily executed, without threats, fear, or compulsion.

It is true, it does not state that it was executed without undue influence; but it is difficult to see how a deed, freely and voluntarily executed, without fear, threats, or compulsion, could

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be executed under undue influence, or, indeed, any extraneous influence at all.

2. There is nothing in the point that a Justice of the Peace cannot take an acknowledgment of a *feme covert* to a deed conveying a homestead, even if the objection be good when applied to a conveyance of separate estate. The statute, (Wood's Dig., 100, Sec. 4,) empowers Justices of the Peace to take acknowledgments; and Section 21, (page 102,) empowers any officer "authorized by this Act to take the proof or acknowledgment of any conveyance whereby any real estate is conveyed or may be affected, and such officer may take and certify the acknowledgment of a married woman to any such conveyance of real estate." We think the statute was intended to be uniform, and can see no reason why a Justice of the Peace should not be allowed to take an acknowledgment of a *feme covert* as well as a Notary. If compelled, by the express words of the Act in reference to the conveyances of the wife's separate estate, to hold to the contrary, we think we are neither compelled or permitted so to hold in regard to a deed of the homestead.

3. The deed having been admitted, the Court could attach to it all its legal weight; and it showed a valid contract on good consideration. The ground upon which the Court put its decision might well be maintained. It is true, the evidence of the witness who swore that the property was owned jointly by Smith and Brown, may not be the best mode of proving this fact; but no objection seems to have been taken to this kind of proof when offered, and if a party permits his antagonist to prove a fact by secondary evidence, we know of no rule which allows him afterwards to object that it was not proved by the best.

4. The jury found there was no duress; and if they had found to the contrary, this being a Chancery case, the Court would have been well justified in holding otherwise. The evidence shows that Smith and Brown did represent the Kentucky Ranch to be free from incumbrances; it was not. Smith and Brown were under the highest moral obligation to make good their representations. There is no proof that Smith was coerced into making this deed by any threat of criminal prosecution, even if there was sufficient proof that the plaintiff threatened to prosecute,

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and that this threat was communicated. It is quite as charitable to suppose that Smith acted from a sense of moral obligation, as that he acted from a sense of fear. We are not disposed to interfere with the finding of the jury, and the judgment of the Court in this respect.

The other assignments we do not consider it necessary to notice. On the whole case, we think the plaintiff entitled to recover, and if minor errors intervened, as this is a Chancery cause, we would not notice them, if, on the whole record, the decree was right.

Judgment affirmed.

BRYANT v. WATRISS et al.

In a suit against the maker of a note, or the acceptor of a bill, the indorser is a competent witness for either party.

APPEAL from the Twelfth District.

The facts appear in the opinion of the Court.

Stanly & Hayes, for Appellant.

The witness, Ira P. Rankin, the payee and indorser of the note sued on, was incompetent, by reason of his interest. (*Bashins v. Wilson*, 6 Conn. 471; *Pingree v. Warren et al.* 6 Greenleaf, 457; *Steinmetz v. Currie*, 1 Dallas, 270; *Barnes v. Ball et al.* 1 Mass. 73; *Cowles v. Harts, Johnson et al.* 3 Conn. 516; *Hurick v. Whitney et al.* 15 John. 240; *Duncan v. Pindel*, 4 Bibb, 331; 19 Wend. 561; 2 Watts, 121; *Soule v. Daves*, 6 Cal. 475; *Schilling v. McClann*, 6 Greenleaf, 368, side page; *Richardson et al. v. Bartley et al.* 2 B. Monroe, 333.)

Balie Peyton, for Respondent.

In a suit by the holder against the maker, the payee and indorser is a competent witness for the holder, because his interest is exactly balanced. (1 Greenl. Ev. Secs. 399, 400.)

FIELD, J. delivered the opinion of the Court — BALDWIN, J. concurring.

This is an action upon a promissory note, in which the maker

Bryant v. Watrous et al.

and indorsers are joined as defendants under the fifteenth section of the Practice Act; and the only question presented by the appeal is, whether the first indorser was a competent witness for the plaintiff. No service appears to have been made upon the indorsers, and the judgment was taken only against the maker.

There is a want of consistency in the adjudged cases as to the competency of parties to bills and notes, as witnesses in suits between other parties to the same paper. In England the authorities favor the admission of parties, their competency being determined by the doctrine of equal liability. Thus, "in an action by indorsee against drawer or acceptor," says Bayley in his treatise on Bills and Notes, "an indorser is, in general, a competent witness either for plaintiff or defendant; for plaintiff, because, though the plaintiff's succeeding in the action *may* prevent him from calling for payment from the indorser, it is not certain that it will; and whatever part of the bill or note the indorser is compelled to pay, he may recover again from the drawer or acceptor; and he is competent for defendant, because if plaintiff fails against drawer or acceptor, he is driven either to sue the indorser or to abandon his claim." The same doctrine which allows an indorser of a bill of exchange to be a witness against the acceptor admits the indorser of a promissory note as a witness against the maker. The acceptor of a bill and the maker of a note stand in the same relation to the indorser in respect to primary liability. There are decisions in the American Courts sustaining the opposite doctrine, though the cases are not uniform. Cowen & Hill, in their notes to Phillips, (Part 1, Note 99,) after citing a great number, observe that from them "it appears that the Courts are not consistent in their decisions as to the competency of a party to a bill or note. As a general rule he is, in England, a competent witness, for he is equally liable, let the suit terminate as it will, and for nothing beyond the face of the paper; not for costs, unless the party for whom he is called become a party for his accommodation, or he has otherwise made himself liable by some special undertaking. The American cases mostly come short of that, especially as to the competency of a drawer or indorser, for a subsequent holder. We are inclined to believe, however, that there is a tendency to

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the adoption of the English rule." (See, also, *Baretto v. Snowden*, 5 Wend. 181; *Hall v. Hale*, 8 Conn. 337.)

The English rule appears to rest upon principle, and to place the admissibility of the parties to a bill or note upon tenable grounds. And the whole tendency of the decisions is to relax rather than to extend the rule of exclusion. The interest of the witness to exclude must be such that he will gain or lose by the direct legal operation and effect of the judgment, or the record of the judgment must be evidence for or against him in some other action. Neither of these events can happen in the case at bar. A recovery against the maker cannot affect the liability of the indorser. It is payment of the note alone which can discharge him. If the judgment is not made upon execution the indorser may be sued; and if he is compelled to pay the amount he has his recourse against the maker. The judgment between the holder and maker cannot be evidence between the holder and indorser, or, in a subsequent suit, between the indorser and maker. Neither of the conditions by which the competency of the indorser can be tested could possibly happen in the case at bar. He can neither gain or lose directly by the judgment against the maker, nor can its record be evidence for or against him. We are, therefore, of opinion that he was a competent witness.

Judgment affirmed.

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THE 8th section of the Act of 1851, concerning divorces, which provides, that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party," does not prohibit the introduction of confessions in evidence, but simply prevents granting a decree on them alone.

THIS was the rule of the common and English Ecclesiastical law, and our statute is merely affirmatory of that rule.

THE object of the rule requiring proof, in corroboration of defendant's confessions, is to guard against collusion; and when the entire testimony, confessions, and circumstances, repel all suspicion of collusion, and leave no doubt of the truth of the confessions, the Court should act upon them.

WHERE a statute is in affirmance of the common law, it is to be construed as was the rule by that law.

IN a verified answer an evasion of the controlling fact in issue, is a strong circumstance against the defendant.

A child born in lawful wedlock, is presumed to be the child of the husband. The marriage is an acknowledgment by the husband that the child is his; but, to be effective, there must be knowledge at the time of the fact admitted. Hence, where a man marries a woman with child, the law pre-

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sumes the child is his; but this presumption is based upon the assumed fact that he knew, at the time of his marriage, the situation of the woman. Marriage by our law is a civil contract, and may be avoided for material and substantive fraud in its procurement; and ante-nuptial pregnancy by a stranger is a fraud going to the very substance of the contract, vitiates it *ab initio*, and authorizes a divorce.

A woman to be marriageable must, at the time, be able to bear children to her husband; and a representation to this effect is implied in the very nature of the contract.

APPEAL from the Twelfth District.

Action for divorce *a vinculo matrimonii*, on the ground of fraud. The facts appear in the opinion of the Court.

McDougall & Sharp, for Appellant.

I. The confessions of the defendant were admissible.

Section 8 of the Act of 1851, as to proof in cases of divorce, is simply in affirmance of the common law, and must be construed according to that law. (*Harlest's Case*, 3 Coke, 13; 2 Vol. 13; *Stowell v. Lord Zouch*, 1 Plowd. 364, a; *Moore v. Hussey*, Hobart, 97; Bacon Abr. Statutes, I. 4, Vol. 9, 245; 1 P. Wms. 252; 2 Just. 148, 301; 1 Saund. 240; 10 Mod. 245; Foster, 94; 11 Mod. 150; Bacon Stat. I. 5, 246; Plowd. 205; *Stradling v. Morgan*, Lit. R. 212; 11 Mod. 161; 1 How. 491; 1 John. 105; *Burgess v. Burgess*, 4 Eng. Eccl. 532, 546.)

The reason for excluding confessions in cases of divorce, is the danger of collusion. This reason cannot apply when it affirmatively appears there can be no collusion. (Smith's Com. 637; Bishop on Divorce, Secs. 305, 309, 310; *Billings v. Billings*, 11 Pick. 461; *Matchen v. Matchen*, 6 Barr, 337; *Sawyer v. Sawyer*, Walker's Ch. R. 52; *Tewksberry v. Tewksberry*, 4 How. Miss. 111; *Conant v. Conant*, 10 Cal. 254.)

II. The fact that the child was begotten by a stranger is sufficiently established.

The defendant confesses the fact clearly and distinctly, and in addition to the confessions, we have the following circumstances:

1. The child was generated out of wedlock, and *before the contract of marriage* between plaintiff and defendant.
2. The child has a putative father other than plaintiff.
3. The putative father was on terms of intimacy with defendant at and during the time when the child should have been generated.

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4. The defendant, and the family of defendant, have recognized, or at least acquiesced in the fact, that the child was the offspring of the putative father.

5. The defendant, under circumstances which do not admit of the idea of collusion, admits the child the offspring of the putative father.

6. The plaintiff and defendant lived together from the time of the contract of marriage, until the time the obnoxious fact presented itself, in harmony. Immediately upon its presentation, upon the first notice of the wrong, plaintiff did all in his power, or in the power of any man, to vindicate himself—to discharge himself from the burden of a child foreign to his blood, and the burden of a wife false to her obligation. He repudiated child and wife.

7. The plaintiff not only repudiated, but separated from the defendant immediately upon notice of the fact.

8. The repudiation and separation were recognized as for good cause, both by the defendant and her family.

9. The answer of defendant, which is not a mere “admission or statement,” but which, from its being under oath, has the dignity of evidence, is itself a fact. While, under our statute and the general rule of law, it could not by itself justify a conclusion, it has the character and force of a most significant circumstance. It is itself a confession distinct and independent in such a form, and made under such circumstances, as not only repels all idea of collusion, but all foundation for the suggestion that the first confession was made under questionable circumstances; and if the doctrine in *Vance v. Vance*. (8 Greenleaf, 132) is recognized as sound, would by itself justify a decree against defendant.

The force of these circumstances is sought to be overcome by the legal presumption that a child born in lawful wedlock is the child of the husband. We admit this presumption in its place, but deny its applicability to the present case. The rule is derived from the English law, but not from that law as applicable to divorces. The effect of ante-nuptial incontinence has been a frequent subject of discussion in the English Ecclesiastical Courts, but the effect of, or the presumption incident to, ante-nuptial pregnancy, seems open to be settled according to the rules of

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right reason. (For the English rule, as recognized by American authorities, see 1 Black. Com. 457.) The presumption at most is the legitimacy of the child. (See, also, *Wells v. Stout*, 9 Cal. 499; Mathews Presumptive Evidence, 24, 25.) The question in *Stetgall v. Stetgall*, (2 Brock. 265,) cited by defense, was one of legitimacy. As to the authorities cited to show the inadmissibility of defendant's confessions. The cases of *Baxter v. Baxter*, (1 Mass. 346,) and *Holland v. Holland*, (2 Id. 154,) are perfectly consistent with the ruling in *Billings v. Billings*, (11 Pick. 461,) and *Vance v. Vance*, (8 Greenleaf,) and clearly sustains the same doctrine. The same is true of *Betts v. Betts*, (1 John. Ch. 197); *Van Veghten v. Van Veghten*, (4 John. Ch. 501); and *Barry v. Barry*, (Hopkins Ch. 118.) Every one of the cases cited recognizes the admissibility of the confessions and their sufficiency when supported by circumstances which repel all idea of collusion.

The defendant having been with child by a stranger at the time of the contract of marriage, and having concealed her condition from the plaintiff, was such concealment a fraud, and may the plaintiff for this cause have the contract canceled? (Comp. Laws, 371.) Divorce may be granted "when the consent of either party was obtained by force or fraud, upon the application of either party."

Our statute intends to place the marriage contract upon the same grounds with other civil contracts, and to justify its avoidance for material fraud in the making or procurement of the contract. (Reeves' Domestic Relations; Irving's Civ. Law, 102; 2d Burns' Eccl. Law, 500a; Page on Divorce, 161, 162; *Morris v. Morris*, Wright's Rep. 630; *Ritter v. Ritter*, 5 Black. 81; *Scott v. Shufeldt*, 5 Paige, 43; *Montgomery v. Montgomery*, 3 Barb. Ch. 132.)

Stanly & Hays, for Respondent.

1. The testimony as to the so-called confessions of the defendant was inadmissible, as they could not be the basis of a divorce.

The rule of the common law never prevailed in this State, for Section 8 of the Act concerning divorces, passed in 1851, (see Comp. Laws, 372,) which section was re-enacted in 1857,

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(see Laws of 1857, 240,) provides that, "No divorce shall be granted in any action by the default of the defendant, nor on the admission or statement of either party, but in all cases the Court shall require proof of the facts alleged, as the grounds for a divorce." (*Conant v. Conant*, 10 Cal. 254; 2 Kent, 67; *Hansley v. Hansley*, 10 Ired. 510; *Hansel v. Hansel*, Wright's Ohio, 212; *Brainard v. Brainard*, Id. 354.)

The authorities cited by the counsel for the plaintiff on the subject of confessions, come from States and countries where the common law rule prevails, and they all, with one exception, reject confessions unless corroborated. (*Baxter v. Baxter*, 1 Mass. 346; *Betts v. Betts*, 1 Johns. Ch. Rep. 198; *Doe v. Roe*, 1 Johns. Cases, 25; *Holland v. Holland*, 2 Mass. 153; *Washburn v. Washburn*, 5 N. Hamp. 195; *Clutch v. Clutch*, Saxton's N. J. 474; *Devenbagh v. Devenbagh*, 5 Paige's Ch. 555; *Matchin v. Matchin*, 6 Barr, Penn. 337; *Montgomery v. Montgomery*, 3 Barb. Ch. 134; *Hansel v. Hansel*, Wright's Ohio, 212; *Brainard v. Brainard*, Wright's Ohio, 354; *Müller v. Müller*, 1 Green's Ch. N. J. 143.)

2. The "admission or statement" of the defendant, is not a confession in law; or, in other words, it was made under such circumstances as not to entitle it to any credit.

A statement, to constitute a confession, must be made voluntarily. (1 Greenleaf's Ev. Secs. 219, 229, p. 208, Note 1; 1 Green's Ch. R. 139; Bouvier's Law Dict. word "Confession.") Here the confessions were not voluntary.

3. The testimony, even if the confessions were admissible and competent, does not establish that the defendant was pregnant by a stranger, at the time of her intermarriage with the plaintiff.

The only evidence offered by the plaintiff to establish that she was pregnant by a stranger, was an admission made through fear.

The law presumes that the child born of the defendant, after her marriage, was the offspring of the plaintiff. *Moss v. Moss*, 2 Ired. 60; *Stegall et al. v. Stegall*, 2 Brock. 261.)

The record shows that he acquiesced in the child being his for several days after its birth, that he did not attempt to repudiate it until Wm. Arrington called on him at the Oriental Hotel.

In *The State v. Herman*, (13 Ired. 502,) it was held that a "child born in wedlock, though born within a month or a day

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after marriage, is legitimate, by presumption of law." (See, also, the authorities cited in Notes 1 and 2, 2 Greenl. Ev. Sec. 150; *Scroggins v. Scroggins*, 3 Dev. 535, 547; *The King v. Luffe*, 8 East, 191.)

In this case, it is shown that the plaintiff's courtship extended over a period of some seven or eight months previous to the marriage; that they had been engaged for that length of time before marriage; that he was frequently with her alone, while she was not alone with any other person than himself; that they lived happily together until two or three days after the birth of the child.

In *Montgomery v. Montgomery*, (3 Barb. Ch. 135,) which was an action to obtain a divorce, the Court said, "in the absence of any proof to the contrary, the legal presumption is, that the child, of which the defendant was subsequently delivered, was the child of the complainant, although the testimony shows it must have been begotten before the marriage." (See *Baxter v. Baxter*, 1 Mass. 346; *Holland v. Holland*, 2 Mass. 154.)

4. If the defendant was with child by a stranger, at the time of her intermarriage with the plaintiff, the mere failure to disclose that fact, there being "no false representations," nor "active measures to deceive," was not a fraud, within the meaning of our statute concerning divorces. Nor would it be a ground of divorce at common law. (Bishop on Divorce, Sec. 106; *Baden v. Baden*, 3 Dev. 548.)

"If a woman pretends to be a virgin, while she is not, or even while she is a common prostitute, a marriage contracted on the faith of the representation is nevertheless good." (Bishop, Sec. 105.)

This is the settled law of Scotland, and is also the doctrine of the English Courts. (Note 1, to Sec. 105, *Id.* and cases there cited, Sec. 101, *et seq.*) As to meaning of "fraudulent contract," as applied to Marriage and Divorce, see *Benton v. Benton*, (1 Day, 111.)

FIELD, J. delivered the opinion of the Court — BALDWIN, J. concurring.

On the 22d of September, 1857, the parties to this action intermarried, and until the tenth of the following February they lived

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together as husband and wife. On this last day, four months and nineteen days from the date of the marriage, the defendant gave birth to a fully developed child. The plaintiff insists that this child was begotten by a stranger; that the defendant knew, or had sufficient reason to believe that she was with the child at the date of her marriage, and concealed the fact from him; that he was ignorant of her condition, and believed her at the time to be chaste and virtuous; that he continued thus ignorant until the birth of the child, and that upon this event happening, he repudiated the defendant and her child, and as soon as her health would permit, returned her with the child to her family and relatives. Upon these facts, as established, the plaintiff seeks a divorce *a vinculo matrimonii*, on the ground of fraud. On the hearing before the Referee, the confessions of the defendant as to the father of the child were admitted in evidence, against the objection of her counsel; and much of the argument at the bar was directed to the propriety of their admission. In considering the case, three questions present themselves for determination. These relate: 1st. To the admissibility of the testimony as to the confessions. 2d. To the sufficiency of the testimony if admitted, taken in connection with corroborating circumstances, to establish the fact alleged that the child was begotten by a stranger; and, 3d. To the sufficiency of the cause assigned, if established, viz: the condition of the defendant at the date of her marriage and her concealment thereof, the plaintiff being innocent and ignorant, for a divorce under our statute.

The objection of the defendant's counsel to the introduction of the confessions rests chiefly upon the eighth section of the Act of 1851 concerning divorces, which provides that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party; but in all cases the Court shall require proof of the facts alleged as the grounds for a divorce. A similar provision, in identical language, is contained in the Supplemental Act of April, 1857. The statute, as appears, does not in terms prohibit the introduction of confessions; but only provides that the decree shall not be granted on them. In this respect it is only affirmatory of the well established rule of the common and of the English Ecclesiastical law, which has been recognized from the earliest period,

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both in England and the several States of the Union. The object of the rule is to prevent collusion between the parties. Without some limitation of this kind it would be in the power of the parties to obtain a divorce in all cases. The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system, and the law wisely requires proof of the facts alleged as the ground for its dissolution.

The agreement of the parties will not answer, as then the marriage relation would be one only of temporary convenience; the default in the action will not answer, as this would only be another form for carrying out their previous agreement; confessions alone will not answer, because they may be the result of collusion, and be untrue, in fact. But the public can have no interest in suppressing the truth; and, as a means of its ascertainment, the confessions of parties against their interests have always been regarded as evidence of the most important character. And when all presumptions of collusion are repelled, and, from circumstances, it appears reasonably certain that the confession made is true, the ground of the rule of exclusion in cases of divorce is obviated, and there can be no reason for refusing consideration to the confession. "Thus, it has been held," observes Dr. Lushington, in *Harris v. Harris*, (2 Hagg. Ecc. R. 409,) "that confession, when perfectly free from all taint of collusion, when confirmed by circumstances and conduct * * ranks among the highest species of evidence. It has been so held on different occasions. It was most truly stated by Lord Stowell in the case of *Mortimer v. Mortimer*, 'that the Court was inclined to view confession, when not affected by collusion, as evidence of the greatest importance,' and the grounds upon which the Court laid down this principle are too obvious to need any explanation."

In *Matchin v. Matchin*, (6 Barr, 337,) Gibson, C. J. said: "It is a rule of policy, however, not to found a sentence of divorce on confession alone; yet, where it is full, confidential, reluctant, free from suspicion of collusion, and corroborated by circumstances, it is ranked with the safest proofs."

In *Sawyer v. Sawyer*, (Walker Ch. 52,) Manning, Chancellor, said: "In cases of adultery, the right to a divorce consists in the

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proof of a single fact; and if the confessions of the party were to be received as sufficient proof, there would be a danger of collusion. It is to guard against this that other proof is required in corroboration of the defendant's confessions. The same rule must apply to confessions as evidence in all other cases of divorce from the bonds of matrimony, with this limitation: that, where there is less danger of collusion, or it could not be practiced so easily, the corroborating facts or circumstances need not be of so decisive a character. The object of the rule is to guard against collusion—not to obstruct the administration of justice. Where the circumstances of the case are such as to repel all suspicion of collusion, and leave in the mind of the Court no doubt of the truth of the confessions, it should act accordingly."

The rule of the statute, as we have already observed, is that of the common, as well as of the ecclesiastical, law. That no decree or sentence can be founded upon the sole evidence of the confessions of the defendant out of Court, "is clearly," says Bishop, (Sec. 305,) "the rule of the ancient, as well as the modern common law. For, in Collet's case, it being suggested to the Court of King's Bench that parties who had lived together sixteen years, were proceeding in the Spiritual Court collusively, on the false allegation of incest, to dissolve a marriage for the purpose of bastardizing their children—'they both appear and confess the matter, upon which a sentence of divorce was to pass'—it was held that prohibition would lie."

The statute of this State, being in affirmance of the common law, is to be construed as was the rule by that law. This is a received doctrine of construction in such cases. Thus in *Miles v. Williams*, (1 Peere Wms. 252,) the Court said: "The best rule of construing Acts of Parliament is by the common law, and by the course which that observed in like cases of its own before the Act;" and, in *Arthur v. Bokenham*, (11 Mod. 150,) the Common Pleas said: "The general rule in exposition of all Acts of Parliament is this—that, in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of the common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare; therefore, in all general

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matters, the law presumes the Act did not intend to make any alteration; for, if the Parliament had had that design, they would have expressed it in the Act." (See Bacon's Abridg. 9 Vol. 244, Rules to be observed in the construction of a Statute, 4; and Viner's Abridg. 19 Vol. 512, Construction of Statutes, 12, and authorities there cited.)

Having in view, then, the doctrine of the law as it existed previous to the adoption of the statute, and the reason of it, and regarding the statute as merely declaratory of that doctrine, we are necessarily led to the conclusion that it was never intended to exclude entirely the introduction of confessions, but only, as the statute in terms purports, that upon them the decree shall not be granted; and that to them, when freed from the presumptions of collusion, and sustained by circumstances, the Court may justly look as evidence of greater or less weight, according to the special character of the case. The question, as justly stated by the counsel for the Appellant, is this: "Would the entire testimony, confessions, and circumstances, lead the guarded discretion of a reasonable and just man to the conclusion."

The circumstances under which the confession was made by the defendant exclude all presumptions of collusion. It was made with reluctance — Under great distress of mind, from sense of shame, and the humiliation of her position — to her own brother — and fully exonerates the plaintiff, and names the seducer of her virtue, and the time and place of her seduction. Previous to this the plaintiff had, on repeated occasions, informed the brother, that he should return the defendant to his house, and it would appear that some words of anger had passed between them on the subject; the brother attributing, at first, to the plaintiff the dishonor of his sister, and distrusting his declarations to the contrary. Upon hearing the confession he became satisfied, and immediately arranged with the plaintiff for the removal of the defendant from her residence, in the hotel, to his house, but, upon conversation with defendant, she herself concluded it best not to go until the following morning, it being at the time late at night. On the following morning, in pursuance of the arrangement of the previous night, she was removed to the house of her brother. From this time, all association between the parties appears to have ended.

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The pretense that the confession was made through fear, does not merit consideration. That it was made, as we have stated, under great distress of mind, is true; but no retraction of it, or denial of its truth, on her removal the following day, or subsequently, appears ever to have been made. The brother, who was acting under the most painful circumstances, and was deeply affected by them, and who had previously refused to allow the removal of the defendant to his house, upon the belief that she had been the victim of the plaintiff's solicitations, accepted the confession as true, and acted upon it. The brother and mother were examined as witnesses in the cause, and not a word impeaching the truth of the confession is stated to have ever been uttered by the defendant, nor do they themselves attempt to impeach it. That it was without collusion is evident, and that it is true, hardly admits of a doubt. The conduct of the plaintiff corroborates it. Previous to the birth of the child, the parties had lived in affectionate harmony. Immediately upon this event, the plaintiff did all that a just and upright man could do to vindicate himself — to relieve himself from the burden of a dishonored wife, and her child of bastard blood. He repudiated them both — and so soon as the health of the defendant would permit, after consultation with her physician and her brother, restored her to her family. Had the parties had illicit intercourse previous to marriage, the possibility of issue must have often occurred to them, and it is highly improbable that so sudden a revulsion of feeling to his wife would have happened upon its appearance. The instinct of paternity — one of the strongest in our nature — would have strengthened rather than weakened the previous attachment to his wife upon the birth of the child.

The conduct of the defendant corroborates the confession. We have already referred to the want of any subsequent retraction or denial of its truth. The answer to the present suit, filed about six weeks subsequently, is itself an admission, and constitutes a circumstance worthy of consideration. It is under oath, and in answer to the charge in the complaint, that she was with child at the date of the marriage, by a stranger, it avers that if she was then with child she had no knowledge of it, and it was the result of an act to which she never consented, and had no knowledge of it at the time of its commission, nor until after her

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marriage with the plaintiff, and that the same was committed while she was in a state of unconsciousness. There is no direct averment that the plaintiff was the father of such child, or any direct denial that it was begotten by a stranger. The controlling fact in issue is evaded in the answer, and this evasion, in a solemn judicial proceeding, is a most significant circumstance.

The conduct of the relatives of the defendant corroborates the confession. They have recognized it as justifying the repudiation and separation. These several circumstances, taken in connection with the conceded fact, that the child was begotten out of wedlock, furnish, in their collective force, sufficient corroboration of the confession to justify the conclusion that the child was the offspring of a stranger. In the cases cited by Bishop, the corroborating circumstances held sufficient, were less satisfactory than the circumstances in the case at bar.

In *Harrison v. Harrison*, (4 Moore P. C. 96,) the suit was for nullity of marriage on the allegation of the husband's impotence, and in giving judgment in the Court of Privy Council for the divorce, confirmatory of the decision of the Consistory Court, and of the Court of Archers, Lord Brougham said: "It has been insisted by the counsel for the Appellant, that the confession of non-consummation is not sufficient to satisfy the one hundred and fifth canon, and that there must be some extrinsic proof and for that purpose proof by inspection is said to be essential. Their lordships give no opinion on this construction of the canon; for if adminicular proof is requisite, they think the circumstance of the Appellant's *having taken a legal opinion of the validity of the marriage*, which he admits in his answer, coupled with the confession of non-consummation, and the *refusal, in the first instance, to undergo inspection*, is sufficient extrinsic proof; and being satisfied that there is no collusion between the parties, they affirm the decree of nullity." "In *Noverre v. Noverre*, (1 Robert, 428,) the evidence, aside from the defendant wife's confession, went no further than to show extreme, but no indecent familiarities with the alleged paramour, together with ample opportunities. In *Tucker v. Tucker*, (11 Jur. 893,) there were no acts of familiarity proved, but there was the reception of a letter from the paramour to the wife, which she had not read and could not know the contents of, and a meeting, not at all shown to be

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criminal, between her and him, after she was turned off by her husband; yet this was held amply sufficient to sustain the confessions." (Cited from a note to Sec. 310 in Bishop.)

Against the conclusion from the evidence of the confession, and the corroborating circumstances, the counsel of the Respondent urges the presumption of paternity in the plaintiff from the fact of marriage. There is no doubt that such is the presumption of the law. A child born in lawful wedlock is presumed to be the child of the husband. This has been held in numerous cases. (See *Stigall et al. v. Stigall*, 2 Brock. 261; *The State v. Herman*, 13 Ired. 502; *The King v. Luffe*, 8 East, 191.) The marriage is regarded as an acknowledgment by the husband that the child is his, but as in all cases of acknowledgment, to be effective, there must be knowledge at the time of the fact admitted. The case of *The King v. Luffe*, (8 East, 210,) cited by the Respondent, arose upon a question of bastardy, but in the opinion of Mr. Justice Lawrence, the reason of the presumption in cases of ante-nuptial pregnancy, is stated. "By the civil law," says the Justice, "if the parents married any time before the birth of the child, it was legitimate; and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule, and it seems to be founded in good sense; for where a man marries a woman *whom he knows to be in this situation*, he may be considered as acknowledging, by a most solemn act, that the child is his." The knowledge of the situation of the party constitutes the ground of the presumption.

In *Wright, Administrator v. Hicks*, (15 Ga. 160,) the doctrine of presumptive paternity in a case of ante-nuptial pregnancy was considered, and the decision of the Court bears directly upon the question before us. In that case the wife was with child at the time of the marriage, and immediately upon her pregnancy being discovered, the husband returned her to her family. In the settlement of the estate, the question of the child's right of inheritance arose. Mr. Justice Lumpkin delivered the opinion of the Court, and after referring to the able and thorough discussion had in the case, on a previous occasion, said: "The importance, as well as the novelty of the question, led us to devote to it as large a portion of our time as we could possibly spare

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We cannot assume that he detected her pregnancy, and if he had reason to suspect it, that he must have done so at so early a period after marriage as to have referred it to ante-nuptial incontinence. To one, who we must believe from the evidence, possessed a strong affection for his wife, the suspicion of a want of chastity would never arise. Affection will give every excuse for appearances, except that of dishonor. As against the weight of the evidence from the confession and corroborating circumstances, the suggestion is without force.

The remaining question relates to the sufficiency of the cause assigned as a ground of divorce. Our statute provides that a divorce may be granted "when the consent of either of the parties to the marriage was obtained by force or fraud, upon the application of the injured party." (Act of April, 1853.) Marriage is considered by our law as a civil contract, to which the consent of the parties is essential, (Act concerning Marriages, Sec. 1,) and is subject to avoidance for material and substantive fraud in its procurement. Reeve, in his treatise on the domestic relations, says on this subject: "A man by the foulest fraud, gets possession of the property of his neighbor. A contract thus basely obtained is not only void, but, in many instances, the obtaining of it is a felony. The common sense of mankind must revolt at the idea that, when a man, by the same abominable fraud, has obtained the person of an amiable woman and her property, the law should protect such contract, and give it the same efficacy as if fairly procured. The truth is, that a contract which is obtained by fraud, is, in point of law, no contract. The fraud blots out of existence whatever semblance of a contract there might have been. A marriage procured without a contract, can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud than one procured by force and violence. The consent is as totally wanting, in view of the law, in the former as in the latter case. The true point of light in which this ought to be viewed, I apprehend, is, that the marriage was void, *ab initio*; but it is necessary to have a divorce by the Court, since the marriage has been celebrated, that all concerned may be apprised that such marriage has no effect. Upon the same principle that chancery decrees contracts, unfairly obtained, void, all the apprehension that is created in

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the minds of conscientious men, of the illegality of separating husband and wife, is dissipated." (Cited from Bishop on Marriage and Divorce, Sec. 104, Note 1.)

It cannot be pretended that the condition of the defendant was not a most material circumstance to the consent required for the validity of the contract. Its concealment operated as a fraud upon the plaintiff of the gravest character. His contract was with and for her; it referred to no other person, much less included a child of bastard blood. A child imposes burdens and possesses rights. It would necessarily become a charge upon the defendant, and through her upon the plaintiff. It would become presumptive heir of his estate, and entitled under our law, as against his testamentary disposition, to an interest in his property acquired after marriage, to the deprivation of any legitimate offspring. The assumption of such burdens, and the yielding of such rights, cannot be inferred in the absence of proof of actual knowledge of her condition on his part. Again, the first purpose of matrimony, by the laws of nature and society, is procreation. A woman, to be marriageable, must, at the time, be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. The second purpose of matrimony is the promotion of the happiness of the parties by the society of each other, and to its existence, with a man of honor, the purity of the wife is essential. Its absence under such circumstances as necessarily to attract attention must not only tend directly to the destruction of his happiness, but to entail humiliation and degradation upon himself and family. We can conceive no torture more terrible to a right-minded and upright man than an union with a woman whose person has been defiled by a stranger, and the living witness of whose defilement he is legally compelled to recognize as his own offspring, as the bearer of his name and the heir of his estate, and that, too, with the silent, if not expressed, contempt of the community. By no principle of law or justice can any man be held to this humiliating and

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degrading position, except upon clear proof that he has voluntarily and deliberately subjected himself to it.

In *Morris v. Morris*, (Wright's Rep. 630,) there was pregnancy and concealment, but there were no affirmative acts on the part of the wife to conceal her situation, except in the wearing a full Quaker dress at the ceremony of the marriage, which took place in the dusk of the evening, without lights. From the 4th of July to the marriage, on the 17th of October following, the husband was unremitting in his attentions to her. No representations were proved, and "the husband and wife lived together, without his suspicions being awakened, until the wife was taken in labor pains, and presented her wondering spouse a full-grown child, before the expiration of the honeymoon, after which they separated." A divorce was decreed, and the child given to the mother.

In *Ritter v. Ritter*, (5 Black. 84,) the defendant was pregnant by a stranger at the date of the marriage. The petitioner discovered her situation the night of the marriage, of which he had no previous knowledge or suspicion. Upon discovering the pregnancy, he abandoned her. It does not appear that the defendant herself made any efforts to conceal her situation, though it was alleged that the true father fraudulently and clandestinely assisted in effecting the marriage. The Circuit Court refused the divorce and dismissed the bill, but the Supreme Court reversed the decision, using in its opinion this language:

"However little we may feel disposed, in general, to disturb the decisions of the Circuit Courts, respecting divorces for causes not specified by the statute, we cannot contemplate the case presented by the record without coming to the conclusion that, in refusing the divorce, the Court, did not exercise its discretion in a sound and legal manner, having due regard to the rights of the injured party, and the purity of public morals."

The principal case upon which the respondent relies, is that of *Scroggins v. Scroggins*, (3 Dev. 535). The opinion delivered in that case contains general observations which, if admitted as law, would sustain the defense; but the special ground upon which the decision rests does not militate against the views we have expressed. The point decided is, that where the husband at the marriage knows that his intended wife is lewd, he is not

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entitled to a divorce upon the subsequent birth of a child begotten previously. There was no statute in North Carolina similar to ours, authorizing a divorce when the consent to the marriage had been obtained by fraud. The statute of that State authorized a divorce only in two cases — impotency at the time of the marriage and still continuing, and separation by one party from the other and living in a state of adultery. For other cases, the Superior Courts were empowered to divorce whenever they were satisfied of the *justice of the application*. In the case in question the wife gave birth to a mulatto child about five months after the marriage, and upon that event the husband left her. But the Court says:

“He does not venture to swear that he believed her chaste at the time of the marriage. It must be taken that he did not; if he had, it would have been the first thing thought of, to aggravate his case. Suppose that we are to presume that he means to admit a criminal conversation between themselves — and that is the most favorable to him — what claims has he to relief, upon the ground of grosser incontinence, than that in which he had participated?” And, again:

“His disgrace is voluntarily incurred, and he has no elevation of sentiment or feeling above it. We think him criminally accessory to his own dishonor, in marrying a woman whom he knew to be lewd; or, by continuing his cohabitation, after he must have known it, up to the happening of an event by which the world acquired the same knowledge. He now asks to be freed from his bonds, because the infamy of his wife has become notorious, though he could reconcile himself, in secret, to the crime which makes her infamous. Such a prayer must be rejected, and the judgment of the Superior Court affirmed.”

The Judge who delivered the opinion appears, from his general observations, to have considered that concealment of pregnancy was not such a fraud as would vitiate the marriage contract; and the ground upon which he rested his conclusion was the supposed difficulty of limiting the principle contended for. “If it embrace,” he says, “a case of pregnancy, it will next claim that of incontinence; it will be said the husband was well acquainted with the female, and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first

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sight, and drawn, on the sudden, into a marriage with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage, and advantage taken of the lusts of his imagination, which were stronger than his understanding. From uncleanness, it may descend to the minor faults of temper, idleness, sluttishness, extravagance, coldness, or even to fortune inadequate to representations, or perhaps, expectations."

We do not perceive the difficulty which the learned Judge appears, from the passage cited, to have experienced, in limiting the application of the principle. There is a marked distinction between the ante-nuptial incontinence and the vices and faults he enumerates, and ante-nuptial pregnancy by a stranger. The former do not impose upon the husband the burden of another's child, while the latter does; they do not give him an heir by a stranger; they do not necessarily render the wife, at the time of marriage, incapable of bearing children to her husband, while the latter does; they may be concealed, and much of the humiliation attendant upon the birth of the child, and the consequent change in the relations of the parties to the community be avoided. The former are deemed insufficient for a divorce, on grave grounds of public policy, which can have no existence with reference to the latter. To use the language of the counsel of the Appellant, the line of whose argument we have mainly followed in this question, "no good purpose can be subserved by charging upon a man, as his own, a child of bastard blood, or by coercing a legal union between an upright man and a corrupted woman, where there can be no union, in fact, and where the mandate of the law would be a vain record, except so far as it would be an instrument of undeserved and perpetual torture."

We are of opinion that the fraud alleged in the present case goes to the substance of the marriage contract, and vitiates it *ab initio*; and, as a consequence, that the judgment of the Court below must be reversed, and that Court directed to enter a decree annulling the marriage contract between the parties.

Ordered accordingly.

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- A JURY being waived, it is immaterial whether an action under Section 254 of the Practice Act, is an equitable or a legal proceeding.
- An executory agreement between a landlord and tenant, that, after the title to the premises is settled, by a suit to be prosecuted by the former against third persons, the tenant may purchase, does not destroy the relation of landlord and tenant.
- To maintain a suit to quiet title, by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession.
- A deed, recorded January 30th, 1850, by a person acting as Recorder, by virtue of an election by the people, without authority of law, is not properly recorded.
- To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the Court.
- To admit evidence of notice of a prior unrecorded deed, to defeat a subsequent deed, there must first be proof of the prior deed. There can be no notice where there is no title.
- Whether the conditions of a deed are complied with or not, is matter between the grantor and grantee, with which third persons have nothing to do.
- The fact that the record is erroneous in stating that the parties waived a jury, cannot be shown by an affidavit of the Judge who tried the cause.
- It would seem that a party cannot try his cause before a Judge without objection, and, after losing it, complain that the case was not tried by a jury.

APPEAL from the Tenth District.

The complaint avers title and possession in plaintiff, the title being derived from John A. Sutter, who claims under a Mexican grant; that the defendants wrongfully *claim* an *estate* and *interest* in the above described real property, adverse to this plaintiff and his title thereto, and found the same, as the plaintiff is informed and believes to be true, upon a certain pretended conveyance which they allege was executed by the said John A. Sutter, on the twenty-seventh day of July, A. D. 1849, to, etc. which said last-named conveyance has never been recorded, and does not now appear of record in the records of Sutter County; and this plaintiff further avers that he purchased in good faith, and for a valuable consideration, and without notice of the estate or interest claimed and set up by the said defendants to the same, and without notice of the execution of the said pretended conveyance, etc.; that said pretended conveyance was without consideration, and upon conditions never performed by the grantees, and was null and void; that defendants' claim to an interest in the property clouds the title of plaintiff and depreciates the value of his estate and interest therein. Complainant prayed that the claim and interest of defendants in the property be "de-

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terminated and ended," that their claim be barred; that the conveyance from Sutter to them be decreed null and void, and they forever enjoined from asserting any right or claim to the premises. Brannan, alone, answered, denying generally, these allegations, and setting up title from Sutter, as aforesaid.

The conditions of the deed from Sutter to Robinson and others in July, 1850, were: 1st. That the grantees should sustain the labor and expense of litigating the right of the grantor to the premises. 2d. Pay to him (Sutter) one-sixth of the proceeds as parcels of the land were sold from time to time; and, 3d. Convey to the wife of Sutter Hock Farm.

In the two deeds from Robinson, McDougall, Mesick & Gillespie, to McCorkle, the condition is, that the sum of six thousand dollars in one case, and ten dollars per acre in the other, shall be paid by the grantee to the grantors so soon as they "shall become clearly possessed of a good and perfect title to the premises hereby conveyed, and shall execute and deliver a good and sufficient deed in fee-simple thereto, free of all incumbrances to the said grantee or his legal representatives." A perfect title was stipulated to mean final confirmation of the Sutter grant.

The statement on new trial and on appeal, as also the findings of the Court, stated "that the cause was tried by the Court, a jury having been waived by the parties."

In the transcript appears an affidavit by the Judge who tried the case that this statement, that the parties waived a jury, is erroneous and was a mistake of his own, and that he promised to strike it out.

Winans, for Appellant.

I. The complaint does not set forth facts sufficient to constitute a cause of action.

It is a bill in equity seeking to remove an alleged cloud from plaintiff's title, created by a deed held by the defendants for the premises in controversy, and asking cancellation of such deed. This is the whole ground of equitable jurisdiction set forth in the bill, yet it charges that defendants' deed, which is averred to be a cloud on plaintiff's title and sought to be canceled, was given to defendants fraudulently, without consideration, was never recorded, and that plaintiff obtained title to the premises

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by deed, legally, in good faith, and without notice or knowledge of defendants' deed. If this be so, plaintiff's bill must fail, for there is no cloud on his title to remove. It is true that he refers to Section 254 of the Practice Act, and contends that thereunder he can maintain his bill to determine defendants' adverse claim. But we insist that he cannot. 1st. Because plaintiff's complaint was not framed under said section and does not seek to determine defendants' adverse estate, but on the contrary is an equitable bill, praying cancellation of defendants' deed, on the ground that it is a cloud on defendants' title; and, 2d. Because said Section 254, while giving a party in possession the right to have an adverse claim decided by action, leaves the character of such action to be determined by the circumstances of the case.

Plaintiff assumes that Section 254 gives only equitable jurisdiction, and cites the case of *Merced Mining Company v. Fremont*, (7 Cal. 319,) where equitable jurisdiction was asserted, plaintiff having possession.

In that case, equitable jurisdiction was properly asserted, because plaintiff sought for, was entitled to, and obtained, an injunction. On the contrary, the case of *Salmon v. Hoffman*, (2 Cal. 128,) was a common law action, brought by a party in possession.

The Court of Chancery has no jurisdiction where the party has an adequate remedy at law. (*Ritchie v. Dorland*, 6 Cal. 33; *O'Connor v. Corbett*, 3 Cal. 370; *Bird v. Hollabard*, 2 Root, 35; *Poage v. Wilson*, 2 Leigh, 490; *Batchelder v. Elliott*, 1 Hen. & M. 10; *Carroway v. Wallace*, 2 Ala. 542; *Walker v. Smith*, 8 Yerger, 239; *Hall v. Davis*, 5 J. J. Marsh. 290; *Combes v. Warren*, 17 Maine, 404, *et passim*; 2 Cal. 469; 6 Id. 273; 8 Id. 384; 4 Id. 6.)

Furthermore, defendants' deed having no indorsement of registry upon it, and plaintiff having had no notice thereof, and it being, therefore, void as against plaintiff, and so appearing to be on its face, its illegality is cognizable at common law, and equity cannot interfere. (See *Simpson v. Lord Howden*, 3 Mylne & Craig, 103, 104, and cases there cited; *Gray v. Mathias*, 5 Vesey, Jr. 294; *Coleman v. Sorrel*, 1 Vesey, Jr. 50.) Defendants' deed is no cloud upon his title. (Statute of Conveyances, Art.

363, Wood's Digest, 103.) See, also, *Wiggins v. Mayor*, "A proceeding which upon its face is not only illegal, but absolutely void, does not constitute a cloud upon the title to real estate against which a Court of Equity will relieve." (9 Paige, 17, and Note 1, 23, 24, where the whole doctrine is clearly set forth; *Hickman v. Cook*, 3 Humph. 640; *Carrol v. Safford*, 3 Howard, 441.) *Daniel v. Morrison's Ex'r* (6 Dana, 186,) where the Court says (Robertson, Chief Justice): "The Trustee having a legal right to the property, there was no ground for going into a Court of Equity, and therefore the Court had no jurisdiction." (*Van Doren v. Mayor*, 9 Paige, 388.) See, also, *Carrington v. Otis*, (4 Grattan, 235-255,) — a very important case.

II. The evidence is insufficient to establish a cause of action. It shows no title in plaintiff. To sustain jurisdiction in equity, on a bill to quiet title, there must be clear evidence of title. (*Trustees of Louisville v. Gray*, 1 Littell, 147, 148; *Norton v. Beaver*, 5 Hammond, 178; *Bank of the United States v. Shults*, 2 Ohio, 495; *Tenham v. Herbert*, 2 Atkyna, 483.)

III. The two deeds from Robinson, McDougall, Mesick, and Gillespie, as grantors, to plaintiff's grantor, McCorkle, were conveyances on condition precedent, and did not take effect in *presenti*. Under them McCorkle could and did acquire no title.

1. Because the condition has never been complied with or performed.

2. Because under the Sutter deed to them, which was duly recorded, and of which, therefore, McCorkle had notice, they had no right to make a conditional conveyance.

Precedent conditions must be literally performed, and *even a Court of Chancery*, will never vest an estate, when by reason of a condition precedent, it *will not vest in law*. It cannot relieve from the consequences of a condition precedent unperformed. (4 Kent's Commentaries, 125; *Popham v. Ramfield*, 1 Vernon, 83; *Harvey v. Aston*, 1 Atkins, 361; *Reynish v. Martin*, 3 Atkins, 330; *Scott v. Tyler*, 2d Brown's Chancery, 431; *Stackpole v. Beaumont*, 3 Vesey, 89; *Wells v. Smith*, 2 Edward's Chancery, 84.)

IV. There was no possession in plaintiff sufficient to sustain the action. The only evidence of possession is a written ac-

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knowledge, made by one Stevens, of tenancy to plaintiff, and a contract executed by plaintiff to him of even date therewith. These documents exhibit an equitable combination and arrangement between Stevens and plaintiff, to enable the latter to bring this action in an equitable, rather than a legal forum; and do not constitute such possession as is requisite in a suit to quiet title. (*Trustees of Louisville v. Gray*, 1 Littall, 148; *Bitchie v. Dorland*, 6 Cal. 36-38.)

Reardan, for Respondent.

I. This is an action under Section 254 of the Practice Act, and is warranted by *Merced Mining Company v. Fremont*, (7 Cal. 317.) But, if regarded as a bill in equity to remove cloud of title, it is good on the facts of the case.

The plaintiff alleges title and possession, and that defendants are making claim to the premises. The defendant, Brannan, denies plaintiff's possession, but admits that he is making claim to the property, and sets out his title, "and avers that his said title was duly recorded prior to the date of the pretended title of the said complainant."

This plea indirectly, if not directly, admits the plaintiff's title, which it seeks to avoid.

The possession of Smith having been fully proven, and the fact of defendants making claim being admitted, the only question remaining to be determined is, has the defendant shown "title from John A. Sutter, on July 27th, 1849," and that "such title was duly recorded prior to the date of the title of the complainant."

So that the question as to whether or not the evidence is sufficient to establish title in plaintiff, does not arise in this case.

The grant from McDougall and others to McCorkle was absolute and unconditional, and the title vested in McCorkle upon delivery of the deed. That which is sought to be construed into a condition precedent, is nothing more nor less than a covenant for further assurance. (1 Coke R. 617; 1 Leving, 155; 3 Tomlin, 255.)

II. The evidence shows possession in the plaintiff, through his tenant, Stevens. The defendant did not prove the execution

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of any deed from Sutter to him. (6 Cal. 112.) His deed was neither acknowledged nor recorded, and the copy was properly rejected, because neither the execution nor the loss of the original was shown. (1 Greenl. Ev. 664, 655; 2 Cal. 30, 31.)

Again: Mesick, the grantor of plaintiff, being a subsequent purchaser in good faith from Sutter, without notice of defendant's deed, had an indefeasible estate, and his title passed to plaintiff free. (*Lacy v. Wilson*, 4 Munf. 313.)

J. A. McDougall, for Respondent, argued: 1st. That the action was good under the 254th Section of the Practice Act. 2d. Brannan, though averring title, shows none, and hence can raise but the single question of the sufficiency of plaintiff's own case.

As to plaintiff's testimony being insufficient to justify a decree, because no title is shown in Sutter, the answer is, that both parties claim title under him as a common grantor.

The deed from Sutter to Robinson and others is not conditional, but contains covenants to the grantee. (Lord Cromwell's Case, 1 Coke Rep. by Thomas, 617; *Clapham v. Moyle*, 1 Levins, 155.) At all events, the conditions (if such they are) are conditions subsequent, involving, perhaps, questions between grantor and grantee.

As to the right of Sutter's grantees to make a conditional conveyance, the full answer is, that Sutter granted the legal estate, and that McCorkle was regularly invested with it. With the several covenants contained in the several grants, *the estate* has nothing to do. A question is made as to the technical right of Smith to institute the suit, he not being in possession, except by his tenant, and there being an agreement between the tenant and himself providing for the future disposition of the property.

We say, that with this arrangement between Stevens and Smith, Brannan has nothing to do. In this case he has not and cannot have any — the most remote interest. If a man contracts to be a tenant, nothing short of a prohibitory law can ignore his status. If a man contracts for the rights of a landlord, nothing short of the force of express law can impair his rights. The old maxim, that consent may overcome the law, would govern in all cases of this kind. A man may agree to be either landlord or tenant, as it is in violation of neither positive law or policy.

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The notice of Brannan's title was ruled out.

We say, there was no foundation for the testimony. There was no proof of any title, legal or equitable, in Brannan. Before the point of notice can be raised, something must be established of which one should have notice. That such a thing as a grant under which Brannan claimed ever existed, was not shown to the Court. The execution of any such instrument was neither proved nor attempted.

The copy of the deed, as set up by Brannan, appears page 48. There is no proof whatever as to it. The copy was made by a person without color of office. His copy was no record; and whether or not it was the copy of a genuine original, does not appear.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Suit brought to quiet title to two hundred acres of land.

The plaintiff avers himself to be in possession, and charges that the defendants claim title to the premises.

Brannan answered, setting up title from Sutter, older in date than the title through which plaintiff claims — the source of both titles being the same.

The Court tried the case — a jury being waived.

The plaintiff deduced a regular chain of title from Sutter — the common grantor — to himself, and proved himself in possession, through one Stevens, his tenant. Brannan failed to show title of any sort.

The Practice Act, (Section 254,) provides that "an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

It matters not whether the action under this section was intended to be an equitable or legal proceeding, as a jury was waived.

As Brannan offered no legal proof of title, it is hard to see what errors, to his prejudice, could have intervened, after the plaintiff had shown title *prima facie* in himself, possession by his tenant, and a claim by the defendant.

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Many technical points are made; but the great pressure of business will not enable us to notice them all in this opinion, as they are mostly technical exceptions, involving no new principles.

We will glance at some of the most prominent:

1. The fact that an executory agreement was made between the plaintiff and the tenant, that after the title was settled, the tenant might purchase — but that the plaintiff should go on and prosecute the suit for such settlement — did not destroy the relation of landlord and tenant between them.

2. The deeds from Robinson, McDougall, Mesick, and Gillespie, to McCorkle, were not on condition precedent. There is no definition of a condition precedent which embraces a paper containing words of sale *in presenti*, and then providing for the payment of the purchase money on subsequent condition. The vesting of the title is not made to depend upon any future acts or facts. The provision in the conveyance for a future deed does not affect this view. There was a bargain and sale, or an agreement of bargain and sale, on a good consideration, and the covenant for further assurance does not alter the nature of the transaction. It is enough, perhaps, to maintain this action, that the deed created an equitable estate, or even a right of possession, which it certainly did.

But these deeds are clearly not deeds on condition precedent. The grantor bargains and sells all his right, title, and interest, in the premises to the grantee; the deed then provides for the payment of the purchase money — the payment is conditional on the confirmation of the title by the Federal authorities, and *then a deed* is to be executed; the parties probably supposing a deed necessary after a patent to vest the title passed by the Government. This last deed is only a further assurance, but there is nothing in the deed to show that *no title* was to vest until after payment. On the contrary, the language is express that the property, or the grantor's right, title, and interest, had been sold.

This deed is widely different from that in Mesick and Brannan; for there, no words of grant applied to the premises in dispute, but only a covenant to convey the grantor's property, or

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that title should vest, on punctual payment of the purchase money; and if not so paid, the deed to be void.

3. The deed from Sutter to Brannan was not properly recorded. It is scarcely pretended that it was—the officer having no authority for that purpose. Nor was the deed proven. It seems, from the copy produced, that there were subscribing witnesses to the deed. They were not called. The original itself was not produced. Brannan testifies to its loss; but if his testimony was sufficient to let in secondary evidence for the contents—which is by no means clear—the record fails to show any legal evidence of the contents of the deed. The subscribing witnesses were not shown to be without the jurisdiction of the Court, and their testimony should have been had at least to the fact of the execution of the paper. The paper being the only evidence of the title of the defendant, was, therefore, properly excluded. This left the defendant without any proof of the case made by his answer. Under this state of facts, it is unnecessary to consider any question of notice. There should be no notice when there was no title. The defendant was bound to show a prior deed *and* notice, in order to defeat the subsequent deed. The notice itself amounted to nothing without proof of title.

4. Several points are made as to the authority of Robinson and others, grantees of Sutter, under the deed of July, 1850, to convey the lands granted. But this question cannot arise in this controversy. Whether the conditions of the deed were or were not complied with, is a matter between Sutter and the grantees, and the defendant had no concern with it. If Sutter does not complain of the disposition made of the legal title by his grantees, third persons cannot.

5. There appears an affidavit of the late Judge of the Tenth District, to the fact that the record is erroneous in stating that the parties waived a jury. We cannot amend a record by an affidavit. But if we disregard this point it by no means follows that a party can go on and try his case before a Judge without objection, and after he has lost it complain that the case was not tried by a jury.

We do not, however, think the Appellant's point well taken, that this is not a good bill in equity. We think it clear that it is.

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Many points are taken by the ingenious counsel which it is not deemed necessary to notice; for these main questions being decided, the other points become immaterial, for, on the whole case presented, the decree, resting on a few simple propositions, viz: title and possession in plaintiff, and claim without title by defendants, must be affirmed. Minor errors in the rulings of the Court, and the admission or rejection of evidence when the whole case is before the Court, and we can see that no error that ought to change the result intervenes, are not noticed by us. There is no substantial error in the form of the decree declaring the deed of the defendant void as against plaintiff; for the more strictly proper language, viz: pretended title or claim set up, would have the same effect in establishing the plaintiff's and denying the defendant's pretensions.

The decree of the Court below is affirmed.

(See *Curtis, Administrator v. Sutter*, January Term, 1860.)

**PIERCE v. ROBINSON, ADM'R OF THE ESTATE OF FRIERSON,
DECEASED.**

A MORTGAGEE of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes, by operation of law, Trustee of the surplus for the mortgagor.

Where it was agreed between the mortgagor and mortgagee that the land and its proceeds were to be held, not only as security for the debt due the latter, but for debts due third persons, laborers on the land for instance: Held, that such agreement was an appropriation of said surplus for the benefit of said third persons, not revocable when they have acted on the faith of it, and the mortgagee is a Trustee of the same for said third persons.

Such an agreement operates as an equitable assignment of the surplus so soon as any exists, which does not pass to the Administrator of the mortgagee as general assets for the benefit of creditors at large, but is subject, in his hands, to the same trust which attached to it before the decease of the testator.

Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility, provided they are fairly made, and are not against public policy; and an agreement for such interests will take effect as such assignment when the subjects to which they refer have ceased to rest in possibility and have ripened into reality.

Parol evidence is admissible in equity to show that a deed, absolute on its face, was intended as a mortgage.

Such evidence is not restricted to cases of fraud, accident, or mistake, in the creation of the instrument.

Evidence of the circumstances under which the deed was made and of the relations existing between the parties is admitted, not to contradict or vary the deed, but to establish an equity superior to its terms.

The rule which refuses the admission of parol evidence to contradict or vary written instruments is directed to the language employed by the parties, and

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does not exclude an inquiry into the objects and purposes of the parties in executing the instruments.
Fraud in the use of an instrument is as much a ground for the interposition of equity as fraud in its creation.
Lec v. Evans, (8 Cal. 424,) overruled, so far as it rejects parol evidence.

APPEAL from the Sixth District.

The case is stated in the opinion of the Court. Defendant had judgment. Plaintiff appeals.

Winans, for Appellant.

I. The evidence establishes the creation of an express trust for the payment of plaintiff's debt out of a particular fund, received and held by Frierson, as Trustee, for such purpose. That particular fund is shown to be now held by defendant, as Frierson's Administrator. Plaintiff has a lien thereon for his debt.

II. The facts found by the Court below are correct, so far as they extend, but omit the material and controlling fact that the property conveyed to Frierson was *per se* a trust fund for the security and payment of the debt to plaintiff.

III. Even if the property had been placed in Frierson's hands merely as a security to him for assuming the payment of plaintiff's debts, the doctrine is well settled that where a fund is placed in the hands of a surety to indemnify him for assuming a debt of his principal, the creditor, whose debt he undertakes to pay, has a lien for his debt upon such fund. (*Maure v. Harrison*, 1 Equity Cases Abr.; *Ex Parte Perfect*, Montague's Bankrupt Reports, 25; *Ex Parte Waring*, 19 Vesey, 345; *Wright v. Morley*, 11 Id. 22; *Parsons v. Briddock*, 2 Vernon, 608; *Ourtis v. Tyler*, 9 Paige, 435; *Ohio Life Insurance Company v. Ledyard*, 8 Ala. 866; *United States v. Sturges*, 1 Paine, 525.)

IV. Property held in trust does not pass to the representatives of the Trustee; but as long as it can be traced and distinguished it inures to the benefit of *cestui que trust*. And where an assignment, though absolute upon its face, was intended by the parties to be a security to a party who dies intestate for assuming another's debt, the creditor in an action against the Administrator can enforce his lien against such security. (*Moses v. Murgatroyd*, 1 Johnson's Chancery Rep. 119-129. See, also,

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Nelson v. Blight, 1 Johnson's Cases, 205; *Clark v. Morgan*, 3 Paige, 373; *Malcolm v. Scott*, 3 Hare, 46; Eng. Ch. Rep. vol. 25, p. 45, and American cases there cited; *Kipp v. The Bank of New York*, 10 Johns. 62; *Hendricks v. Robinson*, 2 Johnson's Ch. 283, F. See, also *Hoyt v. Story*, 3 Barbour, 262; *Ten Eyck v. Holmes*, 3 Sandford's Ch. 428; *Tannersley v. Anderson*, 4 Desau. 44; *Rogers v. Hossack's Executors*, 18 Wendell, 334; *Burn v. Carvalho*, 4 Mylne & Craig, 690; *Ten Eyck v. Holmes*, 3 Sandford's Ch. 429.)

V. The exception of defendant to the oral evidence of the witnesses on the ground that parol testimony was inadmissible to vary the written contract of the parties, was not well taken; and the evidence, that the deed and bill of sale, though absolute in terms, were given in trust or as a mortgage for the plaintiff's benefit, was properly admitted.

I. Parol evidence is admissible in equity to show that a deed or assignment, absolute upon its face, was intended as a mortgage or trust deed.

2. Even if such doctrine were not correct as a general proposition, yet still it is clearly so under the circumstances of this case. (*Moses v. Murgatroyd*, 1 Johnson's Ch. 228; *Slee v. Manhattan Co.* 1 Paige, 53; *Whiting v. Heslop*, 4 Cal. 327.)

Clark & Gass, for Respondent.

The first point presented by this record is, whether parol evidence was admissible to vary a written instrument, there being no allegation of fraud, accident, or mistake, in its execution, or in the use attempted to be made of it.

The Court held that parol evidence was not admissible without such allegation. But if parol evidence was admissible, still upon the case as made out, the judgment of the Court below was correct.

The Court finds that Frierson was not in any sense the surety of Hutchinson & Green. The draft accepted by him made the debt his own, and H. & G. were discharged from it. Plaintiff cannot, therefore, avail himself of the doctrine that the creditor is entitled to the benefit of the securities placed by the principal debtor in the hands of his surety. The relation of principal and surety does not exist in the case, and even if it did, the true

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doctrine upon that subject, when applied to the facts of the case could not avail the plaintiffs. The true doctrine is laid down in *Ex Parte Waring*, (19 Vesey Ch. Rep. 345.)

The case of *Moses v. Murgatroyd* differs materially from the case at bar, in this: that there, Ogden appeared and claimed that the coffee should be so applied, while here, Hutchinson & Green have settled with the Administrator, and received back into their possession the property against which the lien is attempted to be enforced. Even if Frierson held this property in trust, he made the contract in his own name, and is individually liable. See *Conner v. Clark*, (12 Cal. 168.)

To permit plaintiff to have a lien for the payment in full of his debt, would be a fraud upon the other creditors of the estate, and more particularly upon that portion of them, whose debts were contracted during the same period.

FIELD, J. delivered the opinion of the Court—BALDWIN, J. concurring.

In March, 1854, Hutchinson & Greene were the owners of a farm in Yolo County, and having become indebted in a large amount to Frierson, for advances of money to enable them to carry on their farming operations, executed to him a conveyance thereof, which though absolute in form, was intended only as security for the payment of their indebtedness. In September following, having become further indebted to Frierson, for advances, and being in debt to their laborers, they executed to him a conveyance of the personal property upon the farm, consisting principally of stock and farming utensils, and, at the same time, delivered possession of both farm and personal property. The second conveyance was made, and the possession of the property under both conveyances delivered, upon the express agreement that such property, and the proceeds of the real property, were to be held, not only as additional security for the indebtedness of the grantors to Frierson, but for their indebtedness to the laborers who had been employed on the farm, and the future wages of laborers which the grantee might himself subsequently employ thereon; and that for the existing indebtedness of the laborers, the grantee would accept the drafts of the grantors. The plaintiff was one of the laborers, for the payment of whose

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wages the agreement provided, and for the amount due to him a draft was drawn in his favor and accepted by Frierson. For the payment of the draft, and for his future labor, the plaintiff was unwilling to trust to the individual responsibility of Frierson, and thereupon Frierson, and the grantors, assured him that he was amply secured by the property; that it was held expressly for the security of the laborers, as well as for that of Frierson. Upon these assurances the plaintiff became satisfied, and subsequently acted upon their faith. Frierson died in February, 1855, and the defendant became the Administrator of his estate. The claim of the plaintiff was duly presented and allowed, and neither its amount or justice is questioned; but its payment out of the proceeds of the farm, in preference to the general creditors of the intestate, is contested. The proceeds arising from the sale of the crops of the farm are admitted to have been sufficient to satisfy the debt of Hutchinson & Greene to the intestate, and to cover the demand of the plaintiff. The former has been settled, and the property reconveyed to the grantors, under the sanction of the Probate Court; and the money for the latter remains in the hands of the defendant, to abide the determination of the present suit. The claims of the other laborers have been satisfied.

If the first conveyance is to be treated as a mortgage, then Frierson was liable after possession taken to account for the proceeds of the farm, and was chargeable for their net amount in the settlement of the debt for the security of which the conveyance was executed, and any surplus remaining was subject to the disposition of the mortgagors. (2 Story's Equity Juris. Sec. 1016.) For such surplus he was Trustee of the mortgagors, the trust arising from the very nature of the security by operation of law, and by the subsequent agreement of the parties the same became appropriated for the benefit of the laborers, including the plaintiff. Frierson thenceforth was Trustee of the surplus for them. It was not his property, to be disposed of as he might elect. Without the agreement, it would have been the property of the mortgagors, and held subject to their order; but, by the agreement, it became subject to the payment of the demands of the laborers, and, to that extent was theirs. The agreement was something more than a mere personal covenant of Hutchinson

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& Greene, which they might at any time disregard, and make other disposition of the surplus. It was an actual appropriation, which they could not revoke, and which Frierson could not surrender, even upon the payment of his own debt, as upon his representations, as well as those of Hutchinson & Greene, that it was made and should be held for the benefit of the laborers, the plaintiff acted. In *Yates v. Groves*, (1 Vesey, Jr. 280,) Lord Thurlow held, that an order to pay a debt out of a particular fund belonging to the debtor, constituted an equitable assignment of the fund *pro tanto*, and gave a specific lien to the creditor; and in *Ex Parte South*, (3 Swans. 393,) Lord Eldon said: "It has been decided in bankruptcy, that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. On the other hand, this doctrine has been brought into doubt by some decisions in the Courts of Law, which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this Court."

If the orders to which Thurlow and Eldon refer, would constitute an equitable assignment of the particular fund *pro tanto* against which they are drawn, equally so must the agreement in the present case—upon the faith of which, and the representations of the parties, the plaintiff relied—took the acceptance of one of them, and relinquished his claim upon the other. The agreement, under the circumstances of the case, must be deemed to have operated as an equitable assignment of the surplus, so soon as any existed, for the benefit of the laborers. Frierson, as Assignee, thereupon held the same as Trustee for their benefit. As trust property, the proceeds could not pass to the Administrator as general assets for the benefit of the creditors at large, but were subject in his hands to the same trust which attached to them before the decease of the intestate. (*Kip v. Bank of New York*, 10 John. 63.)

The principles upon which the plaintiff bases his right to the appropriation of the specific property have been repeatedly asserted and affirmed in the most maturely considered cases. In *Moses et al. v. Murgatroyd et al.* (1 John Chan. 128,) Chancellor Kent held that the holders of certain promissory notes were

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entitled to the proceeds of a cargo assigned by the maker to the indorser as security against his indorsements; that the property was held by the indorser in trust for the payment of the notes, and the proceeds in the hands of his Administrator were not assets for the general creditors of the intestate, but were subject to the same trust, and specifically liable to appropriation to the payment of the notes. In that case it does not appear that the holders had any knowledge of the assignment to the indorser, when the notes were taken, but before their maturity the maker became insolvent, and the indorser, on being charged by due notice of protest, assured the holders that the notes should be paid out of the property assigned as soon as the ship containing the cargo arrived; and relying upon this assurance, the holders forbore to sue. The assignment was absolute on its face, and the Chancellor, after concluding that it was intended as security, said: "This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the case of *Maure v. Harrison*, (1 Eq. Ab. 93, K. 5 Mich. 1692,) is directly to this point. These collateral securities are in fact, trusts created for the better protection of the debt; and it is the duty of this Court to see that they fulfill the design. And whether the plaintiffs were apprised, at the time, of the creation of this security, is not material. The trust was created for their benefit, or for the better security of the debt, and when it came to their knowledge, they were entitled to affirm the trust, and to enforce its performance. This was the principle assumed in the case of *Neilson v. Blight* (1 John. Cas. 205)."

In *Burn v. Cavalho*, (4 Mylne & Craig, 690,) Lord Cottenham decided that directions by a debtor upon his agents to apply property in their hands belonging to him, to the discharge of his liabilities to a creditor, in pursuance of an agreement to that effect, gave the creditor a right in equity to have the property thus applied, notwithstanding the debtor had become bankrupt before the directions had reached the agents, and a commission had issued. To the same effect is the decision in *Clark v. Mauran*, (3 Paige, 373.) In that case the debtor had sent orders to his agents in Caracoea to sell out his goods remaining in their hands, and to ship the balance of his funds in doubloons to the

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defendant. Soon after this, the debtor, in answer to an application for payment, informed the defendant of the orders forwarded to his agents, and requested him to place the funds, when received, to his credit on account. The doubloons were shipped and consigned to the defendant, and the bill of lading given to the Captain of the vessel; but, before their arrival, the debtor failed and made a general assignment for the benefit of creditors; and the question presented was, whether the assignee or the defendant was entitled to them. The Chancellor held that the shipment made by the debtor and the delivery of the bill of lading to the Captain, constituted an appropriation of the property to the defendant upon which he had a specific lien, not affected by the general assignment of the debtor; remarking in his opinion, that as the letter, informing the defendant of the order for the consignment of the property, was written in answer to an application from him for payment, it was to be presumed that he acted upon it, and neglected to press his demands to the extent he would otherwise have done.

The authorities cited, establish clearly the equitable right of the plaintiff to the proceeds in the hands of the Administrator for the payment of his demand. The fact that the proceeds were not in existence at the time of the agreement, does not affect the question. The agreement took effect as an assignment in equity so soon as any surplus existed. The right of the plaintiff to the appropriation of the funds then attached. The case of *Field v. Mayor of New York*, (2 Selden, 179,) sustains the doctrine that equity will uphold assignments — not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility, provided they are fairly made, and are not against public policy; and an agreement for such interests will take effect as such assignment when the subjects to which they refer have ceased to rest in possibility, and have ripened into reality. (See Leading Cases in Equity, vol. 2, Hare & Wallace's Notes.)

I have thus far treated the first conveyance as a mortgage. If not such, the inquiry as to the proceeds of the farm was useless. If the conveyance were absolute, transferring the title in fee-simple, as on its face it purports to be, the proceeds were the property of the grantee, not subject, in any particular, to the

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disposition of the grantors. Whether, then, the conveyance is to be regarded as a mortgage is material to the claim asserted by the plaintiff, and whether it can be so regarded depends upon the admissibility of parol evidence to show the purpose of the conveyance. I leave out of consideration the proceedings of the Probate Court, taken on the petition of the Administrator, in relation to the claims of Hutchinson & Greene, as it is objected that the settlement there made was by way of compromise, and that no admission can be properly inferred from them against the general creditors of the estate for whose benefit the defense is made. I pass over, also, the answer, which is not under oath, as it is asserted that the case was tried upon agreement that the answer should be taken as a full and specific denial of each allegation of the complaint. I place the question whether the conveyance is to be deemed a mortgage, entirely upon the admissibility of parol evidence to establish the fact. The evidence in the record, if admitted, clearly establishes it. The question as to the admissibility of such evidence came before this Court in *Lee v. Evans*, (8 Cal. 424,) and it was there held that it was inadmissible except in cases of fraud, accident, or mistake, in the creation of the instrument, and the doctrine there asserted was affirmed by Mr. Justice Burnett in *Low v. Henry* (9 Cal. 538). At the time I took my seat on the bench, there were several cases pending before the Court in which I had appeared as counsel, and, of course, I was precluded from participating in their decision or expressing any dissent therefrom. *Lee v. Evans* and *Low v. Henry* were among the number. Both of these cases were decided in favor of the parties I represented, but upon other grounds than those arising from the admissibility of parol evidence.

In *Johnson v. Sherman*, decided at the July Term, 1858, the same question was again presented, and I took the occasion to give, in a separate opinion, the reasons of my dissent from the doctrine announced in *Lee v. Evans*. A rehearing having been granted, and a change on the bench having since taken place, and Mr. Justice Baldwin concurring with me, I avail myself of this opportunity to re-affirm the views I then expressed, using substantially the language of my dissenting opinion in *Johnson v. Sherman*, trusting thereby to place the doctrine of this Court in

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harmony with the received doctrine of Courts of Equity, on this subject, everywhere else.

I consider parol evidence admissible in equity, to show that a deed absolute upon its face was intended as a mortgage, and that the restriction of the evidence to cases of fraud, accident, or mistake, in the creation of the instrument, is unsound in principle and unsupported by authority.

The entire doctrine of equity, in respect to mortgages, has its origin in considerations independent of the terms in which the instruments are drawn. In form, a mortgage in fee is a conveyance of a conditional estate, which, by the strict rules of the common law, became absolute upon breach of its conditions. But, from an early period in the history of English jurisprudence, Courts of Equity interposed to prevent a forfeiture of the estate and gave to the mortgagor a right to redeem, upon payment within a reasonable time, of the principal sum secured, interest and costs. As the right to thus recover the estate forfeited arose not from the terms of the instrument, but from a consideration of the real character of the transaction, as one of security and not of purchase, it could be enforced only in equity, and was hence termed an equity of redemption. And when the right to redeem had been once established, to prevent its evasion, the rule was laid down and has ever since been inflexibly adhered to, that the right is inseparably connected with the mortgage, and cannot be abandoned or waived by any stipulations entered into between the parties at the time, whether inserted in the instrument or not. (*Vernon v. Bethell*, 2 Eden, 113; Butler's Note to Coke on Litt. 2046; 4 Kent, 142-144; Story's Equity, Sec. 1019).

As the equity upon which the Courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. It is against the policy of the law to allow irredeemable

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mortgages, just as it is against the policy of the law to allow the creation of inalienable estates. Under no circumstances will equity permit this end to be effected, either by express stipulation, or the absolute form of the instrument. The rule which refuses the admission of parol evidence to contradict or vary written instruments, is directed to the language employed by the parties. That language cannot be qualified, but must be left to speak for itself. The rule does not exclude an inquiry into the objects and purposes of the parties in executing the instruments. It may be shown, for instance, that a deed was made to defraud creditors, or a release given to render a witness competent. The purposes and objects of the parties are considered by a Court of Chancery, and constitute a large ground of its jurisdiction, which will be exercised to restrain or to effectuate them, as may best promote justice. Thus, a deed executed for a fraudulent purpose will be set aside; and as it is the settled policy of equity, admitting of no departure, never to permit a security to be converted by any contemporaneous agreement into a sale, the purposes of the parties in giving and taking an absolute conveyance will be inquired into; and when the rights of third persons have not intervened, a Court of Chancery will control the use of the instrument intended as security in the hands of the grantee, so as to effectuate its object. Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount, compared with the value of the property, and the equity of redemption will elude the grasp of the Court, and rest in the simple good faith of the creditor. A mortgage, as I have observed, is, in form, a conveyance of a conditional estate, and the assertion of a right to redeem from a forfeiture, involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. The conveyance upon condition, by its terms, purports to vest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident.

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In *Lee v. Evans*, the majority of the Court appear to have overlooked, in their anxiety to preserve the integrity of conveyances from attacks of parol, the distinction between evidence of facts raising an equity which will control the operation of the instrument in the hands of the grantee, and evidence to contradict or vary the legal effect of its terms, and yet that distinction is the foundation of the entire equitable doctrine of mortgages.

Fraud, accident, and mistake, are special grounds of equity jurisdiction, and may be shown by any satisfactory evidence, written or verbal, with reference not merely to mortgages, but to all written instruments. From their nature they must generally be established by parol evidence. And the evidence is admissible, not for the purpose of contradicting or varying the terms of the instrument—not to make its language mean one thing, when it speaks another, but to show a state of facts *dehors* the instrument, raising an equity, which a Court of Chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use. And the doctrine is both novel and startling which restricts, in matters of fraud, its jurisdiction over the operation of written instruments, to those cases where the fraud has been committed in their creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases, of almost daily occurrence, where the fraud alleged consists in the use of instruments, entered into upon mutual confidence between the parties. Fraud in their use is as much a ground for the interposition of equity, as fraud in their creation. There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence, and from both the same injury results.

In *Hultz v. Wright*, the Supreme Court of Pennsylvania said: "As to fraud, it is not supposed to be necessary to have proof express that a writing has been obtained fraudulently, in order to admit parol evidence against it on that score; but parol evidence may be admitted to resist the fraudulent use of a writing in the obtaining of which no fraud can be made to appear." (16 Seargt. & Rawle, 346.) And in *Oliver v. Oliver*, (4 Rawle, 144,) the same Court said: "When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud

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at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument. * * * It is no answer to say that the parol evidence is in opposition to the deed; for where there is fraud, or the party attempts to make a fraudulent use of an instrument, contrary to his contract, parol evidence is admitted to prevent injustice."

"A deed," says Kent, "absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by agreement resting in parol, for parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted, or destroyed by fraud, surprise, or mistake." (4 Com. 143.) And Mr. Justice Story, after quoting this passage, adds: "It is the same if it be omitted by design, upon mutual confidence between the parties, for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice. I do not comment upon this subject at large, because it seems to me wholly unnecessary, in the present state of the law, to do more than enunciate the principles which govern cases of this nature, and which are as well established as any which govern any branch of our jurisprudence." (*Taylor v. Luther*, 2 Sumner, 233.)

And if authority is to govern, the concluding observations of Mr. Justice Story are correct beyond all question. For the last one hundred years parol evidence has been held admissible to show that an absolute conveyance was intended as a mortgage. In those tribunals to whose adjudications we are accustomed to look for authoritative expositions of the law, the doctrine is at rest. It prevails in England and in the Supreme Court of the United States; it is held in New York, from which our Statute of Frauds is almost literally copied; it is maintained in the eastern States, except as modified by statutory enactments as to the equity jurisdiction of the Courts; it is the law in Virginia, in the Carolinas, in Alabama, Tennessee, Ohio, Indiana, and Illinois, and, I have no doubt, in other States.

In the case of *Taylor v. Luther*, cited above, there was no alle-

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gation of fraud, accident, or mistake, in the creation of the deed, and yet parol evidence was held admissible to show that the instrument was intended as a mortgage, and a decree allowing a redemption was granted.

In *Van Buren v. Olmstead*, (5 Paige, 10) the allegation of fraud contained in the bill was not sustained, but Chancellor Walworth held that parol evidence could be received to show that the conveyance was intended as security. "It is now well settled," he says, "that parol evidence is admissible to show that a deed, absolute in its terms, was intended by the parties as a mortgage, or security for the payment of money merely."

In *Hodges v. The Tennessee Marine and Fire Insurance Co.* (4 Selden, 416,) the Court of Appeals of New York held the parol evidence admissible. In that case, there was no pretense of any fraud, accident, or mistake, either in the creation or use of the instrument. "From an early day," said the Court, "the admissibility of such evidence had been established as the law of our Courts, and it is not fitting that the question should now be re-examined." (*Strong v. Stewart*, 4 J. C. 167; *Whittick v. Kane*, 1 Paige, 206.)

In *Miami Exporting Company v. Bank of the United States*, (Wright, 252,) the Supreme Court of Ohio said: "It is now the acknowledged doctrine that parol evidence is admissible against the face of a deed, to show that a mortgage only was intended. And whether a conveyance be a mortgage or not, is determined by its object. If given as a security, it is a mortgage, whatever may be its form. This is so whether the condition of defeasance form a part of the deed, is evidenced by other writing, or exists only in parol. The fact of its being given as security determines its character, not the evidence by which the fact is established."

In *Miller v. Thomas et al.* (14 Ill. 431,) Caton, J. of the Supreme Court of Illinois, says: "It is by no means necessary, in order to constitute a mortgage, that the deed and defeasance should be contained in the same instrument, or that they should even refer to each other. Their connection may be shown by parol. Indeed, it is not absolutely necessary that the defeasance should be in writing at all. The conveyance may be absolute on its face, and yet it may be shown by parol that it was in-

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tended only as a security for the payment of money, when it will be treated in equity as a mortgage. These principles are too familiar to require authorities for their support."

In a great number of the adjudged cases in which parol evidence has been held admissible, special circumstances of fraud, accident, or mistake, have existed, and are referred to as distinct grounds for equitable relief. Yet, it is no less well settled that the evidence is admissible in the absence of such circumstances. The jurisdiction of equity is asserted upon the admission of the parties to the character of the transaction, either by pleadings or otherwise, and even against their express denial, upon clear and decisive proof. (*Conwell et al. v. Evill*, 4 Blackford, 67; *Franklin v. Roberts*, 2 Iredell's Eq. 564;) and even where a disposition has been manifested to restrict the jurisdiction to cases in which the elements of fraud or undue advantage are mingled, it is held, with few exceptions, sufficient to authorize a decree for relief, that the proof of the fraud consists in the attempt of the grantee to appropriate the conveyance to his own use.

Thus, in *Wright v. Bates & Niles*, the Supreme Court of Vermont, says: "It is well settled law in this State, that a Court of Chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor continues to remain in possession, though the defeasance rests wholly in parol. When there is an attempt to set up such an instrument as an absolute conveyance, there is a fraudulent application or use made of it; and this is a proper ground on which chancery may proceed." (13 Vermont, 348.)

In *Morris v. Ex'r of Nixon*, (1 How. 126,) Mr. Justice Wayne, of the Supreme Court of the United States, says: "The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale which was originally meant by himself and the complainant to be a security for a loan. It is in this view of the case that the evidence is admitted, to ascertain the truth of the transaction, though the deed be absolute on its face."

In *Strong v. Stewart*, (4 Johns. 167,) the deed was absolute on its face, but it was proved against the express denial of the answer of the grantee to have been executed as security for a loan, and not

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upon a purchase and sale. And Chancellor Kent said: "On the strength of the authorities, and on the proof of the loan, and of the fraud on the part of the defendant in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem."

The parol evidence is admitted, as I have already observed, not for the purpose of contradicting or varying the written instrument, but to show facts *dehors* the instrument creating an equity superior to its terms. The same rule prevails in the admission of parol evidence in equity to establish resulting or implied trusts. Where one party purchases an estate with the money of another, and takes the conveyance in his own name, a trust in favor of the latter results by implication of law without any agreement on the part of the nominal grantee. Such trust may be proved by parol evidence even in the absence of fraud, and against the positive denial of the grantee. "Irrespective of any allegation of fraud," says Greenleaf, "it has been settled upon great consideration that parol evidence is admissible to prove that the purchase money for an estate was paid by a third person other than the grantee named in the deed in order to establish a trust in favor of him who paid the money." (Evidence, vol. 1, 365; *Boyd v. McLean*, 1 Johna. Ch. 582.)

The evidence is received not in contradiction of the deed; on the contrary, the legal effect of its terms is admitted, but to show the source of the consideration. The trust arises from the fact appearing *dehors* the instrument, that the money advanced by the real, and not the nominal purchaser, constituted the consideration of the purchase, just as the equity in the case of an absolute conveyance arises from the fact appearing, *dehors* the deed, that it was executed as security for a debt. In neither case is it attempted to vary the language of the conveyances, but to prevent an inequitable advantage being taken from their terms.

In *Lee v. Evans*, the complaint alleged a loan to the defendant, for a certain period, at a stipulated interest, and the execution of the absolute conveyance as security for the payment of the sum, but contained no averment of fraud, accident, or mistake, in the creation of the instrument, or any attempted fraud in its use. The answer did not specifically deny the allegations of the complaint, but insisted that the conveyance was to operate as a con-

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ditional sale, the premises to be reconveyed provided payment of the money, when due, with interest, was made, but otherwise, that the title was to remain perfect in the plaintiff. Upon the want of a specific denial, and the averments of the answer, the transaction was held to be one of loan and not of purchase, and the relief prayed for was decreed. In other words, upon the admission, by the pleadings, of the character of the transaction, the deed was treated as a mortgage.

It is difficult to perceive the consistency of the judgment with the reasoning of the opinion. The admission by the pleadings only established for the purposes of the suit, the truth of the facts stated. Those facts might have been proved with equal certainty by evidence. Written evidence not being by deed or conveyance, is as much in contravention of the language of the statute as oral evidence. The statute reads: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing." Admissions, whether contained in pleadings or established by competent proof, do not constitute "a deed or conveyance in writing." The answer in *Lee v. Evans* contained no admission of the execution of any such deed or conveyance, but only of the character of the original transaction as one of loan and not of purchase.

The judgment of the Court in *Lee v. Evans*, as to the effect of the admissions by the answer, is undoubtedly correct; but it is not warranted by the opinion. It must rest upon the equity which arises from the nature of the transaction, when that transaction is admitted by the parties, and it follows that such equity must arise when the transaction is clearly established by other evidence than admissions.

Since the opinion containing the views here repeated was rendered my attention has been called to the separate opinion of Mr. Justice Burnett, in *Arguello v. Edinger*, (10 Cal. 160,) in which he again re-affirms the doctrine announced in *Lee v. Evans*.

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In the case of *Arguello v. Edinger*, the only questions which arose were: 1st, whether, under the statute of frauds, of this State, Courts of Equity possessed any power to decree a specific performance of a verbal contract for the sale of land, in case of part performance; and 2d, if they possessed the power, whether the acts detailed in that case constituted such part performance as to justify its exercise. A discussion of the admissibility in equity of parol evidence, to show that a deed, absolute on its face, was intended as a mortgage, was irrelevant to those questions. The reasoning of the learned Justice on a point thus outside of the case, has not induced any qualification of the views expressed in *Johnson v. Sherman*, or created a doubt of their entire soundness.

The parol evidence being admissible, and clearly establishing the fact that the conveyance was intended only as security, Hutchinson & Greene were entitled to redeem the property, and to insist upon a reconveyance after its proceeds had satisfied their indebtedness to Frierson, and to make any disposition they thought proper of the surplus.

It only remains to add, that the judgment of the Court below must be reversed, and that Court directed to enter a decree declaring that the plaintiff is entitled to the application of the funds in the hands of the Administrator, which are the proceeds of the produce of the farm, to the payment of his demand, and directing the same to be made.

Ordered accordingly.

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If a confidential Agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the Agent will be held as Trustee for the owner of the money.

A suit at law to recover judgment against an Administrator for money embezzled by his intestate, pending which, a bill in equity was filed to recover the property bought with the money, and prosecuted to a decree after judgment was taken at law for the amount, evidences no such distinct and deliberate choice to take the general claim on the estate for money, in lieu of the claim on this property, as to bar plaintiff from prosecuting his equitable claim.

The doctrine of election is applicable only when the party is cognizant of all the facts, and then makes a free and deliberate choice.

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Under our system, a judgment against an Administrator is little, if any, better than an allowance by him, and approval by the Probate Judge. An Administrator being compelled by law to hold, protect, and guard, funds coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his commissions thereon.

APPEAL from the Sixth District.

For facts see opinion.

Clark & Gass, and Winans, for Appellants.

I. Where a plaintiff, on the ground of an implied trust between him and defendant, is entitled to certain bonds, bought by defendant with plaintiff's funds, but proceeds to take a verdict and common law judgment against defendant for the amount of said bonds, the act of going to trial and taking a money judgment at common law, constitutes an election on the part of said plaintiff.

In that case, the remedies at law and in equity being inconsistent, such plaintiff is bound by his election, and cannot, subsequently to the taking of said judgment, enforce in equity his claim to the bonds *in specie*. (2 Story's Eq. Jur. Sec. 1262; *Sawyer v. Wood*, 3 Johns. Ch. 416; *Mocher v. Reed*, 1 Ball & Beatty, 318; *Bond v. Hopkins*, 1 Schoales & Le Froy, 441; *Combs v. Perleton*, 2 B. Monroe, 194. See, also, *Ex Parte Ward*, 1 Atk. 153; *Ex Parte Lewes*, 1 Id. 154; *Ex Parte Warder*, 3 Brown, 191; *Ex Parte Cator*, 3 Id. 216; *Seligman v. Kalkman*, 8 Cal. 216; *Merrick v. Darling*, 11 Ohio, 343; *Rogers v. Vosburgh*, 4 Johns. Ch. 84; *Thompson v. Graham*, 1 Paige, 452.)

II. The relation existing between plaintiffs and Angus Frierison did not render him their Trustee, *quoad* the fund in controversy embezzled by him. Nor could the change of that fund from money into gas stock, even if directly traceable, constitute the conversion of a trust fund.

The theory upon which plaintiffs rely is, that wherever the property of a party has been wrongfully misapplied, or converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner. But this doctrine only has application where the relation of Trustee and *cestui que trust* exists. (Willard's Eq. Juris. 599; Hill on Trustees, 144.)

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III. It is denied that the money embezzled by Frierson from plaintiffs was converted into the bonds in controversy, nor can its identity be distinctly and separately traced into any new form of property.

It is a fundamental doctrine of the Court of Chancery that, in order to get equity you must do equity. And yet plaintiffs, although they ask equitable relief, in having these bonds construed to have been obtained with their own money, actually show that they were obtained with the money of others, but fall back upon the legal and inequitable technicality that that money became theirs because put into their trays, although it was immediately drawn out again. Certainly, if these bonds are to be security for any moneys, it must be for those of the owners of the thirty thousand dollars deposited with Frierson, not for plaintiffs. (*Hertell v. Bogert*, 9 Paige, 52; *Dilly v. Bernard*, 8 Gill & J. 170; Story's Eq. Juris. Secs. 1258, 1259, 1265.)

IV. Janes being the agent of plaintiffs, and also a Director of the Gas Company, in the latter capacity sanctioned the transfer of the stock in controversy to defendant, instead of acting in the former capacity and preventing the same by setting up plaintiffs' rights in the Glenn and Chittenden stock held by defendant. This conduct and the sanction by plaintiffs' agent of the sale of these bonds to defendant was an acquiescence on plaintiffs' part in defendant's right to hold the bonds, and estopped them from setting up an adverse claim to them.

Latham & Sunderland, for Respondents.

Did plaintiffs elect to take a judgment at law, and abandon their suit in equity?

Before either suit was brought plaintiffs notified defendant of their intention to hold the bonds. Both suits were instituted about the same time, and by them defendant was again notified what plaintiff claimed.

The judgment in the first suit has been called a common law judgment. We submit where there is nothing more than a quasi judgment, no execution can issue. The money cannot be collected by process issued thereon. The effect of the verdict of the Jury was simply to establish the amount of the defalcation by Frierson. (Wood's Digest, p. 405, sec. 140.)

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The case at bar is unlike any of the cases cited by Appellant, the general doctrine of which we do not deny. Whenever the plaintiff has been held to have elected another remedy, it was because no excuse or reason was assigned for prosecuting the two suits. In this case it was a necessity, the Administrator having rejected our demand. (*Coleman v. Cross*, 4 B. Monroe, 270).

The same Court (in 9 Dana, 425,) say: "The principle is, that the defendant shall not be unnecessarily vexed or harassed with two suits at the same time for the same cause of action. The bare fact of two suits at the same time is not of itself sufficient always to abate the prior suit, if both may be necessary to attain the ends of justice."

In answer to his second point, we refer the Court to Story on Agency, (Secs. 229-231, and authorities there cited; 4 Kent's Com. 305, 306).

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring.

This was a bill in equity, to recover certain bonds and choses in action in the hands of defendant. It appears that in 1854, and for several years afterwards, the plaintiffs were bankers and dealers in exchange, in Sacramento; and that Frierson was their cashier and bookkeeper for a portion of this time, and until his death, in February, 1855; and while so employed, he embezzled and converted to his own use moneys belonging to the plaintiffs to the large amount of one hundred and ninety-five thousand eight hundred and eighty-nine dollars.

After the death of Frierson, Robinson became his Administrator, and plaintiffs in due time after the publication of the statutory notice, presented to defendant their claim for this sum, with an affidavit appended, averring that the estate was indebted to the plaintiffs in this amount; and, also, that fifty thousand dollars of this sum was advanced by Frierson to the Sacramento Gas Company, and that for this amount the plaintiffs claimed a lien upon all the gas stock of the estate, and all bonds of the Gas Company, held by defendant as Administrator. The Administrator rejected the whole claim. In May, 1856, plaintiffs commenced a common law action against defendant for the

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whole amount of the claim, as a money demand. Pending this suit, viz: on the 1st July, 1856, plaintiffs filed this bill; on the 19th January, 1857, the plaintiffs proceeded to try this common law action, and recovered judgment for the whole sum. Afterwards the plaintiffs prosecuted to a decree in their favor this bill. No part of the judgment has been paid.

On the 18th November, 1854, one Wm. Glen was the owner and holder of two thousand one hundred shares of the capital stock of the Sacramento Gas Company, of the nominal value of two hundred and ten thousand dollars, upon which an assessment of three dollars per share had been paid by Glen. On that day, Glen and Frierson entered into a contract by which the latter was to advance and pay all assessments that might be made on the stock by the company, for eight months next after the making of the contract; and upon all assessments thus paid, Glen was to pay Frierson interest at the rate of two and a half per cent. per month, payable monthly; and in the event that it was not promptly paid, to be compounded. To secure Frierson in these advances, Glen delivered him this stock as collateral security. On the 28th December, 1854, one Chittenden was the owner of five hundred and twenty shares of the capital stock of the company, of the nominal value of fifty-two thousand dollars, upon which he had paid an assessment of three per cent. on the nominal value of the stock; and, on the same day, he and Frierson entered into a contract of like import to the one with Glen, and this last stock was deposited with Frierson as collateral security for such advances as he might make. At the date of these contracts, and to the time of his death, Frierson was President of the Sacramento Gas Company. A settlement was made between the Gas Company and the Administrator of Frierson, on the 1st of September, 1855; by which it appeared that Frierson, after the making of the contracts with Glen and Chittenden, advanced to them, in the way of assessments on the stock, the sum of forty thousand two hundred dollars; and by an agreement, and in the way of a settlement of the accounts of Frierson and the company, the Administrator assigned to the company, Frierson's demand against Glen and Chittenden for advances and in consideration thereof, the company issued to the Administrator the bonds mentioned in the complaint. At the time of this set-

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tlement, one James was the Managing Agent of Wells, Fargo & Co. in this State, and was also one of the Directors of the Gas Company, and was present and assisted in the settlement. Between the 1st July, 1854, and Frierson's death, there were deposited with Frierson, by various persons, large sums of money, amounting in all, to thirty thousand dollars, to be invested by him for their use and benefit. Frierson kept a large cash account with Wells, Fargo & Co. and this thirty thousand dollars was deposited with plaintiffs, to Frierson's credit, and so entered on their books.

The Court finds that it was "admitted that during all the time these deposits were being made with Frierson, and by Frierson, with the plaintiffs, there was a balance against him on the books of plaintiffs." "The exhibits introduced show daily balances against him, on plaintiffs' books, between the 8th of November, 1854, and the 18th of February, 1855, of from a few hundred dollars to upwards of thirty thousand dollars. It is shown that for several months, immediately preceding his death, he was in the habit of falsifying the books and making forced balances of the cash accounts. The testimony of the clerks about the house of Wells, Fargo & Co. shows that the money deposited with Frierson by third persons, for investment, was mingled with plaintiffs' money and put into their trays." The Judge proceeds with his finding thus: "Their witnesses, also, state that payments were made by Frierson, on account of the Gas Company and for Glen and Chittenden, out of the moneys taken from plaintiffs' trays, in the banking house. But they were not able to state the amount of these payments. The answer admits that all of the money deposited, as above stated, with Frierson was used by him in paying the assessments on Glen and Chittenden's stock. There is no evidence to show that Frierson, during the time these assessments were being paid by him, which was between the 2d of November, 1854, and the 23d of February, 1855, had any money of his own with which to pay the same, except the proceeds of his wages, unless the deposits, above mentioned, are to be considered his property. It is also shown, that he was engaged in other transactions requiring the use of large amounts of money, and which were sufficient to consume the whole of his wages. From all the evidence in the case, I am satisfied, and so

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find the facts to be, that all of the assessments paid on the stock of Glen and Chittenden were paid from the funds of the plaintiffs, and from the money deposited with Frierson under the circumstances above stated, and after it had been mingled with the funds of the plaintiffs, and that the plaintiffs were ignorant of the fact of its use, and the manner of using it, until after Frierson's death. But the plaintiffs had all the information as to the amount of money used, and the purposes for which it was used, at the time of the commencement of the suit at law against the Administrator, that they possessed at the institution of this suit."

Three questions arise on this statement.

1. Can Wells, Fargo & Co. follow this money, appropriated or invested by their agent, and claim the property or securities into which the money went, as theirs, or subject to their claim, assuming that the proofs sustain the claim in point of fact?

2. If so, have they waived or forfeited their right by the common law suit and judgment; if not —

3. Do the proofs show that *their* money was so appropriated?

In respect to the first question, it does not distinctly appear by the record what were the powers and duties of this cashier or bookkeeper, Frierson, except so far as may be inferred from the designation given him, nor the exact nature and character of the business of plaintiffs, whether it embraced loans on stocks or other securities, or the purchase of such. But it does sufficiently appear that Frierson had the custody and charge of their money, and that very great confidence was reposed in him. The operations into which he carried the money of his employers were entered into on his private account. The money invested by him was embezzled. The question then is, whether, if a confidential agent trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent can be held as Trustee for the owner of the money. This proposition is, in effect, held by the Judge below, and is denied by the counsel for the Appellant.

Frierson, in this matter, may be considered in equity as a Trustee of this money, which he was to hold and dispose of for the proper uses and purposes of the firm of Wells, Fargo & Co.

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He, of course, had no right to divert the money to other uses. It matters little whether he was intrusted to employ the money in the purchase of gold dust or exchange for his principals, or only to pay it out on the order of those who did, or keep it in his possession, until needed by the firm. In either case, he took the money of Wells, Fargo & Co. intrusted to him in a fiduciary capacity, and loaned it on certain securities, in his own name, and for his own account. The rule is thus stated by Mr. Justice Story: (Eq. Juris. vol. 2, Secs. 1258-1261.) "Upon similar principles, wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held, in its new form, liable to the rights of the original owner, or *cestui que trust*. The general proposition, which is maintained both at law and in equity upon this subject is, that if property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the Agent or Trustee converting it, or those who represent him in right, (not being *bona fide* purchasers for a valuable consideration without notice,) any more valid claim in respect to it, than they respectively had before such a change. An abuse of a trust can confer no rights on the party abusing it, or on those who claim in privity with him. This principle is fully recognized at law in all cases where it is susceptible of being brought out as a ground of action, or of defense, in a suit at law. In Courts of Equity it is adopted, with a universality of application.

Thus, for instance, if A is intrusted by B, with money to purchase a horse for him, and A purchases a carriage with that money, in violation of the trust, B is entitled to the carriage, and may, if he chooses so to do, sue for it at law. So, if A intrusts money with a broker to buy Bank of England stock for him, and he invests the money in American stocks, A is entitled to, and may maintain an action at law for those stocks, in whose-soever hands he finds them, not being a purchaser for a valuable consideration without notice. It matters not in the slightest degree into whatever other form, different from the original, the change may have been made, whether it be that of promissory notes, or of goods, or of stock; for the product of a substitute for

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the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only, when the means of ascertainment fail; which, of course, is the case, when the subject matter is turned into money, and mixed and confounded in a general mass of property of the same description.

Cases may readily be put, where this doctrine would be enforced in equity under circumstances in which it could not be applied at law. Thus, for instance, if a Trustee, in violation of his duty, should lay out the trust money in land, and take a conveyance in his own name, the *cestui que trust* would be without any relief at law. But a Court of Equity would hold the *cestui que trust* to be the equitable owner of the land, and would decree it to him accordingly; not upon any notion of his having ratified the act, but upon the mere ground of a wrongful conversion, creating, *in foro conscientiarum*, a trust in his favor."

Thus, it is also held in several cases, that if property has been rightfully sold by an Agent or Trustee, if the proceeds of the sale can be distinctly traced, the property belongs in equity, and often in law, to the principal. Thus, for example, if a factor sells goods consigned to him for sale, and takes notes for the purchase money, those notes, if he fails, will belong to his principal, and not to his assignees or representatives. (1 Atk. 233; 3 Mason, 322; 4 Simon, 438.)

We cannot see that the fact that this money was embezzled makes the rule any the less applicable.

2. It is contended that the plaintiffs have elected to consider the estate of Frierson as their debtor for the amount of this money, including the money advanced to Chittenden and Glen, on this stock; and, therefore, that they cannot recover the stock or the debt due from Chittenden, or the bonds growing out of the transaction. This point rests on the fact, that suit was brought for the money in the common law action, and judgment taken for the full amount. It has been seen that the claim presented to the Administrator was for the bonds as a part of the subject of the embezzlement; and that shortly afterward this bill was filed, setting up this special claim.

This doctrine of election has been a vexed subject of jurisprudence. Judge Story, vol. 2, (Jur.) Sec. 1097, says: "Questions

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have also arisen in Courts of Equity, as to what acts or circumstances should be deemed an election on the part of the person bound to make it. We say acts or circumstances; for positive acts of acceptance or of renunciation are not indispensable. Presumptions equally strong may arise from long acquiescence, or from other circumstances of a stringent nature. Upon such a subject no general rule can be laid down; but every case must be left to be decided upon its own particular circumstances, rather than upon any definite abstract doctrine. Before any presumption of an election can arise, it is necessary to show that the party acting, or acquiescing, was cognizant of his rights. When this is ascertained affirmatively, it may be further necessary to consider whether the party intended an election; whether the party was competent to make an election; for a *feme covert*, an infant, or a lunatic, will not be bound by an election; whether he can restore the other persons affected by his claim to the same situation as if the acts had not been performed, or the acquiescence had not existed; and, whether there has been such a lapse of time, as ought to preclude the Court from entering upon such inquiries, upon its general doctrine of not entertaining suits upon stale demands, or after long delays.

Questions have also arisen in Courts of Equity, as to the time when, and the circumstances under which, an election may be required to be made. The general rule is, that the party is not bound to make an election, until all the circumstances are known, and the state, and condition, and value of the funds, are clearly ascertained; for, until so known and ascertained, it is impossible for the party to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. If, therefore, he should make a choice in ignorance of the real state of the funds, or under misconception of the extent of the claims on the fund, elected by him, it will not be conclusive on him. And, on the other hand, he will be entitled, in order to make an election, to maintain a bill in equity for a discovery, and to have all the necessary accounts taken to ascertain the real state of the funds." (See also Kent, C. J. Opinion in *Dash v. Van Kleeck*, 7 John. 497.)

We think the suit brought at law by the plaintiffs under the circumstances, and the judgment taken — the bill in equity still

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pending—and the distinct claim set up to this fund and afterwards prosecuted to judgment, evidence of no such distinct and deliberate choice to take the general claim on the estate for money in lieu of the claim on this fund, as to bar the plaintiffs from prosecuting their equitable claim. It would be unreasonable to suppose that they intended to surrender a claim on a specific fund they were then prosecuting for a judgment against the Administrator, which would give them no better right to participate in this fund than the rest of the creditors: that is, that they meant that property bought with their money should be equally distributed among all these creditors. The case would be stronger for the Appellants if a judgment here had the same effect as at common law. But under our system, a judgment is but little if any better than an allowance by the Administrator and approval of the Probate Judge. It fixes a recognized claim on the estate: that is, it furnishes a voucher which protects the Administrator in its payment. But it gives no priority, and carries with it no means of security, or coercive payment by execution. No injury has been done by the judgment. For any credit to which the estate may be entitled under this bill, and the decree, the Administrator may require a rebate-ment from the judgment. Nor is it at all certain that the plaintiffs could know, or did know, until the termination of this suit, whether their money had gone to the investment in question; indeed, it is earnestly insisted, even now, that such was not the fact. In such case, the doctrine of Chancellor—then C. J. Kent, in *Dash v. Van Kleeck*, is directly applicable. In that case, it was attempted to be set up that a party, suing a Sheriff for an escape, was estopped, because, when the prisoner was retaken, he opposed his discharge, and, therefore, elected to hold him in custody. But it was answered, “that the mere fact of opposing the debtor’s discharge without having, at the time, any knowledge of the previous escape, cannot conclude the plaintiff. He undoubtedly might, with knowledge of the escape, have waived his remedy against the defendant, and have elected to consider his debtor in custody under the succeeding Sheriff; but without such knowledge, the law will not infer any determination of the party prejudicial to his rights. It would be equally absurd and unjust to conclude that the plaintiff had waived his

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remedy for the escape, when he was ignorant of the fact." "Election," says Dyer, (Dyer, 281,) "is the internal, free, and spontaneous separation of one thing from another, existing in the mind and will." In that case, the failure to show this knowledge was held fatal to the point that the election was made.

The third and last point is, that the plaintiffs have not shown that their money went into this investment. We do not feel inclined to disturb the finding of the Court below on this question of fact. It may be true that other persons deposited money with Frierson. But if Frierson acted as cashier of Wells, Fargo & Co. in receiving it, we do not see how his Administrator can complain of this being considered the money of the house with which it was deposited. If this money was deposited with Frierson in his individual capacity, and on his individual responsibility, then it is shown he passed it over to his principals as his own, giving them credit on the books for it. We do not see how, under this last view, Wells, Fargo & Co. could be held by the Administrator of Frierson to account for this money, or how he could set up that, possibly, it was this money which was invested by Frierson in these loans. There certainly was much evidence tending to show that the money of plaintiffs was used by Frierson in this investment; and we are not disposed to disturb the finding to that effect of the Judge who heard all the proofs.

As these bonds were taken in lieu of the indebtedness and stock pledged as collateral security, they stood — as the plaintiffs are willing to affirm the arrangement — as the stock; and the plaintiffs are entitled to receive the bonds for the purpose of their security, as if they had been delivered to them by Glen and Chittenden.

We do not think it necessary to notice other points, as these views are conclusive of the case on the merits.

Decree affirmed.

On a petition for rehearing, the following opinion was delivered by BALDWIN, J.—TERRY, C. J., concurring.

We deny the petition for a rehearing. Robinson, the Administrator, having taken the credits which came to his hands as Administrator, and which he had reason to believe to be assets of the estate, and with the assent of the agent of Wells, Fargo &

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Co. turned them into these bonds, is entitled to his commissions allowed by law in such cases—just as if these credits had been in the form of promissory notes payable to Frierson, and the Administrator had collected the money and deposited it. The law forced him to hold, protect, and guard, the fund until the right to it was determined, and it is just and legal for him to charge for his services what the law allows him to charge for collecting and disbursing other assets. The judgment of this Court will be modified accordingly.

CHAS. R. SAUNDERS v. J. P. HAYNES.

THE Act giving jurisdiction over the subject of contested elections to the Judge of the County Court, is constitutional, and District Judges are embraced within it.

This is one of the "special cases," of which the Constitution provides, that the County Judge may take cognizance when authorized by the Legislature. The fact that the candidate receiving the highest number of votes at an election by the people, is ineligible, does not give the office to the next highest on the list.

In a proceeding to contest the election of defendant as District Judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense—because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office.

Quære: Whether the place or employment of Inspector of Customs is a lucrative office, under the United States, within the Constitution of this State.

APPEAL from the County Court of Klamath County.

This was a proceeding to contest the election of defendant as Judge of the District Court, for the Eighth District. It was brought before the County Judge of Klamath County, one of the counties of that district.

The nature of the proceeding is stated by the Court. Defendant demurred to the complaint, for want of jurisdiction in the County Court. The demurrer was overruled, and an answer filed denying knowledge of any misconduct in the officers of election, averring that Turner received illegal votes; and further, that at the time of the election he was ineligible, because holding a lucrative office under the United States, to-wit: the office of "Inspector of Customs," and that he, the defendant, received the highest number of legal votes.

Relator demurred to so much of the answer as set up the illegal votes for Turner, and his ineligibility because an "Inspe-

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tor of Customs." The demurrer was sustained. The decree below was in favor of relator, holding Turner to be entitled to the office. Defendant appealed.

Heydenfeldt, for Appellant.

I. The County Court had no jurisdiction of this action because —

1. The statute only confers the right to hear contested elections to an office to be exercised in and for such county. (Wood's Digest, 380, Art. 2155, Sec. 51.)

2. The Constitution gives to the District Court jurisdiction in all cases in law and equity where the amount in controversy exceeds two hundred dollars.

This Court must judicially take notice of the Act creating the Eighth District, whereby the salary is fixed at five thousand dollars; and, therefore, the contest for this office must be within the jurisdiction of the District Court. (*Wammack v. Holloway*, 2 Ala. 31.)

Contesting an election is not a "special case," within the meaning of the Constitution; it is only another form of trying the title to the office. The judgment required to be pronounced is, "annulling and setting aside such election," "declaring the other person elected," "the commission is thereby rendered void and the office vacant." (Wood's Digest, 382, Secs. 63, 64, 73; *Parsons v. Tuolumne Water Works*, 5 Cal. 43; *Brock et al. v. Herrich et al.* 5 Id. 279.) The proceedings here bear a precise resemblance to those in a case of *quo warranto*. The whole effect of the statute is to invest in the County Court jurisdiction in cases of *quo warranto*, allowing those inferior Courts to determine questions affecting property of greater value than was designed by the Constitution to be entrusted to them — and that, too, in cases where Courts of general jurisdiction had always supplied a remedy, and the proceedings in which are well known features in their framework.

Nor can this be called a mere contest about a commission; the statute declares, as a result of the judgment, that "the office shall become vacant." (Wood's Dig. 382, Sec. 73.) It is settled that it is the appointment or election which confers the right, and not the commission, which is only evidence of it. (*Jeter v.*

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The State, 1 McCord, 233; *State v. Lyle*, Id. 238; *Wammack v. Holloway*, 2 Ala. 31.) The contest, therefore, is about a substantial right, which is determined by the judgment, and that right is the right to hold and exercise the office, and enjoy its emoluments and power. To leave such a jurisdiction with the County Court, would be contrary to the whole current of decisions of this Court defining and limiting the powers of the various Courts.

II. The next point is, that the Court erred in sustaining the demurrer to so much of the answer as set up the fact that Turner was at the time holding a lucrative office under the Government of the United States, and was, therefore, ineligible. This was demurred to on the ground that it was not responsive to the relation. Now the relation alleges, as the only reason why the defendant was not entitled to the office, that Turner had received a larger vote — if, then, Turner was not eligible, Haynes was elected. The vote for Turner was a blank, and thrown away. The very question came up in *Hatcheson v. Tilden & Bowley*, (4 Harris & McHenry, 279;) *Spear v. Robinson*, (29 Me. 542.)

If the allegation set up in the answer of Haynes be true, it is a complete bar to the relation — Turner was not eligible. (*People v. Whitman*, 10 Cal. 38; *Rodman v. Harcourt*, 4 B. Monroe, 224.)

Gregory Yale, for the Relator.

Appellant makes two objections to the jurisdiction of the County Court:

1st. That the statute only confers the right to hear contested elections to an office to be exercised in and for such county.

2d. That the Constitution gives to the District Court jurisdiction in all cases in law and equity where the amount in controversy exceeds two hundred dollars.

Both of these points may be considered as settled by the decision of this Court in *Whipley v. McKune* (12 Cal. 352).

This statute was enacted in 1850, and the mode of contesting an election for the office, as well as the election, has remained unchanged, except by the amendments of the Act of the 27th of April, 1855 (p. 160).

True, the word "county" only is used in Section 51 of the Act of 1850 (Wood's Digest, 580). But the caption of that section

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is general, and provides for "contesting elections other than for members of the Legislature, Governor, and Lieutenant-Governor." This exception necessarily includes the office of District Judge. He is a county officer *quoad hoc*; so with respect to all the counties within his district.

Section 5 of the Act of 1850 was amended by Section 10 of the Act of the 25th of April, 1851, (Ch. 15,) by extending the time for filing the statement to forty, instead of twenty, days, as the Act of 1850 provided. The word "district" is still retained in the amendment. This, with the caption to Section 51, which is really a part of the law, leaves no doubt that the Legislature intended to authorize the contest of district officers. The Constitution provided for determining contests for the office of Governor, Lieutenant-Governor, and members of the Legislature. This Act was intended to authorize the inquiry as to all other officers. (See *Williams v. Walton*, 9 Cal. 145.)

It is not admitted that this proceeding is equivalent to an information in the nature of a *quo warranto* to try title to an office.

The Government is not a party. The statute gives the right to any elector to make the statement contesting the right of any one claiming to have been elected, or of the validity of the whole election. The party claiming the office adversely need not be a party to the proceeding, and he is not estopped by the judgment any more than the Government would be. There need be no relator, or a third party. The statement is direct to the Court, without form, embodying the facts.

The Government is an indispensable party to an information in the nature of a *quo warranto*. At common law it was a writ of right for the King against the usurper of an office, franchise, or liberty. (3 Blac. 262.) The same rule is applied to the Government of the United States. (*Wallace v. Anderson*, 5 Wheat. 292.) The writ was dismissed for the want of jurisdiction. Chief Justice Marshall said that "a writ of *quo warranto* could not be maintained but at the instance of the Government." (See, also, *Commonwealth v. Burrell*, 7 Barr, 34; *Commonwealth v. Lexington, etc.* 6 B. Monroe, 399; Practice Act, Sec. 310; *State v. Hardie*, 1 Iredell Law, 42; 1 Blac. Notes 66, 67.)

The writ of *quo warranto* falling into disuse gave way to an information by the Attorney-General, in the nature of a *quo*

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warranto. (3 Blac. 262.) But there is one fact essential to the exercise of this jurisdiction, not common to this case — the party must not only claim the office, or franchise, but he must be actually exercising its duties or liberties. (*The King v. Whitewell*, 5 Term Rep. 85; *Buller's Nisi Prius*, London Ed. 1791, 212.)

This common law rule is preserved in the modern cases. (*The Queen v. Slatter*, 11 Adolph. & EL 505-508; *The Same v. Quayle*; *Regina v. Armstrong*, 34 Law and Eq. 290, 1856.) This case, then, is one of the special cases named in our Constitution. (*People v. Scrugham*, 20 Barb. 203-205.)

The first reply to the objection based on Turner's ineligibility is, that the answer of Haynes does not state the emoluments of the office held by Turner. The term "lucrative office" is a conclusion of law. It is said that he held the office of Inspector of Customs, but avers no fact as to the emoluments.

But is an Inspector of Customs such an officer as the State Constitution contemplates? All officers under the Federal Government, except in cases where the Constitution itself provides, are to be established by law, (*The United States v. Maurice*, 2 Brock. 96,) and they must be appointed by the President, unless in cases where Congress by law vests the appointment of inferior officers in Courts of Law, "or the heads of departments."

Chief Justice Marshall says in that case that an office is defined to be "a public charge or employment;" and he who performs the duties of the office is an officer. And although an office is "an employment," it does not follow that every employment is an office.

The Act of the 2d of March, 1799, (1 Stat. at L. 641; Brightly's Dig. p. 319, Sec. 3,) provides the mode of appointing Inspectors, in the section defining the duties of Collectors. They "shall, with the approbation of the principal officer of the treasury department, employ proper persons as Weighers, Gaugers, Measurers, and Inspectors, at the several ports within their districts." By Section 31 of the Act fixing compensation at two dollars per day, authority is given to employ "occasional Inspectors;" and by Section 41, where the compensation is increased fifty per cent. "persons employed as occasional Inspectors," are mentioned.

In the case of *The United States v. Wood*, (2 Gallison, 361,) Judge Story decides that the office is held at the pleasure of the

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Collector, and ceases at his death, resignation, or removal. (See also *Respublica v. Dallas*, 3 Yeates, 314, 315; 17 S. & R. 219.)

This employment being at the mere will of the Collector, and probably an "occasional" employment besides, no information would lie at the instance of the Government for an alleged usurpation of its duties. (*State v. Champlin*, 2 Bailey, 223.)

It is argued that all votes cast for Turner were so many blanks, and count for Haynes. This is not the law of this State. The Legislature ruled on this question in the Duncombe case at the present session. (See, also, Whitman's case.)

The rule is, that a candidate holding the federal office is not ineligible, but that he cannot hold both the federal and State office; the acceptance of the last is not forbidden, but the effect of the acceptance is to vacate the first. (4 Md.; *Rodman v. Harcourt*, 4 B. Monroe, 225.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This was a proceeding under the Statute of 1850, (Wood's Dig. 389,) for contesting the election of defendant as Judge of the District Court for the Eighth District. It was brought before the County Judge of Klamath County, one of the counties of that district.

The grounds of the contest are misconduct in the officers conducting the election, whereby the defendant was improperly returned as elected, when one of his competitors received the highest number of legal votes.

1. The first point made by the Appellant is, that the County Judge had no jurisdiction to try a contested election for District Judge; but that his jurisdiction is limited to county officers.

The case of *Whipley v. McKune* was brought before the County Judge, though but one county composed the Sixth District. In that case, however, no point was made as to the jurisdiction of the Judge.

The statute evidently designed to afford a new and summary remedy in cases of contested elections, applying to all offices filled by popular vote, except those elected by the State at large. The general election law is divided into chapters, each entitled of the subject matter, which titles seem to be parts of the Act.

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After prescribing the general machinery of elections, follows chapter six, entitled "Contesting elections other than for members of the Legislature, Governor, and Lieutenant-Governor." The first section of this chapter provides, "that any elector of the proper county may contest the right of any person declared duly elected to an office to be exercised in and for said county." This language, it is true, is not as clearly expressive of the legislative intent to include the office of District Judge within its purview as might be wished.

The Judge of the District Court unquestionably exercises his office in and for each county of his district, though it is very true that his jurisdiction is not confined to any one county of his district. The verbiage is peculiar; if the intent were to limit the operation of the Act to county offices, it would have been a simple mode of expression to say that an elector for any county may contest the right of any one declared elected to any county office of the county of the elector's residence. But when, in addition to this, we see a remedy of this same general character provided for all other officers, except State officers, and the title of the chapter—not of the general Act—is as we have stated, and when, further, the words certainly embrace the case of a District Judge, when the county comprises his district—the conclusion would seem to be that the statute meant to embrace the case. Closer examination of the Act confirms this view. The language, "Any elector of the proper county may contest the right, etc., to an office to be exercised in and for such county." The next clause of the same section, which applies to the township offices, uses different language: "Any elector of a township may contest the right of any person declared duly elected to any office in and for such township." Why this distinction in the phraseology, if it were intended to confine the contest to county and township officers? But Section 55 of the Act seems to remove all difficulty, for it provides that no person shall be competent to contest any election unless he is a qualified elector of the district, county, or township, in which the office is to be exercised. The word "district" here, evidently, from the collocation of the words, does not refer to any electoral divisions of a county or a township, but to such a division of the State. And by Section 73, "When the election is annulled and no appeal, the certificate or commission shall be rendered valid."

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Now, no commissions issue to county officers except to the County Judge, who, of course, could not sit on his own case, and therefore is not within the Act, and hence it would seem that the District Judge was meant to be included, as the only officer to whom this expression would apply. A close examination of the seventy-four sections of this Act fails to show any single expression which indicates that the intent was to embrace only county officers within the statute. On the contrary, general expressions are used, which embrace, without straining, the office in question. It is true that some embarrassments may arise in contesting elections in one county when the result of the entire election depends on the returns or acts done or omitted in other counties; but this same difficulty exists in proceedings by *quo warranto*. And the fact that the Judge of the District Court is, or may be, a party to this proceeding, may have been an additional reason for embracing the case within this special jurisdiction.

2. It is objected that this Act is unconstitutional. The grounds of this objection are, that by the Constitution, jurisdiction is given to the District Courts in all cases of law and equity where the amount in controversy exceeds two hundred dollars. Conceding, for the argument, that an office like this has an ascertained value as property, yet the argument cannot be maintained. This proceeding is not according to the course of the common law; it gives new rights and remedies. By the common law an election could not be contested by an elector. The Government might, by proceeding of *quo warranto*, eject an intruder from office; but this it did by virtue of its sovereign power, and by a process analogous to a criminal prosecution.

The Statute of 1850 creates a special proceeding, wholly distinct in form, and substantially different from this common law remedy. It appoints a tribunal for settling these peculiar controversies. This is one of the "special cases" for which the Constitution has provided that the County Judge may take cognizance of by legislative direction. It is an inquisition of office, as much within the jurisdiction of this officer as would be a writ of *ad quod damnum*, or of lunacy, or insolvent proceedings, or forcible entry and detainer. And the mere fact that a pecuniary interest, over two hundred dollars in value, might be inci-

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dentally affected, is no reason why the jurisdiction should be denied.

3. The next error assigned is, the sustaining of the demurrer to so much of defendant's answer as sets up this defense: "And for further answer, the defendant says that all of the votes of said election, cast for said Turner, are null and void, for he charges that the said Turner was, at the time of the alleged election, ineligible to the office of District Judge, for that the said Turner, for a long time previous to, and on the said first Wednesday of September, 1858, held, and at the present time holds, the office of Inspector of Customs for the port of Trinidad, in the State of California, and that said office was, at the time of said election, and is, a lucrative office under the Government of the United States, and defendant says he received the highest number of legal votes for the office of Judge," etc.

It will be observed that the point of this defense is, that the votes cast for Turner, supposing he received the highest number, were nullities, because of his assumed ineligibility. But we do not so consider. Although some old cases may be found affirming this doctrine, we think that the better opinion at this day is, that it is not correct.

The celebrated controversy in the British Parliament between Wilkes and Luttrell has given rise to much discussion; and the opinions of jurists and statesmen have been somewhat divided. But the prevailing opinion, English and American, of modern times, seems to be against the precedent established in that case. In the case of *Whitman and Melony*, (10 Cal. 38) Mr. Justice Field clearly intimates his opinion in favor of the principle that the votes given for an ineligible candidate are not to be counted for the next highest candidate on the poll. In *The State of Wisconsin v. Giles*, (1 Chandler, 117,) the same doctrine is held; and it is enforced by the Judges of the Supreme Court of Maine, in their opinion, to be found in 38 Maine Rep. 597.

Our legislative precedents seem to be the same way. Upon principle, we think the law should so be ruled. An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that

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the next to him on the poll should receive the office. If this be so, a candidate might be elected who received only a small portion of the votes, and who never could have been elected at all but for this mistake. The votes are not less legal votes because given to a person in whose behalf they cannot be counted; and the person who is the next to him on the list of candidates does not receive a plurality of votes because his competitor was ineligible. The votes cast for the latter, it is true, cannot be counted for him; but that is no reason why they should, in effect, be counted for the former, who, possibly, could never have received them. It is fairer, more just, and more consistent, with the theory of our institutions, to hold the votes so cast as merely ineffectual for the purpose of an election, than to give them the effect of disappointing the popular will, and electing to office a man whose pretensions the people had designed to reject.

This view disposes of the whole matter of the demurrer; for the matter set up was no defense to the petition if it were sufficient to defeat the election of Turner. For it was not necessary to a judgment against the defendant in this proceeding, that Turner should show any claim to the office; it was enough that the defendant had none.

But, in order to terminate this controversy, we have examined the sufficiency of this matter of defense as affecting the right of Turner. The Constitution declares that any person holding a lucrative office under the Federal Government shall be ineligible to a State office. Some question has been made whether this provision is anything more than a provision forbidding the acceptance of the State office when the disqualifying fact exists. (See 4 B. Monroe, 225.) But we assume, as seems to be intimated in *Whitman and Melony's* case, that the fact creates an incapacity to be elected to the office. The question arises, is this place or employment of Inspector of the Customs a lucrative office under the Government of the United States. An Inspector of Customs, under the Federal law, seems to be an employee of the Collector of the district, appointed by him and removable at his pleasure. (2 Gall. 361.) The Act of Congress of 2d March, 1799, (1 U. S. St. at Large, 641,) defining the duties of Collectors, says they shall, with the approbation of the principal officer of the Treasury Department, employ proper per-

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sons as Weighers, Gaugers, Measurers, and Inspectors, at the several ports within their districts. This Act fixes the compensation at two dollars per day; it is now, we believe, three dollars. By Section 41, authority is given to employ "occasional Inspectors."

An analogous provision to ours exists in the Pennsylvania laws. In *Commonwealth v. Binns*, (17 Sergeant & Rawle, 220,) the whole question is discussed with great learning and ability, and it is there held that a Government Printer was not within the meaning of the Act.

In *United States v. Maurice*, (2 Brock. R. 96,) Chief Justice Marshall gives the definition of an office: "Federal officers, except in cases where the Constitution itself provides, are to be established by law, and officers must be appointed by the President, unless in cases where Congress, by law, vests the appointment of inferior officers in Courts of Law, or in the heads of departments; and further, that an office is defined to be a public charge or employment, and he who performs the duty of the office is an officer. And although an office is an employment, it does not follow that every employment is an office."

We see no more reason for holding that an Inspector is an officer than a Weigher, Measurer, Clerk, Printer, Drayman, Porter, or other employee, dependent for his wages upon his labor, and for his employment, upon the pleasure of a subordinate officer of the Government.

Judgment affirmed.

On petition for rehearing, the following opinion was delivered by BALDWIN, J.—TERRY, C. J. concurring:

We have given the argument of the Appellant's counsel a reconsideration, as desired. We adhere to the positions in our former opinion: 1st. That the Act giving this jurisdiction over the subject of contested elections to the Judge of the County Court is constitutional, and that Judges of the District Court are embraced within it. 2d. That the fact that the highest candidate is ineligible, does not give the election to the next on the list. 3d. That the special defense set up in the answer—the ineligibility of Turner—was no bar to the proceeding, because this matter, if true, did not protect the incumbent from the com-

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sequences of an unauthorized possession of the office. But it was not necessary to hold, in order to decide the case before us, that the place or employment of Inspector of Customs was not an office under the United States, within the meaning of the Constitution of the State. Neither the Government, nor Judge Turner, the claimant of this judicial office, is before us, and therefore, neither could be bound by the judgment of the County Judge, which only determines that the defendant is not entitled to the office, and furnishes the Executive with *prima facie* evidence that Judge Turner is. The forcible argument addressed to us by the defendant's counsel suggests sufficient doubts of the correctness of the last proposition of the opinion, to leave the question open and undecided until a case shall be presented directly raising it, and all the facts touching the matter brought out, and an opportunity be afforded for fuller consideration. We, therefore, deny the prayer of the petition for a rehearing, but modify the opinion in the manner suggested.

BURNETT v. WHITESIDES et als.

An injunction ought not to be granted, unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown — as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like.

The entire equity of the bill in this case being denied in the answer, and there being no support of the bill, the injunction was dissolved.

APPEAL from the Tenth District.

The case is stated by the Court.

Mesick & Swezy, for Appellant, to the point that the diversion of water from plaintiff's ditch was a nuisance within the power of the Court to enjoin, cited *Bear River and Auburn Water Mining Co. v. York Mining Co.* 8 Cal. 327; *Tuolumne Water Co. v. Chapman et al.* Id. 392; Willard's Eq. Juris. 392; Story's Eq. Juris. Secs. 925-927; 3 Daniel's Ch. Plead. and Prac. side p. 1859; *Robinson v. Bryan*, 1 Bro. Ch. Rep. side p. 588, and Note; 4 Coke, 89; Dyer, 248; 2 John. Ch. Rep. 165, and Cases cited; 3 Paige's Ch. Rep. 577; *Park v. Kildam*, 8 Cal. 77; and to the point that the complaint showed sufficiently that the continua-

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ance of the diversion, as threatened by the defendants, would produce irreparable injury, and render the plaintiff's ditch property worthless; *Crocker et al. v. Simpson et al.* 7 Cal.; *Merced Mining Co. v. Fremont*, Id. 319. The insolvency of defendants is immaterial. The plaintiff was entitled to the injunction during the litigation. (Practice Act, Sec. 112, Sub. 2; *Ryder v. Bentham*, 1 Vesey, Jr. 543; 5 Met. 126.)

Reardan, Mitchell & Smith, for Respondent.

1. To authorize the issuance of an injunction, there must be such an injury, as from its nature is not susceptible of being adequately compensated for in damages. (3 Daniel's Ch. Prac. and Plead. 1859; *Dana v. Valentine*, 5 Met. 8; *Ingraham v. Dunnell*, 5 Id. 118; 2 Story's Eq. Juris. Sec. 925.) 2. Plaintiff's right to the use of the water was undetermined, and an injunction should issue in such a case only when the right to its enjoyment was not disputed. (*Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 165; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272; *Middleton v. Franklin*, 3 Cal. 238; *Hart v. Mayor of Albany*, 3 Paige, 213; *Corporation of New York v. Mapes*, 6 Johns. Ch. 46; *Attorney-General v. Hunt*, 1 Dev. Eq. 12.) 3. The granting and continuance of an injunction lies in the sound discretion of the Court. (*Roberts v. Anderson*, 2 Johns. Ch. 202; *Hilton v. Earl of Granville*, Cr. and Ph. 283; *James v. Lamley*, 2 Iredell's Eq. 278.) The injunction was properly dissolved because the equities of the bill were denied by the answer. (*Morse v. Terrell*, 1 Kelly, 7.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This appeal is from an order dissolving an injunction. The injunction was granted to restrain the defendants from diverting the water of a certain stream from the plaintiff's ditch, the plaintiff claiming a prior appropriation and averring irreparable injury. The answer denies the equity of the bill, averring that the ditch of defendant only diverted the water not appropriated by the plaintiff. The fact further appears that the ditch of defendants has been constructed for several years within the knowledge of the plaintiff. The motion was heard on complaint and answer. There is no allegation of the insolvency of defendants.

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nor that they will not be able to answer all damages recoverable at law, nor any peculiar grounds shown why a recovery could not be had at law for these damages.

It presents the naked case of a claim of property and for damages made, and this claim denied, and no proof of the claim; and no showing of irreparable damage nor equitable circumstances calling for the interposition of the restraining power of the Court. *Prima facie*, the party in possession of this water is at least as much entitled to the property as a claimant out of possession; and the answer of the defendants as much proof of the defendants' right as the complaint of the plaintiff is evidence of his right. The granting and dissolving of injunctions is very much a matter of discretion, but this discretion must be regulated by sound and just rules. For a Court of Chancery to interpose in such a case as this, might lead to the very hardships and irreparable injury which is the ground of the claim of plaintiff to its interference. It ought not to interpose, unless under very peculiar circumstances, when long delays have intervened since the alleged injury or cause of it existed; nor ought it to interpose unless some equitable circumstances beyond the general allegation of irreparable injury be shown — such as insolvency, or impediments to a judgment at law, or to adequate legal relief — or a threatened destruction of the property or the like. But it is enough for this case to hold that as the entire equity of the bill is denied in the answer, and there is no support of the bill, the injunction should be dissolved. (*Gardner v. Perkins*, 9 Cal. 553.)

We understand that to be this case.

Judgment affirmed.

PARTRIDGE v. MCKINNEY *et als.*

THE question as to the necessity of recording mining claims reserved.

APPEAL from the Ninth District.

This case is reported in 12 Cal.

. People v. Rogers.

On a rehearing, the following opinion was delivered by BALDWIN, J.—TERRY, C. J. concurring:

In this case a rehearing was granted. An opinion was rendered by Mr. Justice Burnett, and concurred in. We think, on a re-examination, that this opinion is correct on the proposition before the Court; but that it is not necessary to express any opinion as to the necessity of recording mining claims. That question is reserved. With this qualification, we adopt that opinion, and the result of it, as the judgment of the Court.

Ordered accordingly.

STATE OF CALIFORNIA v. ROGERS, ADM'rs, ETC.

THE Constitution is not a grant of power or an enabling act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference.

The Act of April 10th, 1856, permitting non-resident aliens to inherit real and personal estate, is constitutional.

The Constitution (Art. 1, Sec. 17) gives the *bona fide* resident alien certain rights, which may be enlarged, but cannot be abridged by the Legislature.

APPEAL from the Fourth District.

The Attorney-General filed in the Fourth District an information, setting forth that David Morgan and Isaac Levick had died seized of certain real estate, situated in the city of San Francisco, without heirs capable of inheriting, and claimed that the estate had escheated to the State.

The Administrator and terre-tenants put in an answer denying the facts stated in the information, and also set forth that there were heirs who, at the time, were non-resident.

Two of the heirs of David Morgan, by their Attorneys in fact, filed a demurrer, on the ground that no cause of action had accrued to the State, inasmuch as five years had not elapsed since they had inherited the same. This demurrer the Court overruled. An answer was then put in, to which a demurrer was interposed, and this was also overruled. From this order the appeal is taken.

Thomas H. Williams, Attorney-General, and *B. S. Brooks*, for Appellant. I. The right of the State to succeed to all lands or

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other property for which there are no heirs is not derived from the common law. We do not derive it from the feudal system. (4 Kent Com. 423, *et seq.*)

"It is clear by the common law that an alien can take lands by purchase, though not by descent, or in other words, he cannot take by the act of the law, but he may by the act of the party. The principle has been settled in the year books, and has been uniformly recognized as sound law from that time." (11 Hen. IV. 26; 12 Hen. IV. 20; Co. Litt. 2 b.; Jac. Law Dic. "Alien;" *Fairfax, Devisee v. Hunter's Lessee*, 7 Cranch, 603; *S. P. Dawson's Lessee v. Godfrey*, 4 Cranch, 321; *Craig v. Radford*, 3 Wheat. 594; *Orr v. Hodgson et al.* 4 Wheat. 433; 9 Wheat. 354; 11 Wheat. 332; 3 Peters, 126; 6 Peters, 162; *Orr v. Hodgson et al.* 4 Wheat. 453; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *People v. Conklin*, 2 Hill, 71.) If the disability of the alien to inherit depended entirely upon the common law, the disability created by the adoption of the common law would be removed by a subsequent statute introducing a different rule; and such, it is contended, is the effect of the Statute of April 19, 1856. It, therefore, becomes necessary to inquire whether that law is constitutional.

The Constitution, Art. I, Sec. 17, says: "Foreigners who are, or may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance, of property, as native-born citizens."

The Court in the case of *Farrell and Wife v. Enright*, (12 Cal. 450,) hold language decisive of the point in question. In that case the intestate died 16th April, 1850. The plaintiff was at that time a non-resident alien. The Court held that the plaintiff could not recover. There the death occurred after the adoption of the common law, and before the passage of the Act of April 19, 1856.

One position assumed by the counsel for the Respondent, is by this decision disposed of — that is, that the Respondents can become *bona fide* residents within the meaning of the Constitution after the descent cast; and it is settled that the capacity to take or hold, depends upon the status of the claimant at the time of the descent cast.

But in order to get a proper construction of this clause of the Constitution, it is necessary to ascertain what was the status of

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the alien at the moment of its adoption, and thereby to discover in what status it left the non-resident alien. The decision which I have above quoted, declares: "The clause of the Constitution cited, only removes the disability of alienage to such foreigners as are *bona fide* residents; it leaves the rights of non-resident foreigners in respect to real property as it exists at the common law." This is the very point in dispute. Whether at the time of the adoption of the Constitution, aliens were disabled to inherit, and the Constitution removed an existing disability, or whether, as the Respondent contends, there was then no such disability, and the clause of the Constitution only imposed upon the Legislature a restraint from creating the disability in the expressed cases, and left the rest to the discretion of the Legislature—or whether it "left the rights of non-resident foreigners, in respect to real property, as it exists at the common law."

Whether the common law was in any respect in operation at the time of the adoption of the Constitution, admits of argument. As a rule of decision as to private rights, it was not in force until the adoption of the common law by the Legislature. But in respect to political rights, it was in force. In all cases where clauses of the Federal or State Constitutions are construed, constant reference is made to the common law to ascertain the *status* of the subject matter at the time of the adoption of the constitutional provision. "By the rules of construction, heretofore adopted, this clause negatives any supposed rights which non-resident aliens would otherwise have to inherit." "We are of opinion that the Constitution expressly prohibits the plaintiffs from inheritance, and that being thus incapacitated, they cannot maintain an action of ejectment, and that their rights have not been enlarged in this respect, by treaty." (*Siemssen v. Bofer*, 6 Cal. 250.)

If the clause in question negatives any supposed rights of non-resident aliens to inherit, and expressly prohibits them, according to the rules of construction heretofore adopted by this Court, it is not in the power of the Legislature to remove the negation or prohibition. (Sedgwick on Stat. and Con. L. 493.)

The alien has no rights in regard to the real property within a State except such as are expressly given by the State. His status at the time of the formation of the State is, in this respect,

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Now, no commissions issue to county officers except to the County Judge, who, of course, could not sit on his own case, and therefore is not within the Act, and hence it would seem that the District Judge was meant to be included, as the only officer to whom this expression would apply. A close examination of the seventy-four sections of this Act fails to show any single expression which indicates that the intent was to embrace only county officers within the statute. On the contrary, general expressions are used, which embrace, without straining, the office in question. It is true that some embarrassments may arise in contesting elections in one county when the result of the entire election depends on the returns or acts done or omitted in other counties; but this same difficulty exists in proceedings by *quo warranto*. And the fact that the Judge of the District Court is, or may be, a party to this proceeding, may have been an additional reason for embracing the case within this special jurisdiction.

2. It is objected that this Act is unconstitutional. The grounds of this objection are, that by the Constitution, jurisdiction is given to the District Courts in all cases of law and equity where the amount in controversy exceeds two hundred dollars. Conceding, for the argument, that an office like this has an ascertained value as property, yet the argument cannot be maintained. This proceeding is not according to the course of the common law; it gives new rights and remedies. By the common law an election could not be contested by an elector. The Government might, by proceeding of *quo warranto*, eject an intruder from office; but this it did by virtue of its sovereign power, and by a process analogous to a criminal prosecution.

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dentally affected, is no reason why the jurisdiction should be denied.

3. The next error assigned is, the sustaining of the demurrer to so much of defendant's answer as sets up this defense: "And for further answer, the defendant says that all of the votes of said election, cast for said Turner, are null and void, for he charges that the said Turner was, at the time of the alleged election, ineligible to the office of District Judge, for that the said Turner, for a long time previous to, and on the said first Wednesday of September, 1858, held, and at the present time holds, the office of Inspector of Customs for the port of Trinidad, in the State of California, and that said office was, at the time of said election, and is, a lucrative office under the Government of the United States, and defendant says he received the highest number of legal votes for the office of Judge," etc.

It will be observed that the point of this defense is, that the votes cast for Turner, supposing he received the highest number, were nullities, because of his assumed ineligibility. But we do not so consider. Although some old cases may be found affirming this doctrine, we think that the better opinion at this day is, that it is not correct.

The celebrated controversy in the British Parliament between Wilkes and Luttrell has given rise to much discussion; and the opinions of jurists and statesmen have been somewhat divided. But the prevailing opinion, English and American, of modern times, seems to be against the precedent established in that case. In the case of *Whitman and Melony*, (10 Cal. 38) Mr. Justice Field clearly intimates his opinion in favor of the principle that the votes given for an ineligible candidate are not to be counted for the next highest candidate on the poll. In *The State of Wisconsin v. Giles*, (1 Chandler, 117,) the same doctrine is held; and it is enforced by the Judges of the Supreme Court of Maine, in their opinion, to be found in 38 Maine Rep. 597.

Our legislative precedents seem to be the same way. Upon principle, we think the law should so be ruled. An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their votes upon an ineligible candidate, it by no means follows that

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and the heirs, put in answer denying the facts stated in the information. The Administrator is the representative of the creditors, and he has a lien upon the estate for the payment of the debts due from the estate to the creditors and the expenses of administration. (*Beckett et al. v. Selover*, 7 Cal. 215.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This is an information of escheat, filed by the Attorney-General, to establish the State's interest in certain real estate to which it is alleged the State has title, in consequence of the alienage of those who would otherwise be entitled.

It is conceded by the Attorney-General, that this claim of the State must fail, if the act of the Legislature of April 19th, 1856, entitled "An Act relative to Escheated Estates," (Stat. of 1856, 137,) be constitutional. That Act provides:

"SECTION 1. Aliens shall hereafter inherit, and hold by inheritance, real and personal estate, in as full a manner as though they were native-born citizens of this or the United States; *provided*, that no non-resident foreigner, or foreigners, shall hold or enjoy any real estate, situated within the limits of the State of California, five years after the time such non-resident foreigner, or foreigners, shall inherit the same; but in case such non-resident foreigner, or foreigners, do not appear or claim such estate within the period in this section before mentioned, then such estate shall be sold, upon information of the Attorney-General, according to law, and the proceeds deposited in the treasury of said State, for the benefit of such non-resident foreigner, or foreigners, or their legal representatives—to be paid to them by the Treasurer of said State, at any time within five years thereafter, when such non-resident foreigner, or foreigners, or their representatives, shall produce evidence, to the satisfaction of the Treasurer and Controller of State, that such foreigner, or foreigners, are the legal heirs to, and entitled to inherit such estate, which evidence, together with the joint order of the said Treasurer and Controller, shall be placed on file in the office of the Treasurer, and shall be to him a voucher for any payments made by him under the provisions of this Act; and in the event that such non-resident foreigner, or foreigners, do not appear or claim said estate or pre-

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ceeds, and produce said evidence within said extended term of five years, then said estate or proceeds shall be and become the property of the State, and shall be by the Treasurer of State placed to the credit of the School Fund.

SEC. 2. All Acts and parts of Acts conflicting with the provisions of this Act are hereby repealed."

The constitutional provision, Sec. 17, Art. I, provides: "Foreigners who are, or may hereafter become, *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance, of property as native-born citizens." This provision was construed, recently, by this Court, in the case of *Farrell v. Enright*, 12 Cal. 450. It was held in that case, that, to entitle the alien to hold real estate, the descent of which was cast prior to the Act of 1856, such alien must be a resident of the State at the time of the descent. But the Act of 1856 was not involved in the decision.

It is contended by the Appellant that the clause of the Constitution is restrictive as well as enabling; that its terms exclude any other rights or privileges to aliens than those given. We think this view erroneous. The Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary inference. (4 Cal. 46; 6 Ind. 88.)

The object of this provision was to secure a certain protection to such resident aliens as might be in the State at the time of a descent. But this short sentence was not designed to comprehend all the law in respect to aliens. The Legislature could not, indeed, abridge this privilege, but it was not disabled from extending it or adding other privileges. It might as well be urged that because the Constitution provided that no law should be passed impairing the obligation of contracts, no legislative regulation could be had; or, because a homestead was exempted from forced sale, there could be no exemption of other property. The alien is secured by the Constitution in this one privilege, but he may be secured by the Legislature in as many more as it chooses to give, provided there is no conflict with any constitutional restrictions upon its power; of which this provision is not one.

The Administrator, having possession of the real estate, could

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well set up this defense. The statute denies any present right to the State to take the property; and it is a good answer to one in possession to show a want of power in him who seeks to disturb it.

Judgment affirmed.

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No law authorizes a Recorder or Clerk of a county to record a copy of a deed in the Spanish language so as to make it evidence, without further proof. The fact that a party had cattle on the land, or was there for short periods himself, or that he claimed within given limits, is, in the absence of any inclosure or some visible physical signs of the extent of his boundaries or claim, insufficient to show the fact of possession of any particular tract, when others were also in possession.

APPEAL from the Fifteenth District.

Ejectment for a tract of land, being a part of the Jimeno Grant, in Colusa County. Plaintiff, in deraigning title from Jimeno, offered and read in evidence a copy of the grant, with translation attached. Next, he offered a book from the Recorder's office of Colusa County, and asked to read therefrom, what purported to be a copy, in the Spanish language, of a deed from Jimeno to Larkin and Missroon, executed in 1847. To the introduction of which defendants objected, on various grounds, but mainly that the deed, as recorded in said book, purported to be a copy; that there was no proof of the execution of an original, and that the original did not appear to have been properly acknowledged, or proved and certified. Plaintiff then proved that he had made search for the original deed, without success. The Court ruled out the deed, and plaintiff excepted.

The Court below nonsuited the plaintiff, on the ground that he had failed to show any title or any possession by himself or his grantors, either actual or constructive, prior to the possession of defendants. Plaintiff appeals.

Sanders & Edwards, for Appellant.

The law does not impose on the holder of a conveyance, from a Mexican to an American, the necessity of proving the existence of an instrument made in the Mexican language, or its

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acknowledgment according to the forms of our law. Before the conquest, or organization of the State Government of California, such papers prove themselves, and the circumstance of the record is sufficient evidence of their existence. The circumstance of the instrument being in the Spanish language is no objection; rather a support of our position of its antiquity. Our law authorizes the employment of an Interpreter, or his appointment when required. An *ex parte* interpretation would be rejected.

Belcher & Belcher, for Respondents.

To support ejectment, title or prior possession must be shown. (*Treadwell v. Payne*, 5 Cal. 310; *Wadsworth v. Fulton*, 1 Id. 295.) Prior possession is sufficient to maintain ejectment, but it must be an actual *bona fide* occupation, a *possessio pedis*. That the cattle of the claimant, or those through whom he claims, have roamed over and grazed upon portions of a large tract is not sufficient. (*Plum v. Seward*, 4 Cal. 94; *Murphy v. Wallingford*, 6 Id. 648; *Suñol v. Hepburn*, 1 Id. 255.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The plaintiff failed to deraign title. The deed from Jimeno to Larkin and Missroon was not proven. The deed was executed in 1847, and made a record in the office of Colton, Alcalde of Monterey. A copy in the Spanish language appears to be on the records of Colusa County. But we know no law which authorized the Recorder or Clerk of Colusa to record this copy so as to make it evidence, without further proof. This throws on the plaintiff the burden of showing a *possessio pedis* in himself, or in some predecessor through whom he deduces title. But we see no such evidence in the record. Though some evidence exists of his predecessor, Missroon, being on the premises, yet we see no sufficient proof of any distinct or exclusive possession on his part of any given quantity of land. The fact that he had cattle on the land, or was there for short periods himself, or that he claimed within given limits is, in the absence of any inclosure, or some visible physical signs of the extent of its boundaries or claim insufficient to show the fact of possession of any par-

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ticular tract, when others were also in possession. We think that this qualified and equivocal possession of Missroon, therefore, did not give him a right to sue for the land, as against these defendants, and that his grantees could not maintain this action upon their deed and his possession.

As the nonsuit determines nothing, the plaintiff may proceed, and, under better proof, if he can procure it, try his case anew.

Judgment affirmed.

GOODWIN *et al.* v. HAMMOND *et al.*

AN answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only. The Practice Act, as to evidence at least, governs all cases legal or equitable by the same rules.

If an instrument be void for actual fraud *ab initio*, it is void for every purpose of protection to the fraudulent actor, and will not be allowed to stand as security for advances made.

APPEAL from the Fourth District.

The bill was based upon an attachment levied by plaintiffs, as creditors of defendants, Chittle & Wardner, on the stock in the California Coal Company, transferred by them to defendant, Hammond. Plaintiff had judgment, and defendant, Hammond, who alone answered, appeals.

Yale, for Appellant. 1. Where the answer to a bill in equity denies positively the allegations of the bill, the answer must be disproved by two witnesses, or by one witness and corroborating circumstances. (Practice Act, Secs. 46, 51, 52; *Brooks v. Chilton*, 6 Cal. 640; Practice Act, Secs. 113, 37, 53; 2 Cal. 593; *Id.* 378; Practice Act, Sec. 417; 5 Cal. 192; *Id.* 448; 4 *Id.* 6, 366; 9 Cranch, 160; 6 Vesey, 40; 2 *Id.* 244; *Greenleaf Ev.* Secs. 255, 351; *Story's Eq. Jurisp.* Sec. 1528; *Gresley's Equity Evidence*; 6 *Wheaton*, 468; *Laws United States Courts*, 464, foot note to Rule 43.) The rule derives more force by reference to the Acts relating to the books of mining corporations. (See Sec. 18 of Act April 14th, 1853; *Wood's Digest*, 122, Art. 497; Act of March 27th, 1857, Sec. 1.) Entries in these books are presumptive evidence of the facts, and also of the *bona fides* of all the transac-

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tions detailed. 2. The decree is erroneous in setting aside the transfer *in toto*. It is good to the extent of the actual consideration paid. (*Hardy v. Handy*, 11 Wheat. 126.)

Harmon & Labatt, for Respondent, argued that if the rule in chancery were as stated by the Appellant's counsel, it has no application to this case; that the rule only applies when the plaintiff, of his own accord, swears to his bill, or calls upon defendant to answer under oath. (Story's Eq. Juris. Sec. 1528; *Searcey v. Pannell*, Cooke's R. 110, cited in Note to *Field v. Holland*, 2 Pet. Cond. 294.) And that the Practice Act, (Sec. 417,) controls the question. (See, also, Story's Eq. Juris. Sec. 1493.) The only way for a party to give evidence is prescribed by that Act, in Section 418. (3 Greenleaf Ev. Sec. 257, and Note 2.) Besides, the rule never did apply to cases of fraud.

As to holding the stock as security for advances, notwithstanding the fraud, see *Borland v. Walker* (7 Ala. 280); *Sands v. Codwise* (4 Johns. 536).

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

Bill to set aside as fraudulent two transfers of stock of the California Coal Company, from the defendants, Chittle and Wardner, to defendant Hammond.

The Court below, on express evidence of the existence of the fraud, found for the plaintiff.

Several points are made by the Appellant.

1. That this proof was made by one witness only, and this in contradiction to the defendant's answer, which was responsive to, and negatived the charge in the bill; and that, by the rule of equity pleading, this is not sufficient.

The point is not well taken. We have held recently, in several cases, that the Practice Act governs all cases of pleading, legal and equitable, by the same rules, at least in this respect; and that the answer is not evidence for the defendant.

2. That the decree is against evidence. We have looked into the proof, and think it sustains the decree; at least, that the Judge below had legal evidence before him of the alleged fraud,

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and we do not see any such error as would justify our interference with his conclusion.

3. That the decree is erroneous, in setting aside the transfer *in toto*, and not allowing the alleged fraudulent vendee to hold the stock as security, to reimburse him for the amounts expended by him in purchase money and assessments.

In some cases of mere constructive frauds, this principle is held by Courts of Equity, and in some instances of actual fraud the like doctrine has been maintained. But these last are rare exceptions to the general rule. Where the fraud is actual and characterizes the transaction *ab initio*, we think the better rule is, that the deed is void for any purpose of protection to the fraudulent actor. (See *Borland v. Walker*, 7 Ala. 280; *Sands v. Codwise*, 4 Johns. 536; where the authorities are collected.)

The decree is affirmed.

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- ▲ CLERK's certificate that a statement is the same which was used on motion for new trial, is entitled to no weight, as the Clerk is not authorized by law to verify a statement in that form.
- ▲ statement used on motion for new trial cannot be used as the statement on appeal, when neither agreed to by the parties, nor signed by the Judge.

APPEAL from the Fifth District.

L. Quint and *J. W. Coffroth*, for Appellant, cited *Woods v. Forbes*, 5 Cal. 62; *McLeran v. Shortzer*, Id. 70.

D. W. Perley, for Respondent, cited 4 Cal. 284-112; *Doyle v. Sewall*, 12 Id.; 7 Id. 398, 290, 38; 8 Id. 510; 9 Id. 247; 5 Id. 151, 319.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

There is in the record no properly authenticated statement or bill of exceptions, setting out the evidence.

The statement in the record is neither signed by the Judge, nor agreed to by the parties, nor does it appear that a copy was ever served on Respondent or his Attorney.

De Witt et al. v. Porter.

The Clerk's certificate that the statement is the same which was used on the argument of the motion for a new trial, is entitled to no weight, as the Clerk is not authorized by law to verify a statement in that form.

The judgment roll disclosing no irregularities, the judgment is affirmed.

DE WITT et al. v. PORTER.

A COMPLAINT, stating that whereas said defendant was just indebted to plaintiffs in the sum of three thousand dollars for money paid, laid out, and expended, for the use and benefit of said defendant, and at his special instance and request, to-wit: at, etc. and on the 1st day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to the plaintiffs on an account then stated between them; and the said defendant being so indebted to the plaintiffs afterwards, to-wit: on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs to pay the same, etc. and that said sum is due and unpaid, sufficiently states a cause of action.

APPEAL from the Twelfth District.

Complaint averred as in syllabus. Defendant demurred: 1. That the complaint did not state facts sufficient to constitute a cause of action. 2. That several causes of action were improperly united, without being separately stated.

Demurrer overruled, with leave to answer on payment of costs. Defendant excepted, failed to pay the costs, and final judgment was entered for plaintiffs. Defendant appeals.

Stanly & Hayes, for Appellant, cited 1 Chitty, 337, 397; 4 Cal. 294; Archibald's Civil Pleading, 294; *Porter v. Hermann*, 8 Cal. 619; 13 Johns. 485; 1 Greenleaf Ev. Sec. 126; 3 Meeson & Wels. 606; 7 Barn. & Cress. 103, to the points that the complaint contained two counts, neither of which was sufficient in itself; and that this being so, the pleader could not correct them so as to make one aid the other. To the point, that the Court could not impose costs, as a condition of answering, counsel cited Practice Act, Sec. 67; Section 28 of an Act concerning Courts of Justice, Comp. Laws, 742.

S. M. Bowman, for Respondent.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

The People *v.* Ramirez.

The complaint in this cause sufficiently states a cause of action for money ascertained to be due, upon a statement of accounts, which, it is averred, defendant promised to pay. The demurrer was properly overruled.

It clearly appears, from the record, that the appeal is without merit. The judgment is, therefore, affirmed, with fifteen per cent. damages and costs.

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- In criminal cases the principles of law invoked by the defendant should be stated to the jury in clear and explicit terms. And the error of refusing a proper instruction is not cured by the fact that it was in substance given by the Court.
- If an instruction be refused for the reason that it has already been given, the reason of the refusal should be stated, so as not to mislead the jury.

APPEAL from the Court of Sessions, San Joaquin County.

Indictment for larceny. The instructions which it is stated, in the opinion of the Court, should have been given are so obviously correct, that it is useless to print them.

H. Amyx, for Appellant.

Attorney-General, for Respondent.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

The first, third, fifth, and sixth, instructions asked by the defendants, were certainly pertinent and proper, and the refusal to give them was error.

The Attorney-General seeks to avoid the consequence of this error by showing that these instructions were given in substance by the Court. But this is not sufficient. It is important to defendants in criminal cases that the principles of law which they invoke in their defense should be stated to the jury in clear and explicit terms, so that they may not be misunderstood. An instruction may be given in substance in language so different from that in which it was asked, as to be very difficult of comprehension, and it is always safer to repeat the instruction, than risk

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misleading the jury by the refusal of one which is proper and pertinent. At any rate, if an instruction is refused, for the reason that it has already been given, the reason of the refusal should be stated. (*People v. Hurley*, 8 Cal. 390.)

CLARY v. HOAGLAND.

In this case the application for *certiorari* showing on its face that the party had an adequate legal remedy by appeal, the writ was denied.

PETITION for a writ of *certiorari* to the County Court of Yolo County.

In 1851, plaintiff brought forcible entry and detainer in a Justice's Court against defendant. Judgment was rendered for plaintiff for restitution of the premises, which judgment, on appeal, first to the County Court, thence on appeal, to the District Court, was affirmed in November, 1851.

Defendant then appealed to the Supreme Court, where, in October, 1852, the judgments of both the County and District Courts were reversed, and the cause remanded to the District Court for new trial. (2 Cal. 474.) The *remittitur* was filed in said Court November, 1853.

In February, 1855, plaintiff applied to the Clerk of the County Court for a writ of restitution upon the judgment as originally rendered in that Court. The Clerk refused the writ on the ground of reversal of the judgment by the Supreme Court. Upon application, the County Court ordered a *mandamus*, commanding the Clerk to issue the writ. This order was reviewed, and reversed by the Supreme Court, upon *certiorari* in October, 1855. (5 Cal. 476.) And in January and October, 1856, was again reviewed, with the same result. (6 Cal. 685.)

In March, 1854, upon motion of plaintiff, defendant being also represented, the District Court dismissed the case instead of proceeding with a new trial in accordance with the *remittitur* from the Supreme Court; the ground being, that said District Court, under late decisions, had no jurisdiction of an appeal from

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the County Court. Plaintiff took no further steps, until, in August, 1857, defendant obtained from the County Clerk an execution for costs, contending that plaintiff had virtually abandoned his suit. Plaintiff then procured an *ex parte* order from the County Court, preventing the enforcement of the execution, and also an order placing the cause on the calendar for trial.

Petitioner, upon this state of facts, applied to the Supreme Court for a *certiorari* to review the action of the County Court in placing the cause on the calendar for trial, on the ground of no jurisdiction in the Court, and no remedy by appeal.

Wynans & Zabriskie, for Petitioner.

1. The judgment of the Supreme Court in this case, rendered at the October Term, 1852, remanding the case back to the District Court for trial, was a final judgment, conclusive of the rights of the parties, and became the law of the case, and cannot be changed or modified; and the subsequent act of plaintiff in dismissing the case from said Court was a final determination of the action. (*Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Lafan*, 7 Id. 588; *Woodcock v. Parker*, 35 Maine, 138; *Van Dyke v. The People*, 22 Ala. 57; *Wood v. Wheeler*, 7 Texas, 13; *Dallan v. Bowman*, 16 Miss. 225; *Goodwin v. Huntington*, 11 Illinois, 646.)

Even conceding that the judgment of the Supreme Court should have remanded the case to the County Court for trial, and that this Court has now the power to amend the same accordingly, still the acts of the plaintiff, in omitting to proceed with the case in the County Court for seven years, in dismissing it from the District Court, and in procuring an order for a writ of restitution in the County Court, was a waiver of his right of new trial in said Court, and a discontinuance of the cause. (*Rutherford v. Folger*, 1 Spencer, 299; *Athlock v. Commonwealth*, 73 Monroe, 44; *Jackson v. Haveland*, 13 Johnson, 229; *Guffin v. Osborn*, 20 Ala. 594; *Puddlefield v. Bancroft*, 22 Vt. 529; *McGuire v. Hay*, 6 Humphreys, 419; 3 Black. Com. 296, 316.)

Tpd Robinson and *John Heard*, *contra* — argued that petitioner has full remedy by appeal. (Practice Act, Secs. 336, 456.)

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

Pattison v. Board of Supervisors of Yuba County.

In this case, as the application for a *certiorari* shows upon its face that the party has an adequate legal remedy, by appeal, from any judgment which may be rendered in the County Court to his prejudice, the petition is denied.

PATTISON v. BOARD OF SUPERVISORS OF YUBA COUNTY, AND THE SAN FRANCISCO AND MARYSVILLE RAILROAD COMPANY.

QUESTIONS: Whether a tax-payer can interfere by injunction, to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect, at some future time, if certain other things be done, might be to subject his property to taxation?

To render a law unconstitutional, because opposed to the general policy of the Constitution, that policy must be manifested by the terms of the Constitution, fixing with precision the particular rule, and not as gathered by general inference.

The 8th Article of the Constitution, prohibiting the State from creating debts over three hundred thousand dollars, or loaning its credit, etc. only applies to the State as a corporation — as a political sovereign, represented by her law-making power; and does not prevent the State authorizing counties or municipal corporations, to create debts, when the debt of the State itself is up to the constitutional limit.

The State may have political subdivisions — that is, she may permit a portion of her powers of government to be exercised by local Agents. But, politically considered, geographical or political departments are no more the State, or a part of the State, than a man's land or his agent is a part of himself.

There is no difference in this respect between a municipal corporation and a county. They are both political and geographical divisions of the State. They are both the subjects of its political dominion.

The Legislature has a right to authorize a local tax for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition or without it, or by, or without, a submission of the proposition to the people, and it is not essential that the improvement should be within, or confined to the locality taxed, and a subscription for stock, to be paid for by taxation, is a valid contract to pay it.

Under the Act of April 28th, 1857, authorizing the Supervisors of Yuba County to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento River, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection.

APPEAL from the Tenth District.

The case was tried upon an agreed statement, on demurrer and answer, submitting the two questions discussed in the opinion of the Court, the Court below dismissed the bill. Plaintiff appeals.

Reardan & Smith, for Appellant. I. The Board of Supervisors had no authority to subscribe to the capital stock of the "San

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Francisco and Marysville Railroad Company," even though the Act of the Legislature was constitutional. The Act under which the Board of Supervisors claim to derive their power to take this stock in the name of the county of Yuba, (Statutes of 1857, 296, Sec. 1,) makes it the duty of the Board to submit to the electors of Yuba County, at a general election, "The proposition for the Board of Supervisors of said county to take and subscribe two hundred thousand dollars to the capital stock of any railroad company, for the purpose of constructing any railroad, by which a railroad connection shall be formed between the city of Marysville and either the city of Benicia, or any point on the Sacramento River, at or near Knight's Ferry, or Sacramento City."

Now, the question is, has the Board of Supervisors subscribed the two hundred thousand dollars to the capital stock of any railroad company contemplated in the Act? We contend that this railroad company has quite a different object from that named in the Act.

The record shows that the San Francisco and Marysville Railroad Company is incorporated for the purpose of constructing a railroad from Marysville to Vallejo, and connecting by steamers with San Francisco. The company is not formed for the purpose of connecting Marysville either with Benicia, or any point on the Sacramento River.

In naming the city of Marysville, Benicia, Knight's Ferry, and Sacramento, the Legislature intended that Marysville, and either one of the other three points specified, should be the termini of the road.

The language of the act itself shows that the railroad company contemplated, was one that should be formed for the purpose of constructing a railroad from Marysville to one of the points designated. The stock is not to be subscribed for the purpose of constructing a railroad, but to a company organized for that purpose. We contend, therefore, that if the railroad extend beyond Knight's Ferry, it should terminate at Benicia.

The Supervisors, deriving their whole power from this statute, have undertaken to bind the county by subscribing the amount to the capital stock of a company whose road does not terminate at either of the three last named points, but at Vallejo, and not

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running nearer than six miles to Benicia; and not only that, but to a company whose purpose is to run a line of steamers between San Francisco and Vallejo, a distance of about thirty miles. The electors having voted to take stock in a railroad company, now find that they have become interested in navigating the San Francisco and San Pablo bays. The special power to subscribe in a railroad does not include the power to engage in building and running steamers between the terminus of the road and a point thirty miles distant.

II. Can the Legislature authorize a county to subscribe to the capital stock of any railroad or other incorporated company?

We contend that such power is withheld by the true intent of the Constitution, if not by express words. (Constitution, Art. XI, Secs. 10, 5.) Municipal Corporations are creatures of statute. Counties date their existence before any statute of which we have a record. The common law, which has been made the common law of this State, recognizes the existence of counties or shires in the Constitution of those assemblages of Barons and knights which first admitted Burgesses to a participation in their deliberations. The Constitution of this State recognizes its counties in all their common law rights and prerogatives; and, for convenience, the law extends to these counties certain privileges and prerogatives not necessary to their county organization. A county is "a circuit, or particular portion of a State or Kingdom separated from the rest for certain purposes in the administration of justice." (Webster's Dic.)

Counties are, by their very nature, confined to limits in their expenditure of money more restricted than those which control municipal corporations. The "roads, bridges, and ferries," over which County Supervisors may properly exercise jurisdiction, are those which lie within the county, and are necessary for the convenience and comfort of the inhabitants. Municipal corporations, on the other hand, are creatures of statute, but they are also children of trade. They may be permitted to embark in the construction of roads, the improvement of rivers, and the support of navigation companies, but for reasons growing out of this very law of their existence, are no way applicable to counties.

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(*Clarke v. City of Rochester*, 24 Barb. 446; *Low v. City of Marysville*, 5 Cal. 214.) A county is a component part of the State—a component part cannot do that which the whole cannot do. The State cannot become a stockholder in the railroad. Therefore, a county cannot.

J. A. McDougall and Timothy Dame, for Respondents.

Appellant makes two points:

1. That the Act of the Legislature, under which the Board of Supervisors have acted in taking the stock in the railroad company, is unconstitutional.

2. That the Board of Supervisors had no authority to subscribe to the capital stock of "The San Francisco and Marysville Railroad Company," even though the Act of the Legislature was constitutional.

The first question was fully discussed at bar in the former hearing, and we do not deem it necessary to repeat in full our part of the argument. But let us consider a moment the objections urged.

They say that the power exercised by the Board of Supervisors under the Act in question, is "withheld by the spirit, meaning, and true intent of the Constitution," as expressed in Art. XI, Sec. 10.

It is certainly very clear, from the language of this section, that the State, in her capacity as a State, cannot loan her credit in aid of, or become a stockholder in, any railroad company, or other corporation; because she is restricted from doing so by the plain terms of her Constitution, and which is restrictive upon the powers of the Legislature; and that what is not clearly prohibited by the terms of this instrument, the Legislature can do. Then if the Constitution of the State does not in direct and positive terms prohibit the Legislature from granting the power to counties, cities, or other political corporations, from taking stock in a railroad company, or other public enterprise—there being no limitation or restriction imposed upon counties and cities, touching the matter—the power by implication is conceded to the Legislature to authorize the taking of such stock; for the very language of the section of the Constitution referred to,

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shows that the subject of taking stock in such companies must have been before the convention that framed the Constitution.

The provisions of the Constitution, then, amount to this: they admit the power of the Legislature to authorize counties and cities to take stock in works of internal improvement, but forbid the State from doing so in her State capacity.

It is further urged that the Act in question, "conflicts with the true policy of the State," etc.

We might show the contrary. But it is well settled by this Court in several recent cases, and is the prevailing rule of law in other States, that questions of policy of this character belong exclusively to the legislative branch of the Government, and not to the Judiciary.

It is the business of the Court to decide what the law is, not what it should be. The mere *dicta* laid down by Mr. Chief Justice Murray, in the case of *Low v. The City of Marysville*, (5 Cal. 214,) is repugnant to the decisions of all the State Courts upon this subject, and also of this Court in several cases recently decided. (*The City of Aurora v. West*, 9 Ind. 74, recently decided; and, also, the cases of *Grant v. Courter*, 24 Barb. N. Y. 232; *Benson v. The Mayor, etc.* Id. 248; and *Clarke v. The City of Rochester*, Id. 446, and the authorities cited in these cases.)

The complaint, in assigning causes for the injunction, alleges that the company, "is not formed for the purpose of connecting by railroad the city of Marysville with the city of Benicia, or any point on the Sacramento River, at or near Knight's Ferry, or Sacramento City." We call the attention of the Court here to the discrepancy between the averment in the complaint and the provisions of the Act.

It is not required that the company should have been organized, chartered, or "formed for the purpose of connecting the city of Marysville with any one of the points named. The subscription may be made to the capital stock of any company, 'for the purpose of constructing any railroad by which a railroad connection shall be formed,' between the city of Marysville and either of the named points."

The agreed statement of facts shows that the line of said railroad commences at a point near the center of the corporate limits of the city of Marysville and continues from thence "through the

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county of Sutter to a point on the Sacramento River at Knight's Ferry, forming a railroad connection between the city of Marysville and the Sacramento River at Knight's Ferry;" also, that the company are engaged in the construction of the road.

The plan and purposes of the company fulfill all the conditions required, and it is a strange position that because the same company proposes to do much more than is required, that, therefore, the county of Yuba should not aid in the enterprise. It is sufficient, however, that no such limitation as to the character of the company as is assumed in Appellant's argument is to be found in the Act itself. (Smith Stat. and Const. L. Sec. 545; 6 Dane's Ab. 600; 7 Cranch, 52; *The City of Aurora v. West*, 9 Ind. 74.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The bill in this case was filed in the Tenth District. Its object is to enjoin the Supervisors of Yuba County from subscribing the sum of two hundred thousand dollars to the capital stock of the San Francisco and Marysville Railroad Company, a corporation formed under the general law concerning corporations. By the Act of the Legislature, approved April 28, 1857, (Statutes of 1857, 296,) it was provided, in substance, that this Board should submit, at the next general election to be held for county officers in Yuba County, to the qualified electors of the county, the proposition for this Board "to take and subscribe two hundred thousand dollars to the capital stock of any railroad company, for the purpose of constructing any railroad, by which a railroad connection shall be formed between the city of Marysville and either the city of Benicia or any point on the Sacramento River at or near Knight's Ferry, or Sacramento City."

The second section of this Act provides the time, manner, and other machinery, of the election. The third section declares that if the proposition be carried by the popular vote, the Board of Supervisors, in the name of the county of Yuba, are empowered to take and subscribe, for the use, benefit, and advantage, of said county, to the capital stock of any railroad company, for the purpose mentioned in section one of this Act, stock to the amount of two hundred thousand dollars, and therefore to pledge the faith of said county of Yuba for the payment of the same in

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the manner thereafter provided. By section five a committee, constituted by section four, shall make the subscription, "conditioning the same to be paid in the bonds of Yuba County;" and by section six it is provided when, and in what manner, these bonds are to be issued.

The San Francisco and Marysville Railroad Company was incorporated on the 28th day of October, 1857, for the purposes set forth in their articles of association — that of constructing, owning, and maintaining, a railroad from the city of Marysville, in the county of Yuba, through said county and the counties of Sutter, Yolo, and Solano, to a point on San Pablo Bay, near Vallejo.

The vote on this proposition was in favor of the subscription.

This is a case of much public importance, and we are requested by the learned counsel on both sides to decide the main questions involved, without reference to technical points. The questions were before us at the last term, but we declined to pass upon them for the reason that the proper parties upon whom our judgment should be binding were not before the Court. We thought it a bad precedent to consider grave questions involving important interests, in the absence of parties really interested, since, though in the particular case there was no suspicion of such a design, such a precedent might allow any suitor to bring up mere speculative questions, and bring before the Courts titles or claims of third persons with which he had no concern, and which might be decided in the absence of, and without a hearing by, those who might be affected by the adjudication.

We do not see very clearly that the present plaintiff can interfere by injunction, and restrain the performance of a ministerial duty cast upon public officers by the law, merely upon the ground that the effect of this might be, at some future time, if certain other things were done, to subject his property to taxation. But as the proper parties are before the Court, we waive this inquiry, merely alluding to it to show that it is still an open question, not passed upon or foreclosed by this decision.

Two points are made by the Appellant.

1. That the Board of Supervisors had no authority to subscribe to the capital stock of the San Francisco and Marysville Railroad Company, even though the Act of the Legislature were constitutional.

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2. That the Act is unconstitutional.

The last proposition was the one mainly argued at the bar. We shall consider it first.

It is not pretended by the counsel that there is any provision of the Constitution which specially interdicts the taking of stock in railroads by a county; nor that there is any provision which forbids this mode adopted by the Act of 1857, of ascertaining or giving effect to its will if it so desire. But it is argued that "such a power is withheld by the spirit, meaning, and true intent, of the Constitution." The generality of such a proposition creates an instinctive suspicion of its soundness. We do not deny that there may be a declared policy in a Constitution, as in a penal law, or system of laws, and that it is not within the power of the Legislature to contravene this policy, although the Act do not oppose the express language of any clause of the instrument. But this policy must be manifested by the terms of the Constitution, fixing with precision the particular rule, and not be gathered by general inference, or vague and uncertain speculation of what the framers of the Constitution designed, but failed clearly to express. Mr. Justice Daniel, of the Supreme Court of the United States, took occasion in a recent case, to disapprove of this course of reasoning, and relaxing something of the austere dignity of that august tribunal, remarked, that if the Judges were to adopt the notion that a law might be declared unconstitutional, because of its supposed repugnancy to the spirit of the Constitution, they ought to employ a rapping medium to procure authentic revelations from that spirit. We expressed our views of this mode of constitutional construction in the case of *People ex rel. Brodie v. Weller*, 11 Cal. 77, and do not deem it necessary to repeat here what we there said.

The argument, more fully developed by the learned counsel, seems to be this: The State is forbidden by the 8th Article of the Constitution, to create debts over three hundred thousand dollars, or to loan its credit, etc.; the counties are component parts of the State; the State cannot authorize the creation of this debt by its separate subdivisions any more than by itself as a whole. If this argument were sound, it would seem to follow that all indebtedness of every sort, incurred by all the counties of the State — the State having exceeded its privileged limit — is

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void. But the radical error of the argument is, this provision only applies to the State as a corporation—as a political sovereign, represented by her law-making power. As such corporation, or sovereign being, she has no subdivisions, for sovereignty is not divisible. She may have political subdivisions—that is, she may permit a portion of her powers of government to be exercised by local agents, who, of course, are her subordinates. But politically considered, geographical or political departments are no more the State, or a part of the State, than a man's land, or his agent, is a part of himself. The intent of this clause of the Constitution is plain enough; it was designed as a check on legislation, and such legislation as might create a charge upon the property of the entire State. But it is not only unwarranted by the words of the Constitution to suppose that counties were included in this inhibition, but it might well have been foreseen that the provision would prove extremely embarrassing, if it did not entirely stop the operations of those local governments. All of them, or nearly all, we believe, have been obliged to go in debt to support themselves; and, besides, the restriction would be wholly impracticable, for how ascertain from time to time whether the aggregate of all this indebtedness passed the limit, and when, or whether, by payments or otherwise, returned within it again? For the question of the validity of any contract or debt would depend upon the general balance of State and county debts or credits. Many cases have come before this Court involving the validity of these debts, but the point has never before been taken; and we think there is not enough of plausibility in it to justify a more detailed exposition of its fallacy.

The same argument, which denies force to this proposition, that this is a State debt, within the meaning of the Constitution, equally refutes the idea that it is a loan of State credit.

The general powers of Government being vested in the Legislature, the power to pass this law must be conceded, unless some constitutional restriction is imposed. We see no restriction in this case. The fact that the State could not take stock in this road does not show that the Legislature could not authorize the county of Yuba to take stock; for the reason that the Constitution says the State shall not subscribe, and does not say that

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the county of Yuba shall not. The restriction goes no further than the language carries it. It comprehends the particular act and party interdicted — none other.

There is no difference in this respect between a municipal corporation and a county. They are both political and geographical divisions of the State. They are both the subjects of its political dominion. The local governments derive their powers from the paramount political head, which, while it cedes to certain local agents certain powers, does not thereby remit its rightful and ultimate dominion; for it would be strange if the political power could appoint agents, and delegate powers of a political nature, and not itself be able to do or regulate what is done or regulated solely by virtue of its permission and authority.

It may be conceded that the Board of Supervisors had no power to make this subscription without the Act of the Legislature. It had no power, because it was not authorized by any law. But this law gave them the authority.

Having seen that there is nothing peculiar to our Constitution which denies effect to this Act, we are brought to consider the validity of the statute on more general principles. The question is not new. It has frequently arisen in other States, and the decisions, we believe, have been uniform. Few questions have been more thoroughly argued or more elaborately considered. In New York, Mississippi, Ohio, Tennessee, Pennsylvania, Virginia, Kentucky, North Carolina, and Indiana, the binding force of such a law has been affirmed.

The case of *The City of Aurora v. West*, (9 Ind. 74,) is so pertinent to the leading points involved here that it deserves particular notice. The Legislature, by Act, incorporating the town of Aurora, empowered the city to "take stock in any chartered company for making roads to said city," and that they might issue bonds, etc.; this they had power to do whenever a majority of the qualified voters of the city required it. The City Council subscribed fifty thousand dollars of the capital stock of the Ohio and Mississippi Railroad Company. The Constitution of Indiana forbade the State going in debt for internal improvements, and also forbade counties, but cities were not expressly forbidden. In that case, as in this, the spirit of the Constitution was invoked by counsel. We extract a portion of the opinion of

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the Court, because it not only fully receives our approbation, but comprises, within a short compass, a full answer to the argument of the Appellants. The Court say:

“The provisions in the new Constitution, then, on the question under consideration, amount to this: they admit the power of the State to construct works of internal improvement, but forbid her, in her State capacity, to create a debt for the purpose. They grant that the power may be conferred upon counties to take stock in companies chartered to construct such works, but require simultaneous payment. They do not prohibit the conferring of the power to take stock upon cities, either by means of cash or credit, or of otherwise aiding these undertakings, but they prohibit the State from assuming any debts cities may contract.

The implication from these provisions, in regard to cities, if there be any, is in favor of their power to take stock, etc. At all events, if they ever possessed the power, that power is left unimpaired. The convention did not consider that an inhibition upon the State to construct internal improvements, in her capacity as such, by means of loans, prohibited her from authorizing other agencies to construct them by such means; hence, they proceeded to impose the restriction as to counties, but did not extend it to cities, though naming them in the same section. The maxim, therefore, that the expression of one excludes the other, must apply.

Suppose the Constitution said that the State should not, by means of her officers and funds, construct railroads, would the provision be construed to prohibit the State from chartering companies for that purpose? It would rather imply that they were to be constructed by such agencies; for an intention to entirely arrest the improvement of the State could not be presumed.

If, then, cities, under the old Constitution, or it would seem under, perhaps, any Constitution, could be invested by the Legislature with the power of aiding works of internal improvement, they still can be invested with such power.

The question, therefore, presents itself, can such power be given to a city? Of the policy of conferring it, we have said all that it becomes us to say, in *The City of Lafayette v. Cox*, (5 Ind.

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R. 38,) to which we refer. Of the capacity to confer it, we have not heretofore expressed an opinion. That is now the question. We have seen that no express constitutional provision stands in the way of granting such power to a city, as we hold that the prohibition in the Constitution upon the Legislature to create a State debt does not prohibit that body from authorizing cities to create debts. This is our construction of the language of the Constitution. But it is insisted that the power is not a legitimate part of the authority of a municipal corporation—that it is outside of the purpose for which such corporations are created—and that this is a sufficient reason for holding them incompetent to receive a grant of such power. But is not this begging the very question to be decided? For what precise purposes are municipal corporations created? How much power, and no more nor no less, is embraced by the idea of a municipal corporation? We have not been satisfactorily enlightened on this point. If the Legislature can confer a little legislative power upon a city for local objects, can it not confer a greater amount for the same objects? It would hardly be said that cities were created simply to establish and enforce police regulations—to maintain order among the citizens. By common custom, they establish sanitary regulations, rules governing markets, etc., and on what principle do they exercise these powers? They go further. They construct streets, sidewalks, bridges, etc. within their limits. They do more. They build wharfs to accommodate their trade and commerce, coming to them from a distance; they construct water-works—going, for the purpose, miles beyond corporate limits. They construct works for lighting, etc. These, and other like powers, though not existing in every one, yet, we believe, all concede may be conferred upon municipal corporations as legitimate, as constitutional, though in their exercise, the citizens are not severally equally benefited in proportion to taxes paid. (See *Lafayette v. Cox*, 5 Ind. R. 38.) Now, if a city may build wharfs, or take stock in companies created to build them, to foster commerce—may take stock in companies chartered to furnish the people with water, light, etc.—why, as a question of power, may it not take stock in companies for the making of highways to facilitate the bringing in of bread, and meat, and fuel, to the citizens? Are not these of nearly as

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much importance to them as water, light, etc. And are not such works, in a special manner, locally advantageous to the city? And where the citizens of a place have seen fit to ask, and the Legislature to grant such power, and the citizens have subsequently, in the prescribed mode, exercised it, no constitutional provision forbidding, a Court, whose province is simply to decide what the law is, not what it should be, can annul such exercise of power. How much local benefit must an improvement confer to bring it within the spirit of a local one? If a city may build a wharf to accommodate its commerce, may it not, also, a depot? May it not build the track of a road through its corporate limits? May it not, then, put in that amount of stock, or bonds, to pay the company the sum the depot and track would cost?"

The Court then goes on to hold, with Chancellor Kent, (Com. 2 Vol. 277,) that public corporations are created by the Government for political purposes as counties, cities, etc.; they are invested with subordinate legislative powers, to be exercised for local purposes, connected with the public good, and such powers are subject to the control of the Legislature of the State. It sums up the argument on this general subject by saying: "The Constitution of the State authorizes the Legislature to create corporations, and imposes no limit as to the powers to be conferred on them, no clause confining their action to objects entirely disconnected with anything outside the corporate limits."

In *Grant v. Courter*, (24 Barb. 233,) the subject is elaborately treated. The question there, was as to the validity of a statute of New York, empowering the towns in the counties through which the Albany and Susquehanna Railroad is located and in progress of construction, to borrow money and subscribe for and purchase the stock of the company. After giving the general course of reasoning adopted in the Indiana case, the Court say: "The Act, consequently, is not repugnant to the provisions of the State Constitution above referred to, nor is it without the general grant of legislative power. The precise question at issue, as to the power of the Legislature to authorize towns, cities, and counties, to subscribe for railroad, turnpike road, or bridge stocks, has been decided repeatedly in various States of the Union; and the final decision in each of them, has upheld the law as constitutional. The Constitutions of several of these

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States contain similar provisions for the protection of private property to those above alluded to. The only case in contradistinction to which we have been referred, is that of *Clarke v. The City of Rochester*, (13 How. Pr. 204,) decided at special term, and in which Judge Allen, in his able opinion, rests the decision in part upon other grounds, to which allusion will hereafter be made." (*Sharpless v. Mayor of Philadelphia*, 21 Penn. R. 147; *Commonwealth v. McWilliams*, 11 Id. 62; *The Cincinnati, etc. R. R. Co. v. Commissioner of Clinton County*, 1 Ohio St. 77; *Cass v. Dillon*, 2 Id. 607; *Talbot v. Dent*, 9 B. Mon. 526; *Slack v. The Maysville R. R. Co.*, 13 Id. 1; *Nicoll v. Mayor of Nashville*, 9 Humphrey, 252; *Klein v. Alton R. R. Co.* 13 Illinois, 516; *Shaw v. Dennis*, 5 Gilman, 405; *City of Bridgeport v. Housatonic R. R. Co.* 15 Conn. 475; *Goddin v. Crump*, 8 Leigh, 120; *Harrison Justices v. Holland*, 3 Grattan, 247; *Taylor v. Commissioners of Newbern*, 2 Jones, 141; see, also, *Thomas v. Leland*, 24 Wend. 65; *People v. Mayor of Brooklyn*, 4 Comst. 419; *White v. The Syracuse and Utica R. R. Co.* 14 Barb. 559.)

The Court consider the point made, that the fact that the Act was not to take effect except after a vote of two-thirds of the electors, was unconstitutional as a limitation upon legislative power, and hold that there is nothing in it — the Legislative Act being complete when exercised, and the effect of the Act only controlled by the condition. The same thing is held in 21 Penn. 189; 1 Ohio St. 77.

The case of *Benson v. Mayor of Albany* involved the same question, and was decided the same way. (24 Barb. 253.) The Constitution of New York contains a clause similar to our own in regard to municipal corporations, directing the Legislature to restrict the power of municipal corporations to tax, assess, borrow money, contract debts, etc. But this provision was considered as not interfering with their power to subscribe for stock, tax, etc.

Many more cases might be cited, but it is unnecessary. The decisions, with a single exception — and that case overruled — seem to be all one way.

With the policy of such laws, as the Courts of Indiana and New York remark, we have nothing to do. Our duty is to declare the law as we find it.

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The result of all the cases is, that the Legislature has a right to authorize a local tax for the purpose of internal improvements; that it may authorize the local authorities to impose the tax; that this authority may be given upon petition or without it, or by or without a submission of the proposition to the people; and that it is not essential that the improvement should be within, or confined to, the locality taxed, and that a subscription for stock, to be paid for by taxation, is a valid contract to pay it.

This leaves but one question open; and we think there is nothing in it requiring extended notice. It has been seen that the Act allows the subscription to be made to the capital stock of any company "for the purpose of constructing any railroad, by which a railroad connection shall be formed between the city of Marysville and the city of Benicia, or any point on the Sacramento River." The Committee appointed must decide whether this road is a proper one to effect their object. We do not question that it answers the end intended, and that a subscription to it would give effect to the intent of the Act of the Legislature. The error of the Appellant's argument is, in supposing that the subscription is to be to a railroad company formed for the express and only purpose of connecting Marysville and one of these termini; whereas the truth is, the subscription is to any railroad by which a railway connection shall be formed between Marysville and one of these points. The company receiving the subscription need not be constituted for this express and only purpose; but the effect of their work must be to make this connection. The road of this company commences at a point in the city of Marysville, and continues on from thence, through the county of Sutter, to a point on the Sacramento River at Knight's Ferry, forming a railroad connection between the city of Marysville and the Sacramento River, at Knight's Ferry, thence to Vallejo, thence by steamboats to San Francisco. That the railroad is continued further, or that the work goes beyond this in any other respect, is no objection, as it completely answers the description in the Act, so far as the description goes, and the statute designed.

Judgment affirmed.

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BRANCH TURNPIKE COMPANY v. BOARD SUPERVISORS
YUBA COUNTY.

In a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded.

APPEAL from the Tenth District.

F. L. Hatch, for Appellant.

Bryan & Filkins, Winans and W. T. Wallace, for Respondent.

TERRY, C. J., delivered the opinion of the Court — BALDWIN, J. concurring.

In this case the demurrer should have been sustained for want of a sufficient statement of equities in the bill.

Plaintiff complains that it is an incorporated company under the law, and have, by virtue of their acts as corporators, acquired certain vested rights to collect and fix the rate of tolls to be charged over their road. That defendants, in violation of those rights, and without authority of law, are about to pass an order fixing the rate of tolls to be charged on said road, which order may entirely ruin plaintiffs, and cause them to lose the money invested in their enterprise.

These allegations are altogether insufficient to warrant the interference of a Court of Equity. An injunction is never granted unless the bill shows some vested right in the plaintiff, which is likely to suffer great or irreparable injury from the act complained of. The mere allegation of such injury is insufficient. The facts stated must satisfy the Court that such apprehension is well founded. (6 John. Ch. 19; 2 Dallas, 405; 9 Gill & John. 468.)

No such facts are stated by the plaintiff. In the first place, for aught that appears in the bill, it may have been the design of the Supervisors to increase the rate of tolls charged, and thus enhance, rather than diminish, the revenue of the corporation. Secondly, if the allegation of want of authority in defendants be true, any order which they might make in the premises would be a mere nullity, and could in no way prejudice the rights of plaintiff. On the contrary, if this allegation be not true, defendants should not be restrained from performing a plain duty.

Judgment reversed and bill dismissed.

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A DECREE fairly entered by consent of an Attorney, is as binding upon his client as a decree entered after resistance.

The authority of an Attorney, who appears, will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the Attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmixd with any fault or negligence of either the party or his Attorney.

It seems that the appearance of an Attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground.

If the Attorney assents to the decree, the assent need not be made in open Court by words spoken by the Attorney. It may as well be made by stipulation out of Court. For it is the fact that is effectual, not the mere mode of its authentication to the Court. If that assent exist at the time of the action of the Court, or the entering of the decree, it is enough.

When a decree is made by consent of the Attorney, it is no ground of error that the decree embraces land not in the complaint; and, even if error, the remedy is by appeal.

APPEAL from the Twelfth District.

On the 31st day of July, 1854, Edmund Laffan filed a bill in equity against Isaac E. Holmes and plaintiff, claiming that Holmes had been left by him as his agent in charge of certain real estate in the city of San Francisco; that he had, in violation of his trust, caused said property to be sold on execution against him, Laffan, and had become the purchaser thereof, and afterwards had conveyed the same to the present plaintiff, James G. Holmes, who had united with the said Isaac E. Holmes, his brother, to defraud the said Laffan — and the bill prayed an account of rents and profits, and a reconveyance of the property. To this bill the two defendants made separate answers. The defendant, Isaac E. Holmes, denied all the equities of the bill; averred that he had acted with the best faith to said Laffan; that he had bought the property in question with the full knowledge and acquiescence of Laffan, who relinquished and abandoned it to him, and had declined to redeem the most valuable portion when full opportunity was offered him to do so. The defendant, James G. Holmes, the present plaintiff, answered that he had purchased from his codefendant for valuable consideration and without any notice whatsoever of any fiduciary relations between Isaac E. Holmes and Laffan. The defendants were both residing in Charleston, South Carolina, and were absent from the State of California. The answer of the defendant, Isaac E. Holmes, was signed by him *propria persona*. Mr. Louis Blanding appeared as the Attorney of James G. Holmes, the present plaintiff. When

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the pleadings were in this position, and before the case was brought to trial, on the 8th of June, 1855, a certain instrument purporting to be a compromise of all matters in dispute between the parties to the said action was filed in the cause, executed by Laffan in person, on the one part, and on the other part by Hall McAllister, as professed Attorney in fact of the defendant, Isaac E. Holmes, and by Wm. Blanding as professed Attorney in fact of plaintiff; and on the 27th of the month an instrument supplementary to the former, and executed by Wm. Blanding for both defendants, was filed in the cause. These instruments surrendered to Laffan all the property claimed by him in the suit, and agreed to transfer to him other property belonging to plaintiff, which had never belonged to, or been claimed by Laffan, and they provided for the entry of a decree, directing a conveyance by defendants to Laffan of all the property mentioned in them. On the 18th of July, 1855, a decree was accordingly entered, ordering the conveyance to Laffan of all the property described in the complaint, and other property not therein claimed, and which had never belonged to Laffan. The decree purports to have been made "by consent of parties" "with the consent of the defendants by their respective Attorneys in open Court." This decree the present bill prays may be set aside, and that the plaintiff may be allowed to make his defense to that action, according to the averments of his answer therein. The bill details at length the original transactions between Isaac E. Holmes and Laffan, and shows no fraud on the part of the agent.

The bill then alleges that the instruments of compromise upon which the decree was founded were made without authority and were void; that they were made by the friends of the defendant, I. E. Holmes, and from good motives, but with an imperfect knowledge of the facts, and without authority. And as to the consent of the Attorney-at-Law, recited in the decree, it is alleged, "that the said Louis Blanding, the Attorney of record of this plaintiff, defendant in that action, had no authority to consent to the rendering of said decree, nor was he in fact, as recited in said decree, present in Court and consenting to the rendering of said decree, nor did he in fact exercise his judgment on behalf of this plaintiff in said matter, but having a great regard for the character and reputation of the said I. E.

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Holmes, and being misled in reference thereto by an imperfect acquaintance with the true facts of the controversy with the said Laffan, which facts he made diligent efforts to ascertain, but could not learn, he neglected and omitted the strong ground of defense which this plaintiff had in law and equity to said action, and allowed the said Wm. Blanding and Hall McAllister to compromise and arrange the whole matter as they supposed best for the said I. E. Holmes, altogether overlooking the legal position and defense of this plaintiff."

For further facts see opinion.

Defendants and intervenors demurred, generally, to the complaint. The demurrers were sustained, and final decree was entered dismissing the complaint. Plaintiff appeals.

Whitcomb, Pringle & Felton, for Appellant, argued that the decree should be set aside because: 1st. The consent or will of the party was not in fact given by his counsel, and hence that the decree was rendered through a mistake of fact. 2d. That even if the counsel consented, he was not authorized to bind plaintiff by such consent, and hence there was no consent of the party.

1st. The consent of counsel was not in fact given. Hall McAllister and Mr. Blanding assumed the settlement of the controversy with Laffan, and made a written agreement, by which all the property that Laffan claimed was given up to him; and Louis Blanding, the Attorney-at-Law, believing these gentlemen to be acting in the best interest of I. E. Holmes, whose real position he did not understand, gave up to them the management of the whole matter and allowed them to close the compromise without interposing the true defense of his own client. Thus there was not actual consent to the decree by Louis Blanding, but rather an abandonment of the case, and the pleadings were in such position that nothing short of an actual consent of counsel could justify the decree. There were no proofs; there was no default; on the contrary, there was a denial of all the equities charged in the bill.

2d. But we claim that such consent as was necessary here is not within the scope of the ordinary powers of counsel.

And again, that it was not within the authority which the counsel produced to justify his action, or rather non-action, here.

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(*Howe v. Lawrence*, 2 Zabriskie N. J. 99; *Derwort v. Loomer*, 21 Conn. 245, 256; *Lamson v. Bettison*, 7 Eng. 401; 25 Penn. 264; *Vail v. Adm'r of Jackson*, 15 Vt. 314, and Cases cited; *Garvin v. Lowry*, 7 S. & M. 24; 3 How. 314; 2 J. J. Marsh. 69, 70, 71; *Smith v. Bossard*, 2 McCord's Ch. 409; *Shaw v. Riddle*, 3 How. Pr. 246; *Gaillard v. Smart*, 6 Cow. 386; *Connoss v. Challes*, 17 L. J. Exch. 319; *Swinfen v. Swinfen*, 87 Eng. C. L. 369; *Holker v. Parker*, 7 Cranch, 436; *Savary v. Chapman*, 11 Adol. & El. 829.)

But the Respondents contend, that even admitting the above, there is no relief against a consent decree unless it were obtained by fraud. And that the remedy the Appellant has invoked here, is unknown to equity proceedings; that a bill to set aside or impeach a decree can only be brought for fraud in obtaining the decree.

I. Undoubtedly, a consent decree cannot be set aside by bill of review, appeal, or rehearing, because there is, strictly speaking, no error in a consent decree.

II. But the Respondents contend that even an original bill can impeach a decree, whether on consent or otherwise, only in the case of fraud.

The books speak of a bill to impeach a decree for fraud, because such is the prevailing character of such original bills, fraud being the chief and most usual ground of equity jurisdiction in such cases, but that the same kind of relief is in fact available in the kindred cases of accident and mistake. We claim that there is relief in equity against a consent alleged, which was not in fact given, the allegation being made by accident or mistake, or against a consent which was actually given through accident or mistake.

This decree is only a part of an executory contract. The instruments of compromise provide for the surrendering up of a large part of the plaintiff's property, for the entering of a decree to enforce part of the agreement, and for conveyance by the parties of the lots in question; some of these lots are included in the decree, though not subjects of the action, and some of them are not included in the decree. The compromise proceeds to the entry of the decree, when the parties repudiate it, and declare

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that they are not bound by the compromise. They are clearly entitled to set aside the uncompleted agreement because there was no authority to execute it; they are not bound to convey the property not mentioned in the decree; are they bound to convey the property improperly embraced in the decree because not the subject of the action, or are they only bound to convey the property more regularly embraced in the decree because the subject of the action? (See *Anderson v. Woodford*, 8 Leigh, 316; *Reid v. Clark*, Speer's Eq. 348; *Piche v. Emerson*, 5 N. H. 394; 1 Vesey, 92; *Smith v. Bossard*, 2 McC. Ch. 409.)

F. J. Lippett, also for Appellant.

I. The decree may be impeached by original bill, without charging fraud.

1. The term "original bill to impeach a decree for fraud" is a mere *nomen generalissimum*; there are bills that are classed in this category in which no fraud is alleged. (Story's Eq. Pl. Seca. 427, 428, and Note 1.) 2. Courts of Equity will open a decree or other proceeding taken against a party by mistake or surprise, as well as fraud. (1 Vernon, 131, Case 117; *Parker v. Dee*, 3 Swanston, 534, Note; *Smith v. Bossard*, 2 McCord's Ch. 409; *Kemp v. Squire*, 1 Vesey, Sen. 205, 206, 207; *Denton v. Noyes*, 6 Johns. 296, 301, 304, 306; *Brooks' Adm'r v. Love*, 3 Dana, 7; *Town of Alton v. Town of Gilmanton*, 2 N. H. 521, 522; *Pike v. Emerson*, 5 Id. 394; *Decarters v. Lafarge*, 1 Paige, 576; *Millspaugh v. McBride*, 7 Paige, 512; *Erwin v. Vint*, 6 Munford, 267-270; *Callaway v. Alexander*, 8 Leigh, 118, 119; *Anderson v. Woodford*, 8 Leigh, 316, 326, 328.) 3. By Section 68 of the Practice Act, a party is relievable "from a judgment, etc. taken against him through his mistake, inadvertence, surprise, or excusable neglect;" and no time is limited for the application. (*People v. Lafarge*, 3 Cal. 130, 134, 135, 136.)

II. Even if it were true that a decree can be impeached only for fraud, this would not affect the present bill, which is to set aside certain instruments of compromise, which the plaintiff never authorized, and under which the decree in question was entered.

III. A decree may be opened, though entered by consent of Counsel.

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1. The consent to the entry of the decree was not actually given by the plaintiff's counsel, Louis Blanding, but by his brother, who had assumed to act for the plaintiff. 2. It is doubtful whether it be within the scope of the ordinary authority of a counsel to consent to a special and final decree in equity. (*Beach v. Shaw*, 4 Barb. 294.) 3. The agency of an Attorney or counsel is limited to the prosecution or defense of the suit. He is clothed with all incidental powers which may be requisite for the successful fulfillment of the object of his agency; but not to make a compromise, nor, withdrawing the suit from the determination of the Court, and putting himself *in loco judicis*, to consent to a final decree, definitively settling the rights of his client. (*Howe v. Lawrence*, 2 Zabriskie, N. J. 106; *Holker v. Parker*, 7 Cranch, 452-455; *Vail v. Jackson's Administrator*, 15 Vermont, 321; *Smith v. Bossard*, 2 McCord's Ch. 409; *Mayor v. Foulkrod*, 4 Wash. C. C. 511; *People v. Lamborn*, 1 Scam. 124; *Filby v. Miller*, 25 Penn. State, 267; *Commissioners of Accounts v. Rose*, 1 Desausa. 469-470; *Kimball v. Gearheart*, 12 Cal. 27.)

Moreover, certain other property, not claimed in the suit, was stipulated to be also given up to Laffan, and although this property is not mentioned in the decree, the plaintiff's title to it is clouded by the agreement so long as it is permitted to stand. 4. Granting that a decree made by consent of counsel will not be set aside because the consent was not authorized by his client, it is no answer to the bill, which does not ask relief on this ground, but on the ground that the counsel's consent was given, not only under circumstances which prevented a fair use of his judgment, but under a supposed compromise which had never been made. If the plaintiff himself had consented to the decree, under a mistake as to an important fact, it would be a sufficient ground to set aside. 5. That courts may open decrees made by mistake of counsel, appears from authority, as well as principle. (*Beach v. Shaw*, 4 Barb. 293, 294, 295; *Denton v. Noyes*, 6 Johns. 301, 304, 306; *Anderson v. Woodford*, 8 Leigh, 316, 326, 328; *Swinfen v. Swinfen*, 87 Eng. C. L. 364; *London Times* of July 29th, 1859.)

Hoge & Wilson, and *D. Rogers*, for Respondents, argued: I. That the complaint was not good as a bill of review. New mat-

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ter is not pretended, and any error of law is barred by time. (Story's Eq. Pl. 450-455; 1 Hop. 104.) II. The complaint is not good as an original bill. A decree cannot be impeached by an original bill, except on the ground of fraud. (*Davoe v. Fanning*, 4 Johns. Ch. 202, 203, and Cases there cited; *White v. Bank U. S.* 7 Ohio, 528; 6 and 7 Cond. Ohio, 233; *Brooks, Adm'r v. Love*, 3 Dana, 7, and Cases cited; Story Eq. Pl. 483, Sec. 426; Id. 647, Secs. 638, 639; 3 Dan'l Ch. Pr. 1724; Id. 1785; *Gifford, Adm'r v. Thorn et al.* 1 Stockton, N. J. 722, etc.)

This case is like *Barnett et al. v. Kilbourne*, (3 Cal. 327,) and the language of the Court there is appropriate to the case at bar. It is, in reality, "only an application for a new trial," and the "ignorance of counsel," or "insufficient conduct in the prosecution of the first suit, do not constitute grounds for relief in chancery." III. That the Attorneys had the power to consent to the decree on the original suit, and that no relief can be granted on account of their negligence, appears from the following authorities:

"There is no difference between decrees entered by consent, and decrees after argument. If fairly entered, they are equally valid and operative, so long as they remain in force." (*French v. Shotwell*, 5 Johns. Ch. 568; S. C. in Ct. of Errors, 20 Johns. 668; *Bradish v. Magee*, Amb. 229; *Costa v. Clark*, 3 Edw. Ch. 410; *Harrison v. Rumsey*, 2 Ves. Sen. 488; 1 Hoff. Ch. Pr. and cases there cited; *Descartiers v. La Forge*, 1 Paige Ch. 574; *Monnell v. Lawrence*, 12 Johns. 584; *Descartiers v. La Forge*, 1 Paige Ch. 574; *Pierce v. Perkins*, 2 Dev. Eq. 252; *Story v. Hawkins et al.* 8 Dana, 13; see, also, *Talbot v. McGee*, 4 Mon. 377; *Glass v. Thompson et al.* 9 B. Mon. 237; *Farmers' Trust and Canal Bank v. Ketchum et al.* 4 McLean, 120; *Town of Alton v. Town of Gilmanton*, 2 N. Ham. 520; *Pike v. Emerson*, 5 Id. 393; *Hanson v. Hoitt*, 14 Id. 56; *Kent v. Richardt*, 3 Maryland Ch. Dec. 392; *Hench v. Todhunter*, 7 Har. & Johns. 275; *Thornburg v. McAulay*. 2 Md. Ch. Dec. 427; *Greenleaf v. McDowell*, 4 Iredell Eq. 484; *Grice v. Rix*, 3 Dev. 64; *Suydam v. Pitcher et al.* 4 Cal. 281; *Markley v. Rand*, 12 Id. 275; *Gifford, Adm'r v. Thorn et al.* 1 Stockton, N. J. C. 722, 723.)

IV. Counsel say: "That this consent or will of the party was

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not in fact given by his counsel, and hence that the decree was rendered through a mistake of fact, and should be set aside."

The case of *Atkinson v. Monks*, (1 Cowen, 709,) furnishes an answer to this proposition. "The decree, in everything that respects the reference, purports to have been made on consent. If the Chancellor was mistaken in supposing Atchinson's counsel to have consented to it, application should have been made to him to have the mistake as to the consent corrected. That course not having been pursued, this Court cannot try the question whether there was a mistake or not. We must take the facts to be as stated in the decree, and entirely disregard the suggestion of a mistake. No appeal or rehearing lies from a decree made by consent." (2 Madd. Ch. Pr. 577; *Bradish v. Magee*, Amb. 229.)

But the counsel cites the 68th Section of the Practice Act, (*People v. Lafarge*, 3 Cal. 130,) and asserts that "an application after the term, can properly be made only by original bill." That case was a bill in equity, to set aside a judgment at law for fraud. Judge Heydenfeldt treated it as the ordinary bill in equity on that ground, but Judge Wells treated it as a motion, and maintained that it could be made after a term elapsed. In *Baldwin v. Cramer et al.* (2 Cal. 583,) it was expressly held, "that after the expiration of a term of the District Court, no power remains in it to set aside a judgment or grant a new trial." The latter cases are all the same way. (See *Suydam v. Pitcher et al.* 4 Cal. 280, 281; *Shaw v. McGregor*, 8 Id. 521.)

But the decree in this case recites that, "This cause coming on for hearing and trial, by consent of the parties, by the Court, and the same being considered by the Court," etc. From this it may be implied that a trial was had, and the decree of the Court rendered after deliberation on the evidence. The fact of a consent to a decree would not vitiate it, if otherwise good. The decree imports a verity, and all the intendments are those that support it.

"Where there are two presumptions, both equally reasonable, arising upon the face of the record, this Court is bound to adopt that which will maintain the judgment of the Court below." (*Whipley v. Flower*, 6 Cal. 632; see, also, *Nelson v. Lemmon*, 10 Id. 49; *Girwall v. Henderson*, 7 Id. 290; *Ford v. Halton*, 5 Id.

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521; *White v. Abernethy et al.* Id. 3, 99; *Blaney v. Findley*, 2 Black. 338; *Evans v. McMahon*, 1 Ala. 45; *Ellis v. Dunn*, 3 Ala. 632; *Ice v. Manning*, 3 Id. 121; *Dearing v. Smith*, 4 Id. 432; *Gary v. Wood*, Id. 296.)

We submit that: 1. The decree sought to be impeached is good as rendered on "a hearing and trial." 2. It is good as a consent decree. 3. That the counsel for the respective parties did, in fact, and without mistake, consent. 4. That counsel may consent to a decree that will bind their client. 5. If there was a mistake in supposing counsel did consent, that it should have been corrected on motion at the same term of Court, and it is now too late. 6. That the complaint is not a bill of review. 7. That no decree can be impeached by an original bill, except for fraud.

V. As to the compromise outside of the decree, this Court has nothing to do with it, and no jurisdiction concerning it. If the "professed Attorneys in fact" had no authority to make the agreement, it does not bind the brothers Holmes: they have not yet conveyed, and have the title in their names. If out of possession, they can recover in ejectment. If in possession, they can file a bill to quiet title.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This is a bill filed to vacate a decree rendered in a case of *Edmund Laffan v. The Plaintiff and others*, on the 18th July, 1855.

It is not a bill of review technically so called, for it is not brought either for error appearing on the record, or upon the discovery of any new matter. (Story's Eq. Plead. 450.)

The bill charges that, on the 16th December, 1851, Edmund Laffan was the owner of certain real estate in the city of San Francisco, and that Isaac E. Holmes was his agent and Attorney; that Holmes became, in various ways, the owner of the property, and conveyed it to the plaintiff; that Laffan sued for this property, alleging that Holmes was his agent, and bought in violation of his trust for his own use; that the fact was that Holmes was fully authorized and justified in buying the property, of which he produces proof of letters of Laffan and otherwise; that a decree, a copy of which appears as an exhibit, was

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BRANCH TURNPIKE COMPANY v. BOARD SUPERVISORS
YUBA COUNTY.

IN a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded.

APPEAL from the Tenth District.

F. L. Hatch, for Appellant.

Bryan & Filkins, Winans and W. T. Wallace, for Respondent.

TERRY, C. J., delivered the opinion of the Court — **BALDWIN, J.** concurring.

In this case the demurrer should have been sustained for want of a sufficient statement of equities in the bill.

Plaintiff complains that it is an incorporated company under the law, and have, by virtue of their acts as corporators, acquired certain vested rights to collect and fix the rate of tolls to be charged over their road. That defendants, in violation of those rights, and without authority of law, are about to pass an order fixing the rate of tolls to be charged on said road, which order may entirely ruin plaintiffs, and cause them to lose the money invested in their enterprise.

These allegations are altogether insufficient to warrant the interference of a Court of Equity. An injunction is never granted unless the bill shows some vested right in the plaintiff, which is likely to suffer great or irreparable injury from the act complained of. The mere allegation of such injury is insufficient. The facts stated must satisfy the Court that such apprehension is well founded. (6 John. Ch. 19; 2 Dallas, 405; 9 Gill & John. 468.)

No such facts are stated by the plaintiff. In the first place, for aught that appears in the bill, it may have been the design of the Supervisors to increase the rate of tolls charged, and thus enhance, rather than diminish, the revenue of the corporation. Secondly, if the allegation of want of authority in defendants be true, any order which they might make in the premises would be a mere nullity, and could in no way prejudice the rights of plaintiff. On the contrary, if this allegation be not true, defendants should not be restrained from performing a plain duty.

Judgment reversed and bill dismissed.

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- A DECREE fairly entered by consent of an Attorney, is as binding upon his client as a decree entered after resistance.
- The authority of an Attorney, who appears, will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the Attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmingled with any fault or negligence of either the party or his Attorney.
- It seems that the appearance of an Attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground.
- If the Attorney assents to the decree, the assent need not be made in open Court by words spoken by the Attorney. It may as well be made by stipulation out of Court. For it is the fact that is effectual, not the mere mode of its authentication to the Court. If that assent exist at the time of the action of the Court, or the entering of the decree, it is enough.
- When a decree is made by consent of the Attorney, it is no ground of error that the decree embraces land not in the complaint; and, even if error, the remedy is by appeal.

APPEAL from the Twelfth District.

On the 31st day of July, 1854, Edmund Laffan filed a bill in equity against Isaac E. Holmes and plaintiff, claiming that Holmes had been left by him as his agent in charge of certain real estate in the city of San Francisco; that he had, in violation of his trust, caused said property to be sold on execution against him, Laffan, and had become the purchaser thereof, and afterwards had conveyed the same to the present plaintiff, James G. Holmes, who had united with the said Isaac E. Holmes, his brother, to defraud the said Laffan — and the bill prayed an account of rents and profits, and a reconveyance of the property. To this bill the two defendants made separate answers. The defendant, Isaac E. Holmes, denied all the equities of the bill; averred that he had acted with the best faith to said Laffan; that he had bought the property in question with the full knowledge and acquiescence of Laffan, who relinquished and abandoned it to him, and had declined to redeem the most valuable portion when full opportunity was offered him to do so. The defendant, James G. Holmes, the present plaintiff, answered that he had purchased from his codefendant for valuable consideration and without any notice whatsoever of any fiduciary relations between Isaac E. Holmes and Laffan. The defendants were both residing in Charleston, South Carolina, and were absent from the State of California. The answer of the defendant, Isaac E. Holmes, was signed by him *propria persona*. Mr. Louis Blanding appeared as the Attorney of James G. Holmes, the present plaintiff. When

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the pleadings were in this position, and before the case was brought to trial, on the 8th of June, 1855, a certain instrument purporting to be a compromise of all matters in dispute between the parties to the said action was filed in the cause, executed by Laffan in person, on the one part, and on the other part by Hall McAllister, as professed Attorney in fact of the defendant, Isaac E. Holmes, and by Wm. Blanding as professed Attorney in fact of plaintiff; and on the 27th of the month an instrument supplementary to the former, and executed by Wm. Blanding for both defendants, was filed in the cause. These instruments surrendered to Laffan all the property claimed by him in the suit, and agreed to transfer to him other property belonging to plaintiff, which had never belonged to, or been claimed by Laffan, and they provided for the entry of a decree, directing a conveyance by defendants to Laffan of all the property mentioned in them. On the 18th of July, 1855, a decree was accordingly entered, ordering the conveyance to Laffan of all the property described in the complaint, and other property not therein claimed, and which had never belonged to Laffan. The decree purports to have been made "by consent of parties" "with the consent of the defendants by their respective Attorneys in open Court." This decree the present bill prays may be set aside, and that the plaintiff may be allowed to make his defense to that action, according to the averments of his answer therein. The bill details at length the original transactions between Isaac E. Holmes and Laffan, and shows no fraud on the part of the agent.

The bill then alleges that the instruments of compromise upon which the decree was founded were made without authority and were void; that they were made by the friends of the defendant, I. E. Holmes, and from good motives, but with an imperfect knowledge of the facts, and without authority. And as to the consent of the Attorney-at-Law, recited in the decree, it is alleged, "that the said Louis Blanding, the Attorney of record of this plaintiff, defendant in that action, had no authority to consent to the rendering of said decree, nor was he in fact, as recited in said decree, present in Court and consenting to the rendering of said decree, nor did he in fact exercise his judgment on behalf of this plaintiff in said matter, but having a great regard for the character and reputation of the said I. E.

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Holmes, and being misled in reference thereto by an imperfect acquaintance with the true facts of the controversy with the said Laffan, which facts he made diligent efforts to ascertain, but could not learn, he neglected and omitted the strong ground of defense which this plaintiff had in law and equity to said action, and allowed the said Wm. Blanding and Hall McAllister to compromise and arrange the whole matter as they supposed best for the said I. E. Holmes, altogether overlooking the legal position and defense of this plaintiff."

For further facts see opinion.

Defendants and intervenors demurred, generally, to the complaint. The demurrers were sustained, and final decree was entered dismissing the complaint. Plaintiff appeals.

Whitcomb, Pringle & Felton, for Appellant, argued that the decree should be set aside because: 1st. The consent or will of the party was not in fact given by his counsel, and hence that the decree was rendered through a mistake of fact. 2d. That even if the counsel consented, he was not authorized to bind plaintiff by such consent, and hence there was no consent of the party.

1st. The consent of counsel was not in fact given. Hall McAllister and Mr. Blanding assumed the settlement of the controversy with Laffan, and made a written agreement, by which all the property that Laffan claimed was given up to him; and Louis Blanding, the Attorney-at-Law, believing these gentlemen to be acting in the best interest of I. E. Holmes, whose real position he did not understand, gave up to them the management of the whole matter and allowed them to close the compromise without interposing the true defense of his own client. Thus there was not actual consent to the decree by Louis Blanding, but rather an abandonment of the case, and the pleadings were in such position that nothing short of an actual consent of counsel could justify the decree. There were no proofs; there was no default; on the contrary, there was a denial of all the equities charged in the bill.

2d. But we claim that such consent as was necessary here is not within the scope of the ordinary powers of counsel.

And again, that it was not within the authority which the counsel produced to justify his action, or rather non-action, here.

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The power of Attorney is as follows:

"Know all men by these presents, that I, John Hastings, of San Francisco City and County, State of California, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, J. P. Haven and J. N. Briceland, separately and jointly, my true and lawful Attorneys for me, and in my name, place, and stead, to collect, receive, and receipt, for any sum or sums of money due, or that hereafter may become due, as my proportionate share of rents or other profits in and of a certain property contained within the parallelogram bounded by Sansome and Montgomery, Chestnut and Lombard streets, in the city of San Francisco, to represent me and my said interest therein, and to cast my vote in relation thereto in common with my own cotenants and copartners therein, in all matters relating to the administration or improvement of said property, and to do and perform any and every act or thing relating to, and concerning my interest aforesaid, excepting the sale or hypothecation thereof, as I, if personally present, might, could, or would, do in the premises, giving and granting unto my said Attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present; with full power of substitution and revocation, hereby ratifying and confirming all that my said Attorney, or my substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof, I have hereunto set my hand and seal, the first day of August, in the year one thousand eight hundred and fifty-three.

JOHN HASTINGS, [L. s.]

Signed, sealed, and delivered, in the presence of E. V. Joice."

F. J. Lippitt, for Appellant, said the power of Attorney from Hastings to Haven and Briceland did not authorize them to borrow money, or to consent to any alteration in the plan of the building. (*Dunlap's Paley's Agency*, 192; *Billings v. Morrow*, 7 Cal. 174; *Pott v. Bevan*, 47 E. C. L. 338; 7 Mees. & Wels. 595; 47 E. C. L. 33; 10 Wend. 680; Story on Notes, Sec. 14; 10 Met.

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168; 23 Pick. 304; 8 Met. 458, 459; 6 Black. 370; 10 Met. 168; 1 Sand. 277; 21 E. C. L. 64.)

The case of *Adams & Co. v. Hastings*, was lost in the Superior Court by the defendants' neglect.

1. On the trial of the cause now before the Court, there was evidence to warrant a jury in finding that Hastings had communicated the facts of his defense and the names of the witnesses who could prove them, to the defendants as his Attorney and counsel, before the suit of *Adams & Co.* was tried. A negative pregnant is an admission. (*Baker v. Bailey*, 16 Barb. 56.) The defendant "never heard of certain matters before a certain time," is a negative pregnant that he did afterwards. (*Walker v. Walker*, 2 Atk. 100.) An evasion is an admission. (*McC Campbell v. Gill*, 4 J. J. Marsh. 90, 91; 3 Greenl. Ev. Sec. 276.) 2. The failure to prove the facts was owing to the defendants' neglect. The only point raised by the defendants on the trial was the sufficiency of the power of Attorney on its face to authorize the borrowing of money. Defendants were guilty of neglect, if they knew enough to put them on inquiry. (*You. & Col.* 271, 280.)

II. By their neglect and misconduct defendants lost Hastings a new trial. Again, the Supreme Court reversed the judgment against Hastings; but the defendants, as Hastings' Attorneys, sacrificed the new trial, to which he had become entitled, by a stipulation that the judgment should stand as affirmed.

III. If, by defendants' neglect, a new trial was lost, they are liable in this action for all damages caused by the judgment, unless they prove affirmatively that a new trial would not have varied the result. (*Swannell v. Ellis*, 8 E. C. L. 542; *Bourne v. Diggles*, 18 Id. 652; *Godefroy v. Jay*, 20 Id. 190, 191.)

IV. If Hastings had had a new trial, apart from his defense to the entire claim, he would have been able to reduce the interest of three per cent. per month from the date of the note to ten per cent. per annum, which would have saved him seven thousand three hundred and forty-six dollars and eighty-seven cents a year, or upwards of twenty-two thousand dollars by the time the judgment was satisfied.

Winans, also, for Appellant, discussed the effect of the stipula-

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tion referred to in the opinion of the Court, insisting that it embraced an appeal from a judgment as well as from an order overruling a motion for new trial. (1 Taunton, 417; *Goodtitle v. Bailey*, Cowper, 600; *Parkhurst v. Smith*, Willis, 332; 2 Blac. Comm. 279; 1 Scott, N. B. 309; 19 Vt. 202; 13 How. Pr. 23; 2 Zabriskie, 104.)

Yale, for Respondents. First, as to the motion to reject the statement. The stipulation had reference only to the appeal taken from the order denying the motion for a new trial. By the terms of the stipulation itself the statement is necessarily associated with the motion for the new trial, for which it was prepared. No stipulation relating to an appeal should be construed to refer to more than one appeal. The legal inference is, that the parties treated of the immediate matter before them, not to any number of appeals growing out of the same case. The immediate appeal referred to here, was the appeal from the motion denying the new trial. On a dismissal of that appeal the stipulation ceased to operate.

On the merits, Mr. Yale argued the following propositions:

1st. The legal obligation imposed upon the defendants, by engaging to defend the action of *Adams & Co. v. Hastings*, was to exercise reasonable diligence and skill in their profession as Attorneys and Counselors-at-Law in the defense of said action. (*Pennington's Ex'rs v. Yell*, 6 English, 227-229; *Evans v. Watrous*, 2 Porter, Ala. 210; *Suydam v. Vance*, 2 McLean, 102; *People v. Yaldon*, 4 Burrows, 2060; *Lamphier v. Phipos*, 8 Car. & Payne, 479; *Lynch v. Commonwealth*, 16 S. & R. 370; *Godefroy v. Dalton*, 6 Bing. 460; 19 E. C. L. 135.)

2d. The presumption of law is, that the defendants did exercise reasonable diligence and skill in their profession of Attorneys and Counselors-at-Law, in said case, until the contrary is established by evidence. (*Pennington's Ex'rs v. Yell*, 6 Eng. Ark. 228.)

3d. "If from evidence, there was no subsisting defense to the suit of *Adams & Co. v. Hastings*, if no just and proper defense could have been set up in said action, then the defendants were not liable to the plaintiff in this action." (*Hogg v. Martin's Adm'r*, Riley, S. C. 157; *Grayson v. Wilkinson*, Smedes & Mar. 288.)

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As to the power of Attorney, it was sufficient to enable the agents to do everything except to sell or hypothecate.

4th. If from the evidence, any important matter was omitted in the defense of the action in consequence of the absence of Dr. H. which might have been made had he been present, aiding and assisting, and that absence was not brought about by the instigation of the defendants, then they were not liable in this action.

5th. It has not been shown by the evidence, that the defendants did not exercise reasonable diligence and skill in the preparation and defense of said action of *Adams & Co. v. Hastings*, either on the trial in the Superior Court, or in the argument of the appeal in the Supreme Court.

TERRY, C. J. delivered the opinion of the Court — FIELD, J. and BALDWIN, J. concurring.

This is an action against Attorneys, to recover damage for injuries alleged to have resulted from their negligent and unskillful management of a cause in which they were retained by plaintiff.

Judgment was rendered in the Court below for defendants, and plaintiff appealed.

The statement in the record was prepared with reference to plaintiff's motion for a new trial, and contains a stipulation to the effect that it may "be used on the motion for a new trial in this cause, and also on the appeal to the Supreme Court." The Respondent moves to reject this statement, on the ground that the stipulation had reference to a contemplated appeal from the order of the Court on the motion for a new trial; and was not intended to apply to an appeal from the judgment only, in which the propriety of the decision on the motion for new trial was not involved.

It was doubtless contemplated by the parties, at the time of making the stipulation, that an appeal would be taken from any decision which might be rendered by the Judge below upon the motion for a new trial. But it is not perceived that plaintiff is at all benefited, or defendants prejudiced, by the fact that the appeal is taken from the judgment alone; and it is not at all likely that defendants intended to hold plaintiff bound to appeal

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from both the judgment and order refusing a new trial, or that they would have interposed any objection to his appealing from the judgment alone. We think the language of the stipulation is sufficiently broad to include any appeal which plaintiff should elect to prosecute in the cause, and that the objection to the statement is not well taken.

Having disposed of the preliminary objection to the statement, we will proceed to an examination of the case made by the record.

The Court below instructed the jury "that plaintiff had not proved any legal damages as resulting from defendants' neglect," and the point presented by the exception to this instruction necessarily involves an investigation of the evidence given on the trial, and the determination of questions of fact, which are almost the only questions at issue.

It appears that in 1853, plaintiff was part owner of certain lots in San Francisco, on which he, in connection with his cotenants, Adams & Co., Woods, and Flint, Peabody & Co., was constructing large and expensive improvements; that while these improvements were in progress, plaintiff departed from the State, leaving Haven and Briceland as his agents, with full power to act for him in matters pertaining to his interest in the property; that, after his departure, a change was made in the plans of the building, involving a large increase of expenditure; that, in consequence, large advances were made by the banking house of Adams & Co. to defray the expenses incurred in the erection of the buildings, for the one-fourth of which advances, the agents of the plaintiff executed a note or obligation in writing, on the part of the plaintiff, to pay the same, with interest at three per cent. per month from the dates of the various advances; that suit was instituted by Adams & Co. on this obligation, and plaintiff's interest in the property attached; that, after the institution of this suit, plaintiff returned to the State, but within a short period he, after having employed defendants to conduct his defense, again left the State clandestinely, and under an assumed name, in order to avoid service of process, and thus delay the trial of the cause; that defendants appeared in the action as the Attorneys of plaintiff; that the judgment was rendered against plaintiff for the full sum claimed; that an appeal

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was taken to the Supreme Court, in which the judgment was reversed, because of the allowance of interest for the time prior to the date of the obligation sued on, after which defendants signed a stipulation, agreeing to permit the judgment to stand as affirmed upon the deduction of the amount of interest erroneously allowed in the Court below.

The plaintiff alleges that he had a good defense to the whole of the claim of Adams & Co. because of an unauthorized change in the plans of building, (which had been agreed on by all the parties interested in the property,) made by Woods and Haskell, the agent and resident partner of Adams & Co., by which alone the additional expense was incurred, and the advances made necessary; that defendants were fully informed of this defense, but failed to set it up in answer to the suit, and by stipulating for the affirmance of the judgment, after deducting interest, deprived plaintiff of the benefit of a new trial, in which such defense could have been established.

The only evidence that the defendants were apprised of the grounds of defense stated, is contained in an allegation in the complaint, (which plaintiff insists is not sufficiently controverted by the answer,) and the fact that the plaintiff was, while the suit was pending, and before his second departure from the State, in frequent consultation with defendants, and living upon terms of close intimacy with one of them. It is at all times difficult, if not impracticable, to produce evidence of the tenor of confidential communications between client and Attorney, and perhaps the evidence offered, being the only kind of which the case is susceptible, would be sufficient to warrant the jury in finding that plaintiff had put defendants in possession of all the facts which constituted his defense to the action. But in order to charge the defendants with negligence in failing to set up such defense, he must show by evidence the existence of such facts, and that they were susceptible of proof at the trial by the exercise of proper diligence on the part of his Attorneys. In this the plaintiff has wholly failed. He has, indeed, shown that a material change was made in the plan of the building by which the cost was greatly increased, but so far from showing that this change was made by Woods and Haskell alone, the fact is conclusively established by the evidence of plaintiff's agents that it was approved

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by both, and actually carried out by one of them, who also acted as Superintendent of the building.

That no such defense really existed, or could have been proven on the trial of the suit of *Adams & Co. v. Hastings*, 6 Cal. 126, is further shown by the evidence of O. L. Shafter, Esq., (who argued the case both before the Superior and Supreme Courts,) who testifies to frequent interviews and conversations with plaintiff, whilst the case was pending in the Supreme Court, in which he gave his opinion that plaintiff could derive no advantage from a new trial unless he could overcome the evidence of his agents, Haven and Briceland, as given on the trial. That plaintiff never informed him that this could be done, or mentioned the names of any witnesses by which he could establish a state of facts different from that made out by their evidence, and by the failure of the plaintiff on the trial of this cause to produce such evidence. He has shown the departure from the plans originally adopted to have been ill-advised, and to have entailed a large pecuniary loss on all the parties interested, but he has failed to show any circumstances which would have relieved him from responsibility for his proportion of this loss. The persons who were fully authorized to represent him in the premises consented to the departure, and he was bound by their acts.

It is urged by the Appellant, that a great damage to plaintiff was caused by the stipulation of the defendants to permit the judgment to stand as affirmed in part after it had been reversed in the Supreme Court and the cause remanded for further proceedings, because, but for this stipulation, plaintiff would have been able, upon a new trial of the cause, to establish his defense.

And it is said that, but for this stipulation, "apart from his defense to the whole claim, he would have been able to reduce the ruinous interest of three per cent. per month from the date of the note, February 13th, 1854, to ten per cent. per annum, which would have saved him from seven thousand three hundred and forty-six dollars and eighty-seven cents a year, or upwards of twenty-two thousand dollars, by the time the judgment was satisfied in 1857. The first of these propositions is already answered; the second is untenable. The question as to the rate of interest accruing from the date of the obligation had been directly made and decided, and counsel cannot be charged with

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neglect for believing that the decision had become the law of the case and could not have been reviewed under the rulings of this Court, in *Clary v. Hoagland*, (6 Cal. 685.)

From a careful examination of all the evidence contained in the record, we are satisfied that the facts proven were sufficient to sustain a verdict for plaintiff, and that there was no error in the instruction complained of. This view renders it unnecessary to examine in detail all the points made in the elaborate and ingenious brief of counsel, the greater part of which seems to have been addressed rather to the allegations of the complaint than to the facts proven on the trial.

Judgment affirmed.

On petition for a rehearing, the following opinion was delivered by TERRY, C. J.—BALDWIN, J., concurring:

Plaintiff asks for a rehearing in this cause, on the ground that the Court had mistaken material facts contained in the record. Before the opinion was rendered, a very careful investigation of the whole record was had. The case was a novel one, involving the professional integrity of respectable Attorneys, and the decision depended mainly on the facts of the record. The charge of the Court below having, as counsel for Appellant consented, "entitled the Appellant to the benefit of every fact in evidence on the trial."

Upon the suggestion of the plaintiff we have again instituted an examination of the statement, and are unable to discover the mistake of fact into which it is claimed the Court became involved.

We think the conclusion stated in the former opinion that the departure from the plans originally adopted by the owners of the building were assented to by Hastings' agents, who had authority to bind him in the premises, is entirely supported by the record. The power of Attorney, authorized Haven and Briceland to represent plaintiff's interest in the property, and to cast his vote in relation thereto in all matters relating to the administration or improvement of the property, and to do and perform every act or thing relating to, and concerning such interest, except the sale or hypothecation thereof. There can be no question as to their power to consent to alterations; as to the

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fact of such consent having been given, Haven says: "I remember saying to Woods when he showed me his diagrams, that I thought the alterations were wise ones. There was nothing said about the increase of cost. Briceland and myself had frequently spoken of the defects in the original plans."

Again, in answer to a question as to his testimony on the trial of a former cause, he said: "Briceland always consulted me about his vote with the other owners, and he cast the vote as we had agreed." Briceland says: "When Mr. Woods proposed to substitute bricks, I objected to it. There was no consultation on the subject. It was simply mentioned in the office. There was a strong force employed, as strong as could be, in filling in, and the winter was coming on. Masons know why it is easier to build in winter with brick than stone. I at last came to the conclusion that it would not be much more expensive, if any, to build with brick than stone. When the winter approached I thought it would be for the interest of the owners to build with brick, as the building could be sooner completed and rendered productive.

Plaintiff says: "That on the eve of Hastings' departure, the four co-owners, including Woods and Haskell, entered into a mutual agreement that the works should be completed according to the original plans, and that the warehouse and wharf being sufficient to bring in a considerable revenue, there should be thenceforth no new outlay, but the expenses of completion should be paid out of the receipts from storage and wharfage.

And further, that it was on the faith of this agreement that the power of Attorney was given to Haven and Briceland."

This is the counsel's conclusion from the testimony of Mr. Flint, who stated that "it was so understood among the owners."

It does not appear that at this time there was anything stored in the building, or that any revenue whatever was collected from the wharf, and if such an anticipation was indulged in by the parties, it must necessarily have resulted in disappointment. No revenue was being derived from the property, and we think it sufficiently appears from the evidence that in the then state of the building there was no probability of realizing any considerable sum from it. Its condition at the time is thus stated by the Superintendent:

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"There was in the rear part of the building, a portion of the floor laid — about one-quarter, or thirty or forty feet — the only chance of having storage was either outside the building, or under cover of the floor, that is the floor of the second story. You could not get to the warehouse with any kind of a vehicle at that time. He further says: "I never understood that the improvements were to be completed out of the profits. If I had, I would not have drawn on Adams & Co. and would have discharged all the men."

There was certainly no reasonable ground for indulging the belief that the current revenue of the property would defray the costs of the improvements, and that plaintiff himself had doubts on the subject, is shown by his conversation with Haven, in which he expressed the belief "that moneys would be forthcoming if his own failed, that is, if his part could not be paid, it would be advanced by other partners," and the fact that he undertook to make an arrangement with Adams & Co. to advance the necessary funds, at one and a half per cent. and his giving to Haven, on the eve of his departure, a paper to this effect, which Adams & Co. refused to sign.

It is also objected that illusion is made to the fact that the plaintiff clandestinely left the State to avoid service of process, in the suit of *Adams & Co. v. Hastings*, which fact the counsel conceives, has no bearing upon the merits of the case, and which he insists is not true.

It was certainly not the design of any member of the Court to go out of the record, to imply a charge affecting the standing of any litigant.

The fact was thought to bear upon the merits of the case, for the reason that one of the charges in the complaint upon which damages are assigned is that defendants, instead of using proper means to procure a speedy trial of the cause, permitted it to remain pending in the Court below for about a year, the interest meantime accumulating at the rate of over seven hundred dollars per month. Defendants urged in reply to this charge that the delay was desired by the plaintiff so earnestly that he took extraordinary means to procure it. The counsel is much mistaken in supposing that evidence of this fact is confined to the

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sworn answer of defendants. It appears in the testimony of two witnesses called by plaintiff, and is nowhere contradicted.

Dr. Maxwell, a witness sworn on behalf of plaintiff, testified:

"When Dr. Hastings left, in 1854, I went part of the way with him to the steamer. * * * I met him somewhere on Washington Street. At his request, stopped short and did not accompany him. He requested me not to go on board, as he did not want it to be known that he was going home. He told me the day before that he was going to remain two weeks longer, and I afterwards learned that at that time he had his ticket in his pocket. He did not tell me the business on which he went home. * * * He intimated to me that it was some private matters that he wished to avoid."

B. F. Voorhies, a witness for plaintiff, "was Cashier of Nicaragua Ship Co. A few days before the sailing of the steamer a gentleman applied to take passage privately. He first applied to Mr. Ralston. I was called to be present at the meeting, and was not informed of his name till he was about leaving. I gave him the cue—a wrong name was put down on the berth-list, which is open to public inspection; but I presume Dr. Hastings' own name was on the ticket, for the tickets were only taken up after getting to sea. * * * John Smith, or some bogus name, was put down on the berth-list. It is a common thing to do. I know that it was Dr. Hastings' from a private mark I placed under the bogus name on the berth-list, to guide me in making out the tickets."

Application denied.

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THE Uncle Sam Mining Company execute a mortgage upon their mining claims to R., a Director of the company. The mortgage was in fact in trust to secure F. *et als.* who had, as sureties of R., signed with him a joint and several note to D. for money loaned by him to R. The money was for the Company. R. assigns this mortgage to F. to secure him against his liability on the note, delivering the mortgage, at the same time, to F., who retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing; *Heid*, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F. *et als.* as sureties was a sufficient consideration for the assignment, and that such assignment is not a mortgage of a mortgage.

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The doctrine of continuous possession of personal property after sale or mortgage does not apply to the case of a paper, the mere evidence of a debt. Nor does the Chattel Mortgage Act, or the general statute of frauds apply to such case.

APPEAL from the Fourteenth District.

The mortgage to Redding was executed under the Chattel Mortgage Act, and was direct to him without expressing on its face any trust in favor of Fall et als. Plaintiff appeals.

McConnell, for Appellant.

I. Did the relation of principal and sureties, subsisting between Redding and Fall, Taylor and others, of itself operate to vest in them any present interest, legal or equitable, in the mortgage from the Uncle Sam Company to Redding?

II. If it did not, then did the assignment from Redding to Fall operate to pass the title in such mortgage?

The debt for which Fall is surety has not been paid. The relation of principal and surety of itself involves no higher equities than that of debtor and creditor. It is only when the surety pays the debt of his principal that his equities begin to vest. He then becomes entitled to demand from the creditor all the securities and remedies against the principal debtor which he at any time had, and if the creditor has released or extinguished any of these securities it may operate to discharge the surety. But this rule does not seem to have ever been applied as between the surety and the principal debtor himself.

The rule as between the creditor and surety, is founded upon the idea of trust. The creditor is regarded in equity as occupying the position of Trustee for the surety who has paid the debt. But there is no element of trust in the relation subsisting between the surety and the principal debtor. A surety before judgment has no legal or equitable liens against the property of his principal. The latest case on this question is *Copis v. Middleton*, reported in *Mylne & Keene*.

The next question is, is there an express trust?

There is no mention of the trust in the mortgage deed, nor was there any other paper produced declaring the trusts, or leaving the uses otherwise than as they were limited by the

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terms of the mortgage itself, that is to Redding. There is, in a legal point of view, an express trust in favor of Redding himself, existing by the direct terms of the deed, which the defendants seek to set aside by parol proof of the intention of one only of the parties to the deed, viz. Redding.

Again, there can be no such thing as an express trust over lands or fixed property unless it be declared in writing. (Wood's Digest, 106, Secs. 6 and 7, of an Act concerning Fraudulent Conveyances and Contracts.)

We contend, next, that the assignment was insufficient to pass the title to the mortgage.

The assignment in terms is to secure Fall as surety. It is, therefore, a mortgage of a mortgage. Every conveyance for the purpose of securing the payment of a debt, the performance of any act, is a mortgage. The original mortgage itself was executed in pursuance of what is termed the Chattel Mortgage Act. (See Wood's Digest, 106, 109.)

The question is, what interest Redding had in the mining claims by virtue of the mortgage to him?

If he had any estate, either legal or equitable, then in order to mortgage that interest to Fall, the same steps were necessary which were required to mortgage the mining ground itself. The assignment does not purport to be in conformity with the Chattel Mortgage Act. It appears, on the contrary, to have been an intentional departure therefrom. Therefore it did not pass Redding's estate, if he had an estate. But the law does not give to the mortgagee an estate in the thing mortgaged. A mortgage is a chose in action. (*McMillan v. Richards*, 9 Cal. 368.) A chose in action passes by delivery.

Besides, Fall had possession of the mortgaged property for the space of fifteen minutes, and then redelivered it to Redding as his agent. This violates the Statute of Frauds. (Wood's Dig. 107.)

III. The finding of facts by the Court is contrary to the evidence, and, therefore, the conclusions of law of the Court are erroneous.

Vanclef & Stewart, for Respondents, argued that no debt ever existed from the company to Redding, and that the mortgage was

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given to secure Redding and his co-obligors on the note to Decker. If Redding had himself paid the notes, the company might have been indebted to him, and such debt might have been secured by the mortgage. Before this assignment, Fall, in equity, had the same interest in the mortgage that Redding had; and the assignment was made for the purpose of greater security to Fall, and for the purpose of giving him a direct remedy against the Uncle Sam Company in case he was compelled to pay the note. This was consideration enough to make the assignment valid. (*Hickox v. Lowe et al.* 10 Cal. 197; *Dana v. Stanford*, Id. 269.)

The statute requiring an actual and continued change of possession, applies only to goods and chattels, and not to a mortgage. (Wood's Digest, 107, Sec. 15.)

The assignment is in writing, subscribed by the party making it, and is sufficient. (*Runyon v. Mersereau*, 11 John. 534.) If no assignment had been made the Appellant could not have maintained his action. Redding had not paid, and could not pay, the debt to Decker. Fall is still liable and solvent. A Court of Equity will not in such a case rob him of his only security.

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring.

This was a bill filed by the plaintiff as a creditor of Redding, to subject to plaintiff's judgment a mortgage executed to Redding by the Uncle Sam Mining Company. The bill charged that Redding had, before the judgment, made a pretended assignment of this mortgage to the defendant, Fall, to secure him against a certain demand against Redding, for which Fall was his security. This assignment the bill charges to be fraudulent. 1. It was without legal consideration. 2. Made to hinder creditors. 3. Because the mortgage was not delivered to Fall. 4. And it is further asserted that the assignment is insufficient on its face to pass the title of the mortgage.

Fall and Redding answered by denying the fraud charged.

The Judge below finds this state of facts: That in September, 1857, Redding was President of this mining company, and that the company authorized Redding and one Burgess to buy a steam engine and other machinery to work the claims; that to raise the money they negotiated a loan with one Decker for five

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thousand dollars, to secure which, the note of Redding, Fall, and two others—the last three as sureties—was made; that of this sum three thousand dollars was appropriated to buying a steam engine and appurtenances—the balance paid to the Treasurer of the company or laid out for its uses; the machinery was placed in the claims, where it is yet. At the maturity of the note, Decker delivered it to the makers, and it was canceled, when a new note was given to Decker, for the same money, due 25th of May, 1858, signed by Redding, Fall, Taylor, and one Gingle; the company paid the interest on these notes as it fell due. That some time after the five thousand dollars was obtained, and before the making of the mortgage to Redding, in the bill mentioned, the company issued an order on the Treasurer of said company, payable to Fall and others, for the sum of five thousand dollars. That at the time this mortgage was executed, a settlement took place between Redding and the company, and a balance of one hundred dollars found due the company from Redding, which was deducted from the order drawn in favor of Fall & Co. Redding then desired that the company should execute a mortgage on the mining claims to secure Fall *et al.* against their liability on the note to Decker; this the company refused to do, for the reason that they did not wish to have so many creditors, but proposed to execute a mortgage to Redding individually; this was accordingly done on the 12th April, 1858, and it is the one in controversy. On the execution of the mortgage, Redding delivered up to the company the order in favor of Fall *et al.* When the last note to Decker became due, he demanded a renewal of it, and the makers renewed it, taking up the former. At this renewal, Redding assigned the mortgage to Fall, and both the assignment and mortgage were duly recorded, 25th May, 1858. That at the time of the assignment of the mortgage, the same was delivered to Fall, who retained it for a few minutes and then returned it to Redding, as the agent of Fall, to receive the interest of the company. The Court finds that the consideration of this assignment was the liability of Fall *et als.* on this note to Decker. The Court find the subsequent acts of the parties consistent with the arrangement—the Decker note has not yet been paid by these sureties. There is no debt due from the company to Redding, other than appears from the facts already stated.

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The Court accordingly dismissed the bill.

We think rightly. The object of the bill being to seize and appropriate the interest of Redding in this mortgage, treating it as a valid security in his hands, no question, of course, is raised as to its validity. The only question is a question of fact, whether Redding had any interest, which, in equity, should go to this creditor. In order so to hold, it is necessary to show that Redding had a beneficial interest in the subject matter. It might be difficult for the plaintiff to show, even if there had been no assignment of this mortgage, it having been executed to Redding merely in trust, that he had such interest. But after the assignment which executed the trust, there is no pretense that any interest remained which could be appropriated by the creditor of Redding, the latter being the mere conduit through which this title passed. Nor do we consider that any further delivery of the mortgage or assignment of it as security for the protection of Fall than is proven was necessary. A corporal delivery and retention of a paper answers none of the purposes of publicity or notice which are subserved by the possession of personal or even real estate, though delivery, of course, is essential to give effect to the contract. But, after such delivery, the lodging of the paper in the hands of the nominal mortgagee for the purpose of collecting the interest, did not, in the absence of any circumstance of fraud or suspicion, impair the right of the assignee. The papers were recorded, and it nowhere appears that the transaction misled the plaintiff or induced him to advance his money or extend credit to his debtor, much less that anything was done by Fall with this design. It seems to be a fair transaction, entirely free from fraud, and there is no pretense for holding that the defendant, Redding, had any interest in the mortgage debt or property which a Court of Equity could subject to the payment of the plaintiff's claim. The Appellant supposes that the evidence does not sustain this finding of facts; but certainly, taking the whole transaction together, it tended to establish the main facts stated. But we do not deem it very important to view critically the proofs; for enough of the statement is undisputed to justify the conclusion of the Court.

The assignment of the mortgage was sufficient. We do not understand it to be a mortgage of a mortgage. It is the assign-

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ment of a mortgage for a particular purpose, to wit: the security of the assignee as surety for a note. But the assignment vested all the interest of the mortgagees in the assignee, who could enforce the mortgage and hold the proceeds in trust for the proper purposes of the assignment. Nothing was required of him but to make the assignment available in the given contingency, or, probably, he might have enforced it before he was required to pay the debt. It is like a promissory note assigned as a security to a party for indemnity against his suretyship. The consideration of such liability is sufficient to support the assignment, and it is not required, in order to the validity of the transfer, that the assignee, after receiving it, should keep the paper in his pocket or his desk all the time. The doctrine of continuous possession of personal property has no application to the case of a paper, the mere evidence of a debt. Nor is it embraced by the provisions of the Chattel Mortgage Act, or the general Statute of Frauds.

Decree affirmed.

McDONALD & BLACKBURN v. THE BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

New trial not granted on affidavit of the Attorney of record, that he as well as his client and witnesses were absent on the trial of the case, because of a verbal agreement by opposing counsel to give notice of day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an Attorney did appear and contest the case on the trial.

In an action of damages for diverting the water of a river from plaintiffs' mill, an averment in the complaint of possession of the land and mill, is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water.

Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument, it will not be such, even though the characters [L. s.] are added to the signature.

A general objection will not exclude a paper offered in evidence, unless on its face inadmissible or void.

Though an instrument be inadmissible as evidence of title, because on its face it is doubtful whether it be the deed of the agent executing it or of the principal, still it may be admissible to show the date of plaintiffs' possession; and if the agent was in the actual occupancy of the land, the paper would be good to show a surrender by him to plaintiff.

Arguendo: Right to water acquired by appropriation may be transferred like other property.

Arguendo: If by the erection of a mill and the possessory right of land on a stream, the water be acquired, a transfer of the possession of the property to a vendee, as owner, passes the water right.

Arguendo: An appropriation of water for mill purposes, stands on the same footing as an appropriation for the use of miners.

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Where a power of Attorney, not under seal, authorizes the agent to sell a saw-mill, dwelling, etc. by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal, by a paper not under seal, representing himself as the Attorney of the principal, and the vendee takes possession, and retains it for several years, he has an equitable estate in the premises, with the right to its full enjoyment, and this right, united to possession, enables him to maintain an action for interruption to his possession or injury to the property.

The rule requiring an instrument to be executed or signed in the name of the principal does not apply to instruments not under seal.

If the name of the principal and the intention to bind him, appear in an instrument not under seal, the agent having authority, the principal alone will be bound, though the instrument be signed in the agent's name only.

A power of Attorney to sell "my saw-mill, dwelling, etc. said mill and other improvements being situated," etc. embraces the water privilege of the mill.

Arguendo: Where a party takes up a mill seat on public agricultural land, erects a saw-mill, dwelling, etc. and appropriates the water of the stream for the use of the mill, he may use the water for a grist-mill erected at the same place years afterwards.

It would require clear proof that the purposes of the water for the saw-mill had been fully answered, to hold that the title to the water was abandoned. This question cannot be raised for the first time on appeal.

V. erects a mill and acquires a water right in 1850. In 1851 defendants appropriate for ditch purposes, water from the same stream, forty miles above the mill. In 1854 plaintiffs, M. & B. succeed to the possession of V. *Held:* that plaintiffs may, possibly, recover damages for the diversion of the water, on their possession, without connecting themselves with the title of V. back to 1850; that defendants' appropriation in 1851 could only be of the water not appropriated by V. there being no abandonment by him, and that M. & B. can jointly maintain an action for damages accruing after they came into possession.

At all events, the objection that M. & B. have no common interest in the mill, etc. but claim title from V. under different rights, should have been taken by motion for nonsuit or upon instructions, the want of common interest appearing from plaintiffs' evidence.

The question of the Statute of Limitations cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded.

APPEAL from the Tenth District.

Action of damages for the diversion of the water of Bear River to the injury of plaintiffs' saw and grist-mills situated on that stream.

The original complaint was filed March 6th, 1857, and an amended complaint filed January 18th, 1858. The difference between the original and amended complaint consists in the substitution of the phrase "one thousand inches of water sectional area, with a two and one-half foot head," instead of "one thousand cubic inches of water."

Among other things the complaint avers that plaintiffs "are lawfully possessed of a certain saw-mill and grist-mill, works and premises, with the appurtenances, situate and being in the county of Yuba, California, and situate upon a stream called Bear River, and by reason thereof, etc. * * * ought to have and enjoy the benefit and advantage of the water of said stream or water-course * * * called Bear River."

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The complaint also avers, in substance, that, by reason of the diversion of the water by defendants' ditch, plaintiffs have lost the use of their mill; have suffered in the reputation of the mills; have been put to great expense on account of their not running; have lost the profits which would have accrued, and claim damages in the sum of twenty-five thousand dollars.

The complaint describes defendants as the "Bear River and Auburn Water and Mining Company," composed of numerous persons unknown to plaintiffs, etc. but does not aver it to be a corporation.

An answer was filed to the original complaint denying, generally, its allegations and setting up the Statute of Limitations of three and five years, and that defendants were in possession of the land and water, etc. as public land, and using it for mining purposes. To the amended complaint a demurrer was filed, on the ground: 1st. Defect of parties defendant in not averring defendant to be a corporation, etc. 2d. Want of facts to constitute a cause of action. Demurrer overruled February 1st, 1858. The Attorney of record, Crocker, being absent, the demurrer was argued for him by Mr. Rowe. No time for answering was given, as none was asked. February 8th, 1858, the cause was called for trial, and, in the absence of Mr. Crocker, as also of the defendants and their witnesses, Mr. Rowe, an Attorney employed by Mr. C. to attend to serving notices, etc. appeared, and a continuance being refused, conducted the trial for defendants. Defendants asked the following instructions, which were refused and exceptions taken:

1st. That unless the jury believe, from the evidence, that the defendants turned the waters of Bear River into the ditch themselves, the plaintiffs cannot recover.

2d. That the defendants are not liable for any injury occasioned by miners or others turning the water into the plaintiffs' ditch.

4th. That the jury must be satisfied, from the evidence, that the division of the water was not occasioned by any other cause than the defendants' dam and ditch, or the plaintiffs cannot recover.

The Court instructed the jury as stated in the opinion. Verdict for plaintiffs, twenty-one thousand and eight dollars. Mo-

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tion for new trial on most of the grounds authorized by law. The grounds mainly relied on were, that neither defendants nor their attorney of record, Crocker, knew of the trial until it was over, because of an alleged verbal agreement on the part of Bryan, Attorney of plaintiffs, not to bring the case on without notice to Crocker, and that there was no issue, no answer having been filed to the amended complaint. The motion was based on affidavits by one of the defendants and others, and by Crocker, stating the alleged agreement with Bryan, surprise, etc. an answer being annexed.

A counter affidavit was filed by Bryan, denying any such agreement, according to the best of his recollection. The Court overruled the motion, on the ground that the affidavits of defendants were contradicted, and that it would not notice verbal agreements between counsel. And, further, that the defendants were not entitled to answer the amended complaint after demurrer overruled, without leave of Court on motion. Defendants appeal.

E. B. Crocker and Gregory Yale, for Appellants, argued: 1st. That the complaint was defective in not averring that plaintiffs were the riparian owners, or the first appropriators, of the water of Bear River, and that the allegation of possession merely was insufficient; citing *Tuolumne Company v. Chapman*, (8 Cal. 397,) *Parke v. Kilham*, (Id. 79,) to the point, that diversion of a water-course is a nuisance. The owner of the property must bring the action. (Practice Act, Section 249; *Leigh Company v. Independent Ditch Co.* 8 Cal. 323; *Crandall v. Woods*, Id. 144.)

Counsel also argued, that *Tartar v. Spring Creek Water Company*, (5 Cal. 397,) and *Fitzgerald v. Urton*, (Id. 309,) go too far in protecting the appropriators of water, for mill purposes, and town lots against miners. That the mill in this case being forty miles below the point on Bear River, where defendants' ditch takes the water, to give plaintiffs exclusive use of the water for the purposes of the mill, is a violation of the entire policy of the State relative to mining interests.

2d. The demurrer should have been sustained upon the ground that no damage is set forth in the complaint. The only mention of damages is in the prayer, as part of the relief claimed. (Prac.

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tice Act, Sec. 39.) The particular circumstances out of which the damages arose, are nowhere stated in the complaint. (*Goodman v. Stebbins*, 2 Cal. 103; 1 Saund. Pl. and Ev. 918, Ed. of 1851; 1 Chitty's Pl. 338, 396; Sedg. Measure of Damages, 574, 575; Chitty's Pl. 385-388; 8 T. R. 133; Peake's N. P. C. 46, 62; 9 Coke, 113, a; 1 Saund. 346 a. b. n. 2; 2 East, 154; 1 Saund. 243, n. 5; Vin's Abr. Ev. tit. b. 6. See, also, 9 Wend. 425.) The doctrine is unquestionable. (*Bogart v. Burkhalter*, 2 Barb. 525; *Donnell v. Jones*, 13 Ala. N. S. 490; and *Rowand v. Bellinger*, 3 Strobb. 373.)

3d. The demurrer should have been sustained upon the ground that there was not a proper party defendant.

The 29th Section of the Practice Act requires the complaint to contain the names of the parties to the action, plaintiff and defendant. The complaint was not framed under Section 69, but under Section 14. This section has been decided in *Andrews v. Mokelumne Hill Co.* (7 Cal. 333,) to be applicable to equity cases only, and not to actions at law. This is strictly an action at law. If it was intended to declare against the defendants as a corporation, such should have been averred. (Wood's Dig. 115, Art. 448; 6 Cal. 186; 5 Id. 503; 4 Black. 50; 4 Sandf. 657, 659.)

As to errors on the trial. The paper purporting to be a deed from B. J. Van Court to McDonald, dated March 25th, 1854, is void on its face, and should not have been admitted in evidence. (Story's Agency, Secs. 147, 149, Note 4.) The name of the principal is not signed to it, nor is he described in it as grantor, and the Attorney had no power to make a deed, his power not being under seal.

Without this paper, plaintiffs could not show themselves prior appropriators of the water, or that they had title by connecting themselves with the possession of B. J. Van Court, in 1850.

The power of attorney was not under seal, and hence the principal was not bound by a deed signed by the agent. (Dunlap's Palcý, 157, Note A, to top page 156, Note C, top page 157.)

Under this paper neither the land nor the grist-mill could be sold. (6 Cal. 373; 7 Id. 171.)

The contract made between A. Van Court and plaintiff, Blackburn, does not give him any interest in the land or saw-mill, and yet he has recovered damages jointly with McDonald for injury

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to the saw-mill in which he has no interest. There is, therefore, a misjoinder of causes of action. B. J. Van Court should have been co-plaintiff instead of Blackburn. Tenants in common must join in an action for the diversion of a water-course. (8 Cal. 77.)

A water right cannot be transferred in any way except by deed. The mere delivery of possession of the land, and the mills by which the water is used, will not do. (Angell on Water Courses, Secs. 168-172; Wood's Dig. 106, Sec. 6; *Hill v. Newman*, 5 Cal. 445; *McCanon v. O'Connell*, 7 Id. 152; *Jenkins v. Redding*, 8 Id. 598; *McKeon v. Bisber*, 9 Id. 137; *Partridge v. Townsend*, 10 Cal. 181; 5 Id. 40-87, 249, 485; 4 Id. 33, 69; *Bird v. Lisbros*, 9 Id. 1; 4 Id. 209; *Howard v. Easton*, 7 Johna. 205; *Stephens v. Mansfield*, 11 Cal. 365; *Simpson v. Downing*, 23 Wend. 320; *O'Keiffe v. Cunningham*, 9 Cal. 590.) Some of the cases cited refer to transfers of mining claims. (See, also, 1 Denio, 550; 5 Barb. 364; 7 N. H. 523; 1 Sugden's Vendors, 111, 126; 16 Wend. 28; 8 Barb. 130; *Riddle v. Brown*, 20 Alb. 412.)

During the argument it was suggested that, though these papers did not constitute a conveyance, yet they might give a right to call for a deed. But the complaint is strictly for a legal cause of action, following Chitty's forms literally. And this Court has held that the essential and inherent distinctions between law and equity are not abolished by the Practice Act. (*Smith v. Rowe*, 4 Cal. 6; *De Witt v. Hayes*, 2 Id. 463.)

And if a party has an equitable cause of action or defense, his pleadings must be framed accordingly. (*Thayer v. White*, 3 Cal. 228; *Smith v. Rowe*, 4 Id. 6; *De Witt v. Hayes*, 2 Id. 463; *Coates v. Campbell*, 3 Id. 191; 4 Id. 227; 5 Id. 156; 6 Id. 56.)

But plaintiffs insist that, being in possession, they had a right to maintain the action upon proof of that fact alone, and cite numerous authorities. These authorities merely show that persons in possession of land can maintain trespass, that they are proper parties; but the case of *Fentiman v. Smith*, (4 East, 107.) shows that possession is insufficient in actions for the diversion of water, unless the plaintiff has the right to the use of the water. The question is who has the right to the use of this water? We say that, as against the plaintiffs, defendants have the better right to it, as they appropriated it prior to plaintiffs.

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(*Irwin v. Phillips*, 5 Cal. 140; *Tartar v. Spring Creek Co.* 5 Id. 395; *Bird v. Lisbros*, 9 Id. 1.)

In the answer we plead limitation of five years, and also of three years.

An action for "trespass upon real property" must be commenced within three years. (Wood's Dig. 47.)

This is an action, not for the "recovery of real property," but to recover damages for a "trespass upon real property," that is, for the diversion of the water from plaintiff's land. It is, therefore, governed by the three years' limitation law.

The evidence shows that we appropriated the water in June, 1851, actually diverted it in the fall of 1852; and this action was not commenced until March 6, 1857, more than four years afterwards. The statute, therefore, commenced running, at least from the time we actually diverted it. This was before the sale to plaintiffs, which was in March, 1854.

If they claim that their right of action accrued from the time of their purchase, and that the statute only commenced running, as to them, from that time, we reply that a party cannot stop the running of the statute by conveying to a third party.

In addition to the above it is urged, that the offer to prove that the water was diverted by others, below the point where the defendants' ditch takes the water from the Bear River, and the rejection of the evidence by the Court below, entitles the defendants to a reversal of the judgment. The charge is against a particular company, and that company proves that the injury was committed by others. As an elementary rule of pleading, the evidence is material, and goes directly to the issue. A general denial would let in this evidence.

In *Lower v. Winter*, (7 Cowen, 264,) the Court admits that improvements can be sold by parol, but refers to *Howard v. Easton*, (7 Johns. 205,) as a contract for the sale of the possession to the land, and the case is placed upon the principle that possession is *prima facie* evidence of title to land. This is the principle contended for by the plaintiffs; that their possession is evidence of title, and yet that this possession can be sold by word of mouth.

Is the water privilege attached to the improvements or to the land, the possessory interest in the land? If to the improvements which could be removed and placed on another piece of

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land. then the water privilege would follow the improvements to another stream, or another district, where timber is not so scarce. But in all probability the water right will be held to follow the land, and not the improvements.

Mr. Brown states the rule emphatically in his work on the Statute of Frauds. In Sec. 231 he says: "Mere possession of land seems to be properly regarded as such interest in or concerning the land itself as cannot be contracted for or disposed of without writing."

How, then, can the plaintiff claim the possessory title, on conveying the water right, without connecting themselves by deed with those in possession prior to the appropriation in June, 1851, by the defendants?

Bryan & Filkins, for Respondents.

The Court is not bound to fix a time to file an answer after demurrer overruled. The party must apply for time if he desires it. (Practice Act, Sec. 67.)

Defendants were represented on the trial by an Attorney, and that the Attorney of record was absent, is no fault of plaintiffs.

The complaint is sufficient without averring ownership, etc. It is taken literally from 2 Chitty's Pleading, 785-793; (see also, 1 Chitty Pl. 379, 380; 1 East, 244; 4 T. R. 719; 5 East, 276; Com. Dig. Pl. C. 39; 2 Lord Raymond, 1228; 2 Saunders' Pl. and Ev. Vol. 2, Part 1, 462, 463; Angell on Water Courses, Sec. 407, and cases cited; 18 Conn. 243; 8 Barr. 13.)

This Court has never decided otherwise.

It is not necessary in an action for the diversion of a water-course, that the particular circumstances out of which damages arose should be stated in the declaration. (See 2 Chitty, before cited; 17 Com. 297; Stephen on Pleading, 428; 1 Gilman, 544; 2 Johns. 149.)

The point as to want of proper party is not tenable, under the 69th section of the Practice Act. Besides, having answered the complaint without raising the question, the demurrer to the amended complaint only goes to the portion amended. (Practice Act, Sec. 45.)

The various papers offered in evidence were properly admitted, the defendants not specifying any ground of objection.

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(*Provost v. Piper*, 9 Cal.) Nor could defendants question the proper execution of the papers, because they were not subsequent purchasers, nor was there any privity of interest between their right to the water and the right of plaintiffs. (8 Cal. 187.)

Upon the point that a new trial was correctly refused, we cite: (*Rogers v. Huie*, 1 Cal. 429; *Cooke v. Stewart*, 2 Id. 348; *Brooks v. Lyon*, 3 Id. 113; *Speck v. Hoyt*, 3 Id. 413; 3 A. K. Marshall, 81; 7 Smedes & M. 270; 2 Zabriskie, 19; *Steret v. Culver*, 6 Mo. 254; 2 Bibb, 177; 4 Humph. 229; 1 Caines, 111; 8 Mo. 186; 3 Bibb, 80; 2 Cowen, 578.)

As to the Statute of Limitations, we say: The only evidence upon the subject of adverse possession by defendants was that of J. A. Hill, a witness called by us, and he swears that the Bear River Company turned their water into the ditch "about September, 1852."

This suit was brought early in the spring of 1857, inside of the five years. We could not be injured until the water was turned into the ditch. If we were injured, then dating from the moment they turned in the water the five years lacks six months of having expired. But the fact is that we were not injured until 1854. Then: 1. If the limitation of five years could run in this case we are inside of it from the time of the turning the water in. 2. It could not run until we ascertained their possession.

The former opinion of this Court is erroneous in regard to the facts in relation to Blackburn's interest. We did not introduce the paper between Alexander Van Court and Blackburn for the purpose of showing title, but to locate the time he went into possession. (*Provost v. Piper et al.* 9 Cal. 552.) Throw the paper out of the case and the testimony shows that we did succeed to Van Court's possession, and this is sufficient. (*Biquette v. Caulfield*, 4 Cal. 278; *Morris v. Russell*, 5 Id. 249; *Partridge v. Townsend et al.* 10 Id.)

If we have succeeded to Van Court's possession, and his possession was prior to the defendants', we can recover. It is mill property upon U. S. Government land, and a verbal sale and transfer of the possession would be sufficient.

A party who does not claim title, but is treated as a wrong-

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doer, cannot go behind our possession, whether it be actual or constructive. (*Bequette v. Caulfield*, 4 Cal. 278, 279.)

If the bill of sale or agreement was of any consequence to us, they failed to make any objection to its introduction in evidence, and it is too late to object to it now. (*Provost v. Piper et al.* 9 Cal. 552.)

We are in possession under B. J. Van Court, he being in possession in 1854 by the possession of his agent, A. Van Court. When we "succeed to the possession we succeeded to Benjamin Van Court's possession, which runs back to 1850, the waters of Bear River being used and appropriated by A. Van Court that year.

If we had alleged title, we might be held to prove it. If the half of the title be in B. J. Van Court at the time of the suit, yet still, we, succeeding to his possession, are the only persons who can sue. If Van Court be landlord and we tenants, he cannot sue. (1 Chitty's Pleadings, 175, and Note 4 and authorities cited.)

The party in possession of real property is the only person who can maintain this action, whether it is for an injury to the land or a right growing out of land, such as to water. Van Court, even if he had title, could not maintain this action against a stranger and trespasser. (*Miller v. Fulton*, 4 Ham. Ohio, 433; 1 John. 510; 3 Id. 468; 12 Id. 183; 8 Pick. 235; 15 Id. 32; 19 Conn. 154; 2 Greenl. Ev. Sec. 618.) As to parol evidence of ownership, see 5 Gil. Ill. 506.

Now, McDonald has a clear and admitted right to one-half interest (running back years behind the possession of defendants) to the waters of Bear River. B. J. Van Court, as well as his agent, A. Van Court, have been out of possession since 1854, during which time the injuries complained of have been committed. B. J. Van Court cannot sue, being out of possession. McDonald is admitted to be rightfully in possession, and Blackburn has been in possession with him during the committing of the grievances, claiming ownership, whether rightfully in possession or not. McDonald cannot sue alone, for all in possession must join in the action.

In reply to a supplemental brief of Appellant, counsel argued, that *Howard v. Easton* (7 Johns.) was a suit *inter partes*, and had

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no application; and the defendants here being trespassers a writing was unnecessary. And, further, that plaintiffs had writings, which, at least, are contracts to purchase, and, as such, admissible in evidence to show the character of their possession. (*Moore v. Moore*, 21 Maine, 350; 1 Chit. PL. 62; 1 East, 244; 4 Taunton, 547; 3 Met. 239; 14 Pick. 297; 2 Greenl. Ev. 618.)

At the July Term, 1858, an opinion was delivered by BURNETT, J.—TERRY, C. J. concurring, reversing the judgment, on the ground that plaintiff, Blackburn, had no interest in the premises, not connecting himself with the possession of A. Van Court.

On rehearing, BALDWIN, J. delivered the opinion of the Court —TERRY, C. J. and FIELD, J. concurring.

1. Many technical and minor points are taken by the Appellants which we do not deem it necessary to consider. Some of these are frivolous, and some unsustained by the record. The refusal of the Court to grant a new trial upon the affidavit of the Attorney was proper. No sufficient cause was shown. If we could listen to affidavits of oral agreements or understandings of counsel, yet the fact that an Attorney appeared for the defendant and contested this case on the trial, and the counter affidavits of the plaintiff's Attorneys, sufficiently negated the grounds of the motion for this cause.

2. Nor is there anything in the objection taken in the demurrer to the complaint. It is a very formal pleading, and is, in itself, unobjectionable. It follows the approved precedents in actions for the diversion of water. It avers the possession of the plaintiffs of the land, and the subject of the injury; and that is enough against trespassers which the defendants are charged to be.

3. Still worse grounded is the objection that ten days were not given the defendants to answer the formal amended complaint.

4. Upon the trial the plaintiffs introduced evidence for the purpose of showing title to the water in dispute. The plaintiffs claimed that the water had been appropriated by one Van Court before the defendants' right accrued, or they had taken possession, and they claimed that Van Court had gone upon this land in 1850, and taken actual possession, and built a saw mill, and afterwards a grist mill, on public land, using the waters of Bear

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River for mill purposes. Van Court remained in possession, by A. Van Court, his brother, until 1854, when he placed McDonald in possession. The following paper was executed at the time:

"Know all men by these presents, that I, Alexander Van Court, of the county of Yuba, State of California, do sell and convey all the right, title, and interest, of B. J. Van Court in the property, to wit: one saw-mill, situated on Bear River, with everything appertaining to said mill; also, the one-half of the merchant and flouring mills; also, all the machinery appertaining to said mills; one dwelling-house, kitchen, and one chest of tools, (millwright,) log chains, etc. also all the interest that the said Van Courts have in a ferry or erection of a ferry on Bear River, near said mills; also, the pre-emption of one hundred and sixty acres of land running up and down Bear River, and belonging to said mills, and all the above named property to be free from all arrears; and I, Alexander Van Court, being my brother's legally authorized Attorney, do sell, convey, transfer, and set over, to J. L. McDonald, all the above named property, for the consideration of two thousand dollars, for which I, Alexander Van Court, receive one thousand in hand, and the other thousand at the completion of the Merchant Mills, when the same are in good operative order.

ALEXANDER VAN COURT, [L. S.]"

This instrument, it will be observed, is not under seal, for though the characters (L. S.) are added to the name of Alexander Van Court, yet no words are in the body of the instrument expressive of the intent to make it a sealed instrument. It was not, therefore, a deed, but only an executory agreement, if sufficient in other respects. It is insisted that this paper was not admissible in evidence; but no specific objection was taken to it at the time it was offered. The general objection was not enough to exclude it, unless plainly upon its face inadmissible or void. The plaintiffs claimed by possession, and this paper, if not otherwise admissible, was proper evidence to show the date of their possession, and, perhaps, the character under which McDonald entered. Besides, the actual occupancy seems to have been in Alexander Van Court, and so far as plaintiffs had gone at the time of offering this paper, it might have been enough

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to show that the person in actual occupancy, supposing this to be the deed of Alexander and not of B. J. Van Court, had surrendered his claim to the plaintiff, McDonald; so that there was no error in admitting this paper. We shall have occasion to consider this paper and its effect further when we proceed to discuss the merits of this case. The same objection, in the same form, was taken to a paper executed on the 30th March, 1853, by Alexander Van Court to his brother, B. J. and to a paper executed by B. J. Van Court, not under seal, purporting to be a power of attorney to Alexander, authorizing the sale of his saw-mill, etc. Under this power Alexander made the sale through which plaintiffs claim. The same remarks so far apply to this paper as to the other.

On the 20th March, 1854, Blackburn made a contract with Alexander, respecting the construction of a grist-mill, by which he became interested in the premises, at least to the extent of the water needed for that mill. It is urged that there was no conveyance to Blackburn, of any interest in the saw-mill or in the one hundred and sixty acres of land. The defendants claim that they appropriated the waters of Bear River in June, 1851, at a distance of forty miles above the mills; and this was prior, of course, to the actual possession of the plaintiffs, but subsequent to the first appropriation by Van Court and one Moore, under whom Van Court claimed. It would seem that if the plaintiffs relied upon their possession alone, they could not by force of it recover damages for a trespass committed before, nor for water diverted prior to their title. Their mere possession would give them title only to that which they possessed. They would take the premises as they found them; and if the water had been diverted from the old channel anterior to the acquiring of their possession, they could not regain it. It was probably in view of this principle that they sought to connect themselves with the title of their predecessors, in order to show that this water in dispute was really a part of their title or property. The ownership of water, as a substantive and valuable property, distinct, sometimes, from the land through which it flows, has been recognized by our Courts; and this ownership, of course, draws to it all the legal remedies for its invasion. The right accrues from appropriation; this appropriation is the intent to take, accompanied by some

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open, physical demonstration of the intent, and for some valuable use. We have held that there is no difference in respect to this use, or rather purpose, to which the water is to be applied; at least, that an appropriation for the uses of a mill stands on the same footing as an appropriation for the use of the mines. Each of these purposes, indeed, may be equally useful, or even necessary to the miners themselves. But the nature of the use may be important, as denoting the extent of the water appropriated. Water taken for a mill is not taken as an article of merchandise, to be sold in the market; it is merely used as a motive power, and after it passes the mill and subserves its purposes, may be used as an aid to the working of the mines. But this last use must not be inconsistent with the prior right acquired by the mill owner, so far as his necessary use is concerned. This right of water may be transferred like other property. If, by the erection of a mill and the possessory right of land on the stream, the water be acquired—this being evidence of the appropriation of the water—we do not see that the right would not pass by any sufficient transfer of the possession of the property to the vendee, as owner; in fact, we do not doubt that it would. And this brings us to consider what we deem the essential matter of this case, whether the plaintiff and Blackburn got the title of Van Court, the first appropriator of the water, to this mill. We assume for proven all the disputed or disputable facts upon which the jury have passed, directly or in effect, by their verdict. The question of the possession of the premises, the mill, etc. by McDonald, by virtue of *some contract* with Van Court, is not disputed; but it is argued, that this contract gives him no title to this water, diverted and used, and sold by the Bear River Company. The grounds of this objection we will now consider: It is said that, conceding that title was originally in Van Court, it did not pass to the plaintiff, McDonald, because the paper executed by Alexander Van Court to McDonald was not legally executed so as to pass the title. The power of attorney from B. J. Van Court to Alexander seems to be regular in form, except that it is not under seal; though professing in the body of it to be sealed, the scroll is omitted. The power authorizes "Alexander to grant, bargain, sell, and convey, my saw-mill, dwelling, etc. situated in the county of Yuba. Said mills and other im-

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provements are situated on a tract or claim of land on Bear River." * * "I do grant unto my said Attorney full power to execute and deliver all needful instruments, whether under seal or otherwise * * to perform all such matters, acts, and things, as my said Attorney shall deem necessary and expedient for the complete and effectual execution of the authority granted," etc.

Under this power Alexander Van Court made the instrument first set out, which, it has already been seen, was not under seal; so that the argument of the counsel for Appellants, that the paper executed by the Attorney was void, because the Attorney could not execute a technical deed, except under authority by deed, has no application to the facts. The power authorizes the execution of needful instruments, sealed or unsealed, and seems, from the comprehensiveness of its language, to impart the largest discretion as to the terms and form of sale to the agent. Taking the agreement, or so to call it, conveyance, in connection with the power, and we can see no fatal objection to it. It is true, that, for technical reasons, a deed of an Attorney must purport to be the deed and executed in the name of the principal. That doctrine was discussed in the argument of *Dupont v. Wertheman*, (10 Cal. 354) but was not passed on by the Court. But this doctrine applies more strictly to technical deeds than to parol contracts. The power is not under seal; it is only a written authority to the agent to contract in reference to the property, etc. and the contract is made by Alexander for the right of the principal in the subject, and the paper recites that "I, Alexander Van Court, being my brother's legally authorized Attorney, do sell, convey," etc. The property sold is the property of B. J. Van Court, the principal, and the agent selling represents himself as the Attorney of the principal; a consideration is stated, and an authority to sell is shown. The vendee is put in possession and retains possession for a series of years, making valuable improvements.

That such an agreement might be specifically enforced, and was a sufficient memorandum in writing to give effect to the contract, we think cannot be disputed. (See Wood's Dig. Sec. 106.)

That by force of such agreement, and the possession taken under it, the plaintiff, McDonald, acquired an equitable estate in the premises, giving him a present right to its full enjoyment, we think, clear, and this right, being united with the present

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possession, enabled him to maintain any action for an interruption of the possession or any injury to the property.

The case of *New England Marine Insurance Company v. De Wolf*, illustrates the distinction between sealed and unsealed instruments, and shows that the rule requiring the instrument to be executed or signed, in the name of the principal, does not apply to instruments not under seal, and the same distinction is expressly stated in *Andrews v. Estes et als.* (2 Fairf. 267). The cases in all the States, in regard to instruments not under seal, agree that if the name of the principal appear in the instrument, and the intention, on the whole, be apparently to bind him, he will be the party bound, if the agent had authority, although the instrument be signed in the agent's name only. (See *Farmers and Mechanics Bank v. Troy City Bank*, 1 Doug. 458, 467.) "In an agreement not under seal," said the Chancellor, in the late case of *Townsend v. Hubbard*, (4 Hill's N. Y. 351, 357; and see *Townsend v. Corning*, 23 Wend. 436, 440,) "executed by an agent or Attorney on behalf of his principal, and where the agent or Attorney is duly authorized to make the agreement it is sufficient as a general rule, if it appears in any part of the instrument that the understanding of the parties was that the principal, and not the agent or Attorney, was the person to be bound for the fulfillment of the contract." (See, also, *Evans v. Wells*, 22 Wend. 325, 335, 340.) In South Carolina, in some earlier cases, this was not admitted, and it has been decided that a note in the form, "I promise to pay," etc. signed "J. L. R. for J. J." bound the agent personally, and did not bind the principal. (*Fash v. Ross*, 2 Hill's South Car. 294; *Taylor v. McLean*, 1 McMullan, 352; *Moore v. Cooper*, 1 Spears, 87.) But all these are overruled in *Robertson v. Pope*, (1 Richardson, 501); and the distinction recognized between deeds and parol contracts, that in the former the sealing and delivery must be in the name of the principal; but in the latter it is enough if it appear that the contract was intended to be made for the principal.

5. There is no foundation for the notion that this power of attorney did not embrace the water privilege. The mill sold, or proposed to be sold, would be wholly valueless without it, and the general language is: "including the mill, dwelling," etc. "said mill and other improvements are situated," etc. The deed

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to a house is held to include the land on which it is, and it would be absurd to hold that a deed to a mill, only of use because of the water which moves it, does not include the right to the water, especially when the phrase *et cetera*, to which Lord Coke attaches such extension of meaning, is used.

6. We have, in these remarks, assumed that these papers were as they are set out in the Appellant's brief. But we do not, after looking over the transcript, find them set out. On page twenty-one we find that some papers of this general character were offered by plaintiff and objected to generally by defendant. But the grounds of objection are not given, and the papers not even particularly described. And it seems that "a bill of sale of a portion of mills and property given by A. Van Court to John C. Blackburn" was given in evidence by plaintiff; and this seems to have been done without objection. The presumption is, that what is done by a Court of general jurisdiction is properly done, and it rests with the losing party to show affirmatively that there was error.

7. It seems that Blackburn was in possession with McDonald, and it might be inferred that he was interested with him in this mill company and the right to the water. The saw-mill was put up January 8, 1850; the grist-mill was commenced in 1853, and was put in operation in the fall of 1854, built on the same side of the stream as the saw-mill. It seems that the mill, before the ditch of defendants, required and used one thousand inches of water. The instruction of the Court limited the plaintiff's claim to the amount of water first taken for the mill.

The appellants contend that they took, by the location of their ditch, all the water not needed for the saw-mill; and that their right, by appropriation, was perfect to all, subject only to the right of the mill-owner; that the right of the mill-owner was limited to a use of this water for this particular purpose, and ceased immediately when the saw-mill, from want of timber in the neighborhood, or otherwise, ceased its operations as such; and that the plaintiffs, having subsequently built a grist-mill, are not entitled to the water for that mill. Probably it would be enough to say in answer to the ingenious argument on this subject, that the point seems to be taken here for the first time; it is not taken in the answer, nor was it made on the trial. No

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instruction on the subject was asked by the counsel; nor was it made a point on the motion for a new trial. The point rests on particular facts or inferences, which, the jury, if properly instructed, might or might not draw from the evidence—such as the extent of the defendants' appropriation, or of the plaintiffs', as evidenced by the acts of both—the declarations, the relative quantity of water needed for the grist-mill or the saw-mill, the quantity of timber, etc. etc. and many other considerations, which a Court of Appeals could scarcely be called upon for the first time to determine. But even if we felt disposed to permit this matter to be asserted here for the first time, we are far from being convinced that the point is well taken. It by no means follows that, because in an agricultural district, a party takes up a mill-seat, gets a good title—as we esteem possession of public land to be—to the land, and makes valuable permanent improvements, all dependent on the use of the water as a motive power—that he means only to use the water appropriated for the first purpose to which he applies it. At any rate a very clear case should be made that that purpose had been fully answered before his title to the water should be held to be abandoned. The mere fact that he chooses to apply the water which he had a right to use, in whole or in part, if he so chose, in sawing timber, to grinding wheat, is no abandonment of his title to it. But the question is not so made on this record as to require from us a decision upon this last point.

8th. The plaintiffs claim that they were in possession of this property and these mills in 1854; that at the time, and since, they were entitled to this water to work their mills; that this quantity was not permitted, at the time laid in the complaint, to flow to their mills, but was diverted by the ditch; and for this they claim damages. Possibly it was enough for the plaintiffs to show the simple fact that they were in the use of this water, as against every one claiming by subsequent right, without calling to their aid any antecedent title to their entry, for the location by defendants of their ditch in 1851, supposing that to be an appropriation of waters of Bear River from that time, was only an appropriation of so much as was not before appropriated by Van Court, and no abandonment is shown by him; but on the contrary, it is shown by plaintiffs' proof that McDonald and

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Blackburn succeeded to the possession of Van Court. For the damages resulting after they came into possession, it would seem they could jointly maintain this action on that possession; at all events, this question of misjoinder, or want of common interest in the subject of the suit, should, if it appeared by the plaintiffs' evidence, have been taken by motion for nonsuit, or upon instructions. The plaintiffs, if the point had been made, might have dismissed the suit as to Blackburn, but if permitted to wait until after a new trial is denied, without making the point, it would throw upon us the trouble of searching every transcript to see if ingenious counsel here were right in the suggestion of points which ought to have been, but were not, made below. This would give a great advantage to the Appellants, for a statement is usually made up with reference to the points actually made below, and there would often be advantages taken in the statement, or effect given to it wholly different from what was foreseen or expected. Besides the unsatisfactory nature of such an inquiry, our labors would be interminable if we were compelled to search every record for the purpose of seeing if some new point resting on the evidence, but never taken by counsel below, was well founded in law or fact.

These observations apply to the question on the Statute of Limitations, insisted upon as a defense. No instruction was asked. Nor do we see how it could be. The injury was not from the location of the defendants' ditch. That was a subsequent appropriation secondary and subordinate in right to the plaintiffs as it was claimed. The diversion complained of was since the period barring the claim for damages; and the statute could not operate merely from the fact that the defendant had made a claim; it must have been shown that he made an exclusive claim with possession.

The instruction given by the Court, at its own instance, fairly placed the law before the jury on the main question in the case. It is in this language: "If the jury should find from the evidence, that the plaintiffs were the first to acquire a right to the use of the water flowing in Bear River, and that the defendants subsequently diverted the waters of the stream to the extent of depriving the plaintiffs of the same quantity of water which they originally possessed as prior locators, then they should find

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for the plaintiff — but if the water which the defendants took by means of their ditch, or other means, did not diminish the quantity of water, then no injury resulted to plaintiffs, and they should find for the defendants. The principle is, as decided by our Courts, that he who is first in time is first in right. The jury should take into consideration the quantity of water which was necessary for the plaintiffs in running their mill, for if there was an excess of water for this purpose, any other locator or proprietor is entitled to have it."

9th. The three instructions refused were, as proposed, manifestly erroneous upon their face, and were properly denied.

10th. There is no error in admitting proof of Dwyer's signature to the paper; no grounds for excluding it were assigned, nor does it even appear that the paper was admitted or read. It might have been proper to locate and explain the premises.

11th. The objection to the refusal to admit the question, "Do you know of any other ditches taken out of this stream, or do you know whether the waters are taken out above the mill by any other company, for any other purpose?" does not give us such information in reference to the subject as to enable us to decide whether the question was admissible. This might well have been refused on several grounds. It is not material whether there was at the time of the trial any other diversion of water from this dam; nor is it apparent that there was error in refusing a question so broad as to admit proof of water taken so far above the mill as to be beyond the ditch of defendant. It must be affirmatively shown that there was error in the ruling of the Court, before, on an incidental point like this, we can reverse on account of it.

We have given the case all the consideration we could extend to it, consistently with other engagements, and we think the judgment should be affirmed.

See Ortman v. Dixon, ante.

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A power of attorney to sell land must contain some description of the property to be sold, unless it be shown *otherwise* that the land in controversy is the only land owned by the principal at the time.

APPEAL from the Twelfth District.

Ejectment for a lot in San Francisco. Defendants aver title in themselves. (See same case in 7 Cal. 479; 10 Id. 12.)

The instrument of title relied on by defendants is in the following words:

TRANSLATION.

"By this present I give ample and sufficient power to Don José de Jesus Noe to use or dispose of my lot, which I hold (or have) granted, as may best seem to him; and, in testimony, I give the present power in the place of Yerba Buena, the 6th day of October, 1846.

MAXIMO Y. FERNANDEZ."

On the trial defendants offered this instrument in evidence, in connection with testimony, that in 1846 sales of land in California were, by custom, sometimes verbal, sometimes by simple writing signed by the vendor, and sometimes, where the value of the property was great, by a writing before the Judge and witnesses. They also offered to show, in this connection, that the Spanish words in the instrument imported a transfer or conveyance to Noe in full property; a consideration paid by Noe to Fernandez, and an actual transfer and possession of the lot accompanying the execution and delivery of the instrument.

Plaintiff objected to all this evidence on the ground that it was incompetent to prove a sale or contract for the sale of lands. The Court sustained the objection and excluded the evidence, defendants excepting. Defendants then offered to prove a verbal sale of the lot from Fernandez to Noe, consummated by transfer of possession and payment of a consideration, offering the writing as a memorandum of said sale. On plaintiffs' objection the evidence was ruled out, defendants excepting.

Defendants offered, with all this evidence, to connect themselves with Noe by conveyances, and also to show in themselves

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or grantors a notorious and continued possession, with claim of title since October, 1846. The Court ruled out the evidence, defendants excepting.

Defendants also offered said instrument as evidence of a license to occupy the land, under which Noe and those holding under him were entitled to a notice to quit before action brought. Same objection. Same ruling.

The jury found for plaintiffs, and defendants appealed from: the order overruling the motion for new trial, and from the judgment entered for plaintiff on the verdict.

Whitcomb, Pringle & Felton, for Appellants, argued: that the defendants derive good title by means of the power given in the instrument by Fernandez to Noe, and the execution of the power by the deeds of Noe; and that, within the rule of the civil law, the execution by an agent, though made in his own name, is binding upon his principal, if actually within the authority given to him. (*Rice v. Gore*, 22 Pick. 158; *New Eng. M. Ins. Co. v. De Wolf*, 8 Pick. 56; *Story on Agency*, Sec. 152; *Hopkins v. Lacouture*, 4 La. 64; *Pothier on Obl. Nos.* 82, 449; 1 Id. Sec. 449; 4 Id. Sec. 88, 252.)

It may be objected that the power of attorney under which a sale takes place should contain the same description of the lands as the former decision in this case requires for the conveyance. But even in the common law a parol authority to make a written contract is valid. (*Shaw v. Nudd*, 8 Pick. 12.) And that although the contract be required to be in writing by the statute of frauds. The same rule holds good in the civil law. (See *Story on Agency*, 49, and Note.) And in 4 La. the power seems to have been a verbal one.

This instrument was offered as a license to occupy, which required of Fernandez or his assigns, at least a notice to quit. (And we think that the dicta in *Salmon v. Hoffman*, (2 Cal. 142,) and the late decision of *Ortman et al. v. Dixon*, ante, 33, sustain the defendants' right of possession. *Salmon v. Hoffman* recognizes the obligation of the deed by the Attorney, as entitling the party to a further conveyance from the principal and admits in the defendants such "an equitable title accompanied by possession" as "is sufficient under our system to give a right of possession."

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No brief on file for Respondent.

TERRY, C. J. delivered the opinion of the Court—BALDWIN, J. concurring.

This cause is before us for the third time, upon evidence not materially different from that contained in the record upon which it was before decided.

The Appellants now contend that the paper which they before called a sufficient deed or conveyance to vest in Noe the title to the property, is a power of attorney authorizing Noe to sell the lot as the agent of Fernandez.

We think the paper is worthless for any purpose. A power of attorney, in order to authorize the sale of real property, must contain some description of the property to be sold. The paper in question, if we admit it to contain a power to sell, designates no property whatever. "By this present, I give ample and sufficient power to Don José de Jesus Noe to use or dispose of my lot." What lot? Where situated? The paper would answer as well for a lot in San José, Monterey, or Los Angeles, as in Yerba Buena. It is not shown that the premises in controversy is the only lot which was owned by Fernandez at the time, and we are not to presume, in the absence of proof, that such was the case.

Judgment affirmed.

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PERSONAL property beyond the limits of this State, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing, and being at the time, in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the *lex loci*: and his title will be maintained here against execution creditors of the assignor.

Such an assignment is not void as contravening the 89th Section of our Insolvent Act.

Rights of property acquired by contract, valid in the place where made, will be protected here.

Doubtful, whether the inference of title from the possession here of personal property, acquired by contract in a foreign country, can be rebutted by the legal presumption, in the absence of proof on the point, that the contract was made subject to the provisions of a statute of the forum.

Under the treaty between the United States and China, of July 3d, 1844, and the act of Congress carrying it into effect, the United States Commissioner and Consuls constitute a judiciary for the government of the citizens of the United States in China, and are governed by the law of nations, the laws of the United States, the common law, and the "decrees and regulations"

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- of the Commissioner, until modified or annulled by Congress. And such a judicial system is constitutional.
- Assignments of personal property in China, made there between citizens of the United States resident there, will be tested by the common law.
- People v. Gerke*, (5 Cal. 281;) *Siemssen v. Boker*, (6 Id. 250,) commented on.
- An alien friend may sue an American in the Consular Courts in China, established under the treaty of 1844. And the assignees of personal property assigned there in trust for foreign creditors, among others, may be compelled by such Courts to execute the trust.
- The right of Englishmen and Americans to sue each other in foreign countries where, by treaty, the laws of England and America, respectively, are the rule of decision, discussed and affirmed.
- What is meant by the common law as used in the Act of Congress carrying out the treaty with China, stated.
- The decision of the Consul, as to the validity of the assignment, is not conclusive in the Courts of this State.
- An assignment of personal property in trust for creditors, need not be delivered, as a deed. The making of the trust and its acceptance, are sufficient, especially if accompanied or followed by the possession of the property.
- In such assignments where no conditions are imposed on creditors, an acceptance by them is presumed.
- Where an assignment embraces the property of the firm and of one member of the firm, in trust to pay his debts and the debts of the firm, it must be construed so as to give individual property to individual creditors, and firm property to firm creditors.
- An assignment in trust for the benefit of each and all the creditors of a firm, is sufficiently specific. Such trust, under the law, imposes well defined duties, such as to convert the property into money and pay over the proceeds, etc.
- After the assignee of property in trust for creditors takes possession, the title and trust become fixed and executed, and the assignment is not revocable.
- An assignment in trust for creditors to two firms jointly, by the firm names simply, is good, and the acceptance of the trust by one of the Trustees is sufficient.
- The want of a schedule of the property in such case, though sometimes regarded as a circumstance of fraud, will not of itself avoid the assignment.
- One partner of a firm, expressly, or by implication, sole manager, his copartners being absent at a great distance, may assign the firm property in trust for the benefit of creditors, if the assignment be necessary for their protection.
- That the Trustees employ the partner assigning, to aid them in winding up the concern, and pay him, and allow his wife some furniture, etc. is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment.

APPEAL from the Fourth District.

The main facts are stated in the opinion of the Court, but it is deemed best to insert those findings of the Court below, not stated:

1. That on the 8th or 10th day of March, A. D. 1856, the commercial house of Nye Brothers & Co. then and before that time doing business in Canton, China, had returned to them by the European Mail which arrived at Canton on one of those days, protested bills to the amount of thirty thousand pounds, (£30,000,) drawn by the said house at Canton upon Frederick Huth & Company, Bankers, at London, G. B. and now the contesting creditors in this case.

2. That said assignment was executed by the said Gideon Nye,

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before the American Consul, at the American Consulate, at Canton, on the day it bears date, and delivered to the assignees.

3. That the James Russell & Co. mentioned in said assignment, constituted, on the 11th of March, 1856, an American commercial house of long standing, good character, and at the date of the assignment, and long before, of unquestionable solvency. Said house being composed of Paul S. Forbes, Robert S. Sturges, Edward Cunningham, David N. Spooner, George Griswold Gray, Charles N. Spooner, and Frederick Reiche, and that James Purdon & Company, mentioned in said assignment, also constituted, on the 11th day of March, A. D. 1856, an American commercial house, established at Canton, of good standing, and at the time of, and long before, the assignment, of unquestionable solvency, composed of the said James Purdon and his brother, John C. Purdon, and that said parties, composing said firms, are the plaintiffs in this case.

4. That said assignees are competent and suitable persons to take charge of said assigned property.

5. That at the time of the said assignment, the house of Nye Brothers & Co. was composed of the said Gideon Nye, Jr. the sole managing partner, residing at Canton, China; of Clement D. Nye, residing at Shanghai, China; and of Charles Keating Tuckerman, a salaried partner, not participating in the profits or losses of the partnership.

6. That said Tuckerman also resided at Canton, but at the date of said assignment was on a voyage from Canton to Calcutta, *via* Manila and Singapore, having left Canton on said voyage in the month of January preceding.

7. That at the date of said assignment the said Charles D. Nye was at Shanghai, between which place and Canton it required ten or fifteen days to make the trip.

8. That the English steamer bringing the European mails with the protested bills, as aforesaid, at Canton, on the 8th or 10th of March, A. D. 1856, left Canton on the 12th with the return correspondence; and that the said Gideon Nye, Jr. between the time of the arrival and the departure of the said mail to and from Canton, had no opportunity of consulting with the said Clement D. Nye, or the said Tuckerman, respecting the propriety of said assignment.

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9. That before the return of said protested bills the house of Nye Brothers & Co. had good credit in China and abroad, and that the return of said bills was the immediate emergency for making said assignment; and that said emergency did, in fact, exist at the time of making of the assignment.

10. That the assignees, at the date of the assignment, resided in China, except Paul S. Forbes, who resided in Boston; and all the assignees were in Canton at the date of the assignment, except Edward Cunningham and Geo. G. Gray, who were at Shanghai, where they resided, and Charles N. Spooner, who was at Chow-Fow, where he resided, about midway between Canton and Shanghai.

11. That the assignees accepted the assignment, took possession of the property, real and personal, of Nye Brothers & Co. under the assignment, made sales of some of the said property, took the general management of the former business of Nye Brothers & Co. relating to consignments on hand and due, issued circulars to the creditors and correspondents of said house, made statements to said creditors concerning the liabilities and assets of said firm, employed the said Gideon Nye, Jr. and others, to assist in the administration of the assignment, and made the said Nye a reasonable allowance for his services.

12. That schedules of the debts and assets of the said Nye Brothers & Co. were made out by said Gideon Nye, in pursuance of the reservation in said assignment of the 11th of March, and delivered to the assignees a short time after the execution and delivery of said assignment of the 11th of March.

13. That prior to said assignment, the said Nye Brothers & Co. had an established credit upon the house of Frederick Huth & Company, to the amount of about thirty thousand pounds sterling, and that since the assignment the said Gideon Nye and some of the creditors of Nye Brothers & Co. contend that the terms of that credit were violated by Frederick Huth & Co. by their protest of said bills.

14. That the said assignment was executed in good faith by the said Gideon Nye in behalf of Nye Brothers & Co. for the benefit of all their creditors, and the same is free from any fraud in fact on the part of the said Nye Brothers & Co. or on the part of the said Gideon Nye, or on the part of the said assignees, in

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the acceptance and administration of the same, and that the co-partners of said Gideon Nye did not and have not dissented or objected to said assignment.

15. That the teas in question constituted a part of the assets of the firm of Nye Brothers & Co. at the time of the assignment, and were actually delivered to said assignees subsequent thereto, who took possession of the same and shipped them to San Francisco for a market, consigned to Morgan, Hathaway & Co. for sale on their account in the regular course of their administration under the assignment, with instructions to remit the proceeds thereof to them, the said assignees.

16. The said teas being the product of China, where the assignment was executed and accepted, it was a proper act on the part of the assignees to ship them to San Francisco for a market — under the expectation of securing a higher cash price — and an immediate return of the proceeds to them — and that said transaction on the part of the assignees was and is entirely free from fraud.

17. That the suit upon which the execution was issued in this case by Frederick Huth & Co. against Nye Brothers & Co. was instituted on the 15th of February, 1856, by attachment.

18. That there were several meetings of the Chinese creditors of Nye Brothers & Co. representing about two-thirds of the entire indebtedness of the house, soon after the assignment, before the American Consul in Canton, at which the assignees attended, and that said creditors assented to said assignment and co-operated with the assignees in carrying it out, etc.

19. That at said meeting the said creditors made a reasonable allowance of furniture to Mrs. Gideon Nye, for the use of the family, to which the assignees assented, and that in assenting thereto, the assignees were not guilty of fraud.

20. That the entire foreign population residing in Canton at the date of the assignment, including Missionaries, did not exceed three hundred, and that among this foreign population, there were not more than thirty or forty American residents.

21. That this population resided together at the place called the Foreign Factories, a place of limited extent, and devoted to the transaction of foreign business.

22. That there were no Americans residing in Canton at the

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date of the assignment, except those connected with the commercial houses, and no suitable person residing at the Factories to act as assignee for Nye Brothers & Co. except those connected with a commercial house.

23. That it is customary for the foreign residents in Canton to execute legal documents and transact legal business at their respective consulates.

24. That the foreign residents of Canton, within the isolated place called the Factories, outside the wall of Canton, have no access to the Chinese Courts for the purpose of litigation, as established by the laws peculiar to that empire.

25. That the first mentioned assignment has been adjudicated upon in a controversy between the American citizens by the Consular Tribunal authorized by Act of Congress, and declared valid.

26. That there is no evidence tending to show that such an assignment is contrary to the positive law of China, or the policy of that empire, or contrary to any usage or custom of the foreign commercial population resident in China.

27. That the value of said teas is fifty thousand dollars.

From the foregoing facts, conclusions of law are by the Court:

1. That the assignment of the 11th of March, 1856, is valid, and vested in the assignees the title of the teas; was acquiesced in by the copartners of Gideon Nye, Jr. and is binding upon the firm.

2. That the assignees are entitled to the teas in question, as their property, to be disposed of by them, in the execution of their trust under the assignment.

3. That the defendant, the Sheriff of the county of San Francisco, having seized and taken said teas by virtue of an execution against the property of the said Nye Brothers & Co. is liable to said assignees in this action for the value thereof, and that judgment be entered accordingly.

4. And that the plaintiffs recover of the defendant, as Sheriff, the sum of fifty thousand dollars, the value of the teas at the date of the seizure.

Julius K. Rose, Sidney L. Johnson, J. P. Hoge, and D. Lake,
for Appellant.

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The only question is, whether these teas were, by the effect of the assignment, so vested in the plaintiffs as to deprive the judgment creditors of Nye Brothers & Co. of the right to seize them on execution.

The claim would not be maintained on such an instrument if executed in this State. The 39th Section of the Act for the relief of insolvent debtors and protection of creditors, (Wood's Dig. 501,) provides that, "No assignment of any insolvent debtor, otherwise than is provided in this Act, shall be legal or binding upon creditors." (*Adams v. Woods & Haskell*, in the matter of Lynch, Intervenor, 8 Cal. 153; *Cheever v. Hays*, 3 Id. 471; *Cohen et al. v. Barrett et al.* 5 Id. 210.)

The first question is whether this is a case for the application of the rule of international comity.

In the *Bank of Augusta v. Earl*, (13 Peters, 519-589,) the Supreme Court of the United States, by C. J. Taney, lays down the rule, but always with the restriction that the foreign law be not repugnant to the law or policy, or prejudicial to the interests of the country where its application is sought to be enforced. (See *Zipcey v. Thompson*, 1 Gray, 243; *Brown v. Knox*, 6 Mo. 306, 307; *Ingraham v. Geyer*, 13 Mass. 147; *Varnum v. Camp*, 1 Green, N. J. 326; *Brown v. Knox*, 6 Mo. 302.)

It may be contended that this repugnancy of the law of California to voluntary assignments for the benefit of creditors, is to be considered as confined to those made within the territory of the State. Of course, it can deny effect to foreign assignments only so far as they conflict with the rights of creditors to property within this State. The statute is general with respect to all creditors and all assignments, except such as our insolvent law permits, and the policy of the law, is as much offended by such assignments made elsewhere, as by those made here, when the former are set up in our Courts against the rights of creditors. For this question, it is not material that the property was transferred to the assignees before it came here. It is the title they assert to it, which our law proscribes, refuses to recognize, in opposition to the claims of creditors. If the rule of comity were to be admitted, the foreign assignee could as well claim property situated here, as to maintain his title to that brought by him into the State. The only question would be the priority

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of the assignment. (Story, Conflict of Laws, Sec. 398, quoting Lord Kenyon in *Hunter v. Potts*, 4 Term R. 182, 192; 2 Kent, 496; Story, Conflict of Laws, Sec. 415, and cases cited.)

But if the Court should be unable to come to this conclusion, the question then arises, What was the law of the place where the assignment was made? The burden of proof of it was on the Respondents, who set it up, and assert their claim under it. In the absence of proof of any other law applicable to the case, the Court must apply the law of the forum at the time the seizure was made. (*Leavenworth v. Brockway*, 2 Hill, N. Y. 202, 203, and the cases cited in the notes; *Harris v. Allnut*, 12 Lou. 465; *Allen v. Watson*, 2 Hill, S. C. 319, 322; *Ingraham v. Geyer*, 13 Mass. 147.)

The Respondents seem to acknowledge this, for they endeavor to establish the *lex loci*. They appeal to the treaty with China, of July 3d, 1844, negotiated by Mr. Cushing, Commissioner for the United States, (8 Statutes at Large, 592,) and to the Act of Congress passed on the 11th of August, 1848, for the purpose of carrying into effect the provisions of the treaty. (9 Statutes at Large, 275.)

From this Act it appears that, in all cases, civil and criminal, even in capital cases, the Consul determines both fact and law without the intervention of a jury, and in some cases without appeal. In cases of a certain magnitude he is to be assisted by two or three Assessors, of his own selection, but even then he decides the case, and their dissent only gives the right of appeal to the Commissioner, who decides, finally and alone, both fact and law.

It thus appears that this Act of Congress, for carrying into effect the treaty, requires a great deal of legislation on the part of the Commissioner before it can go into effect.

If we assume, for the moment, that Congress had the power, under the Constitution, to determine the legal relations, and legislate upon the rights of property and person of Americans in China, a power not admitted now, even in our own territories, and inquire what is the law of American citizens in China, under this Act, we shall be not a little puzzled to determine it. Recurring to the fourth section, which makes the common law sup-

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ply the deficiency of the statute law of the United States, the question arises, What common law?

In *Wheaton v. Peters*, (8 Pet. 591, 658,) the Supreme Court say: "It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle that pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made part of our federal system only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the State in which the controversy originated." (See, also, Vol. 7, Opinions of Attorney-General, 504, Ex. Docs. 33d Cong. 1st Sess. No. 123, Vol. 16, 325.)

[Counsel here quote at length from Mr. Cushing's opinion as to what common law is meant by the Act of Congress, and as to the "decrees and regulations" which the Act authorizes the Commissioner in China to make to supply the defects in the common law, and the laws of the United States. For these decrees, etc. see briefs on file.]

Thus we see that in the judgment of the author of the treaty, the regulations of the Commissioner are necessary to determine what the common law is on all those questions in which the States and their Courts differ from one another.

The jurisdiction is limited by the 25th Article of the treaty, to controversies between American citizens.

No amendments to the Act of Congress, no regulations to define the rights of parties, or the relative jurisdiction of the Commissioner and Consuls, appear to have been made. A curious inquiry here presents itself, how far the Act of Congress is binding upon the creditors, not of other nations only, but even of our own.

It is direct legislation by Congress upon the rights of property and persons of American citizens by a power derived from China. It is a delegation, moreover, of legislative power to an executive officer, holding his place at the will of the President, and a union in his hands of powers executive, legislative, and judicial. It subjects American citizens, in their persons and

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property, to laws which they have no voice in making; it holds them to answer for capital or infamous crimes, without the presentment or indictment of a grand jury, and to liability to be deprived of life, liberty, or property, without due process of law, and without trial by jury. (Arts. 5-7, Amendments to Constitution of United States.)

The reasoning of the Supreme Court of the United States in the *Dred Scott Case*, (19 Howard, 449) disclaims this power in the General Government over American citizens, not merely in the States and Territories, but wherever they may be found.

This absolute power cannot be maintained under the clause which makes treaties the supreme law of the land, because no foreign power, by treaty, can give to our government more power over American citizens than the Constitution allows it to receive, hold, and exercise. In the case of *New Orleans v. The United States*, (10 Pet. 736,) it is held that the federal powers cannot be enlarged by treaty.

The Act of Congress of August 11th, 1848, could have no effect upon the relations of debtor and creditor existing between Nye & Co. and other American citizens, much less upon their relations with strangers; it can afford no rule for determining their rights of property.

But this is the only attempt the Respondents have made to establish the *lex loci*. This Court, then, must apply the law of the forum which sanctioned this seizure at the time it was made, and held null and void the title set up by the plaintiffs, because there is no other rule applicable to the case.

The decision of the Consul at Canton upon the validity of the assignment, can have no weight as evidence of the law of the place, because he was without jurisdiction even under the law itself, unaided by the "legislation" of the Commissioner, as Mr. Cushing says, and because the Act under which he made the decision, and the powers given to him by the Act, are unconstitutional and void, as to citizens, and without authority as to all others.

We say, then: 1st. That the well ascertained policy of this State denies all effect to such assignments, as against creditors, without regard to the place where the assignment was made, or to the citizenship of the creditors; and, 2d. That if it were a

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case for the exercise of international comity, the law of the place of contract has not been proved by the plaintiffs, and no other rule than the law of this State is applicable to the case.

But the Respondents contend that if the foreign law is not provided, the Court should administer, not the statute law, but merely the common law of this State; and they rely upon the case of *Wright v. Delafield*, (23 Barb. 513) in which it is held that when the common law is known, proved, or assumed to prevail in another State, it will be administered by the New York Court, independently of New York statutes.

But this assumption of the existence of the common law in a State is equivalent to proof, *pro tanto*, of what its law is; and, in the absence of proof of a modification of it, by a statute of that State, the Court administers the common law as the ascertained law of the place of contract. The reasoning in *Wright v. Delafield* has no application to cases in which Courts refuse to take judicial cognizance of what the foreign law is.

In most of the cases in which the law of the forum has been applied to a foreign contract, it was statute law, and the principle is invariable and inevitable, that, in the absence of proof of what the foreign law is, the law of the forum, in its unity and entirety, is to be administered as the only rule left to the Court. The case of *Wright v. Delafield* did not turn upon that question, for it is admitted, (pp. 516, 517) that the application of the statute law of the forum did not change the result.

Indeed that case is but a confirmation of the rule we seek to apply. It supposes such a knowledge of the law of sister States as dispenses with the application of the rule of the forum. It is at variance with the rule that courts cannot take judicial cognizance of the laws of other sovereignties, so far only as certain sister States are concerned, but not as to other countries, governed by entirely different systems of law. (Story, Conf. of Laws, Sec. 637, and the cases cited in the notes; *Leavenworth v. Brockway*, 2 Hill, N. Y. 202, and the cases cited in the notes; *Brown v. Gray*, 16 Eng. C. L. 426; *Ingraham v. Geyer*, 13 Mass. 147; *Mason v. Wash*, Breese, Ill. 16; *Allen v. Watson*, 2 Hill, S. C. 319-322; *Bonneau v. Poydras*, 2 Robinson, La. 1-13; *Harris v. Allnutt*, 12 La. 465; *Crozier v. Hodge*, 3 La. 357.)

In the brief made by Mr. Duer, when this case was first before

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this Court, there is an objection to this assignment, which we give in his language:

"Every assignment to Trustees, for the benefit of creditors, tends to hinder the delay even the creditors provided for, in the collection of their debts. They have been upheld, however, where otherwise unobjectionable, on the ground that, though the creditor was hindered in his legal remedy, yet another, through the medium of a Court of Equity, was afforded him. If this latter remedy be wanting, the creditor is hindered and delayed, and, indeed, utterly defeated in the collection of his debt. (5 Mass. 154; 6 Id. 342.) In this case any such relief as that of a bill in equity, to compel the Trustees to discharge their trust, or to remove them for misconduct, is wanting. The assignors have, among their creditors, citizens and residents of China, citizens and residents of the United States, citizens and residents of Great Britain, and also citizens of the United States and Great Britain, residing in China. To a bill filed by a creditor to compel the execution of a trust, all the creditors should be made parties, or it must be filed in his behalf, and that of all others. (4 Paige, 23; 23 Pick. 508; Burrill, 537.) Now what tribunal is there that could take jurisdiction of such an action? Where could Messrs. Huth & Co. go for relief? Not to the Courts in China, for American residents in China, being parties, the treaty divests the Chinese Courts of jurisdiction; not to the American Commissioner, or Consul, for the controversy would not be between American residents merely, though they would be necessarily parties; not to the public officers of the United States and China, acting in conjunction under the 24th Article of the treaty, for that applies to controversies between Chinese and American residents of China; and British subjects, in such action, would be the plaintiffs. In short, there is no tribunal competent to enforce the trust; and if the creditors of Nye Brothers & Co. cannot seize the property of their debtors, where they can find it, they are wholly without relief, legal or equitable; and the insolvent firm, and their assignees, may keep the assets forever."

We call the attention of the Court to the objections under the common law, apparent upon the face of the assignment; 1st. It is not a deed nor a declaration of Gideon Nye, Jr. much less of

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the firm of Nye Brothers & Co. It is the language of the United States Consul, Perry, not of Nye, that is used in it. 2d. It is the act of Gideon Nye, Jr. and not of Nye Brothers & Co. 3d. There is nothing in it, or in the attestation of it, showing that it was delivered or was made to be delivered to the assignees. 4th. This memorandum, in the hands of the Consul, unaccompanied by schedules, operated no conveyance of realty or personalty. 5th. The failure to convey the realty, left all that part of the property of the assignor in his hands. It is not an application of the whole of the assignor's property to the payment of his debts. Moreover, one partner has no power to convey the realty of the other partners. 6th. It is made by one of three partners, without the knowledge, assent, or co-operation, of the other partners. (15 How. Pr. R. 268; *Haggerty et al. v. Granger*, Id. 243; *Patten et al. v. Wright et al.* Id. 481-488; 17 Vt. 393, Opinions of Wright and Redfield.) 7th. It places the individual creditors of Gideon Nye upon a par with the creditors of the firm of Nye Brothers & Co. and pays them *pari passu*, which is a fraud upon both the individual and partnership creditors. (29 Me. 59, 60; 25 Vt. 362.) 8th. The whole purport, aim, and effect, of the instrument, if supposed capable of effect according to its intent, is to transfer property to assignees, without giving them power to sell it or direction how to apply it for the benefit of the *cestuis que trust*, without power to take possession, to collect the choses in action, or any express direction or authority whatever. They are to hold on to it, apparently, until compelled to give it up, and creditors are to look for a Court of Equity in China, of general jurisdiction, capable of supplying the defects of the instrument. (*Grover v. Wakeman*, 11 Wend. 221; *Pierson v. Manning et al.* 2 Gibbs, Mich. 448; *Goodrich v. Downs*, 6 Hill, 438; 21 Pick. 185; 7 Maryland, 380; *Keep v. Sanderson*, 2 Smith, Wis. 58; *Hutchinson v. Lord*, Id. 313; 3 Selden, 438; *Murphy v. Bell*, 8 How. Pr. Rep. 468, Wells' Opinion; 5 How. Pr. Rep. 444, 445; *Van Nut v. Yoe et al.* 1 Sandf. Ch. 7, 8-14; *Averill v. Foucks*, 6 Bar. S. C. R. 474, 475; *Arthur v. R. R. Bank of Vicksburg*, 9 Sme. & M. 433; Same point on same deed, *Bodley v. Goodrich*, 7 How. U. S. 277; *D. Ivernois v. Leavitt*, 23 Barb. 80, 81.) 9th. The assignor reserves to himself, individually, not to the firm, sufficient time to record in this Consulate a full and complete schedule of all

the assets and liabilities, whether appertaining and belonging to him personally or to the said commercial house of Nye Brothers & Co. 10th. The instrument has scarcely any of the essential features of an assignment enumerated by Mr. Burrill on page 238.

But this assignment can not be maintained, for the following additional reasons: Gideon Nye had no power to assign the partnership property without the concurrence of his copartners. Clement D. Nye was at Shanghai, within the same country, under the same jurisdiction, (by the act of Congress, that of the Commissioner,) at about five days distance from Canton. It does not appear that there was any danger of liens, or judgments, or any other excuse for not consulting the other partners, or at least Clement D. Nye. (*Haven v. Hussey*, 5 Paige, 21; *Hitchcock v. St. John*, 1 Hoffman, 518; *Deming v. Colt* and *Hayes v. Heyer*, 3 Sand. S. C. Rep. 290-293; *Fisher v. Murray*, 1 E. D. Smith's Rep. 341; *Kemp v. Carnley*, 3 Duer, 5; *Kirby v. Ingersoll*, 1 Har. Ch. Rep. 172; Same case on appeal, 1 Doug. 477; See, also, the reference to it by Justice Daly in *Fisher v. Murray*, 1 E. D. Smith, 345. So in Missouri, in *Hughes v. Ellison*, 5 Mo. 465, 456; in South Carolina, in *Dickenson v. Legare*, 1 Dessausure, 540, 541.) If a partner cannot assign the partnership effects to a Trustee for the benefit of partnership creditors, with or without preferences, still less can he assign them for the benefit of his individual creditors. (*Jackson v. Cornell*, 1 Sand. Ch. 348; *Kirby v. Schoonmaker*, 3 Barb. Ch. 51; *Moddevell v. Keever*, 8 Watts & S. 64, 65; *Murrell v. Neill*, 8 How. U. S. 421, 426, 427; *Robb v. Stevens et al.* 1 Clarke Ch. 191-195; *Deveau v. Fowler*, 2 Paige, 400, 402.) The trust created in this assignment is "for the benefit of each and all the creditors of the said Gideon Nye, Jr. and the said commercial house of Nye Brothers & Co." It is difficult to understand this in such a manner as to authorize any discrimination between individual and partnership creditors. If it requires a distribution *pro rata* among the creditors of one class, it does so equally among those of the other, without distinction of classes or of funds.

There are numerous other objections to the assignment in this case. 1. There is the want of schedules. This has been held evidence of fraud. (*Pierpont v. Graham*, 4 Wash. 232-237. So

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Stevens v. Bell, 6 Mass. 339-344; *Will v. Franklin*, 1 Binn. 523; *Burd v. Smith*, 4 Dall. 76; *Drakely v. Deforest*, 3 Conn. 272.) Possession did not accompany the transfer; and it is not shown that either assignment or schedules were ever delivered to the assignees. The fact that the debtor was employed as agent of the assignees, with a salary, does not constitute a constructive change of possession, when there was no actual change. (*Camp v. Camp*, 2 Hill, 628; *Hantford v. Artcher*, 4 Hill, 271, 297; *Edwards on Receivers*, 280 *et seq.* Edit. 1846; p. 408, Edit. 1857; and the opinion cited by him in *Hart v. Acker*, *Scholefield v. Hill*, and *Butler v. Stoddart*; *Burrill*, Chap. 25, p. 285.) The whole transaction was merely colorable, and to enable Nye to put the property where the creditors could not reach it by the ordinary process of the law. (*McAllister v. Marshall*, 6 Binney, 344, etc.; *Cook v. Smith*, 3 Sandf. Ch. 336; *Connal v. Sedgwick et al.* 1 Barb. 212; *Caldwell v. Rowe et al.* 1 Smith, 195; *Same case*, 1 Carter, Ind. 405; *Findley v. Day*, 2 Sandf. S. C. 595; *Price v. Rickart*, 21 Barb. 475, etc.; 1 Sandf. Ch. 252; *Id.* 7-14, before cited.) 2. The assignment is deficient in not declaring what is to be done by the assignees with the property assigned. The simple expression, "in trust, and for the benefit of each and all the creditors of the said Gideon Nye, Jr. and the said commercial house of Nye Brothers & Co." is all that indicates the objects and purposes and mode of execution of the trust. An authorization to sell on credit makes the assignment void. (*Barry v. Griffin*, 2 Com. 371.) A right to sell in such convenient time as shall seem meet to the assignees, has also been held void. (*Woodburn v. Mosher*, 9 Barb. 256.) The opinion cited from *Barry v. Griffin*, was held, in the case of *Nicholas v. Leavett*, (4 Sandf. S. C. 252-293,) to be an *obiter dictum*, which could not be supported on authority or principle; but, in the Court of Appeals, it was sustained on both, (2 Seld. 510-521;) as also in the case of *Burdick v. Post et al.* (12 Barb. 168); 2 Seld. 522. In *Schufelt v. Abernethy*, (2 Duer, 533-537,) it is held to be a consequence of the doctrine of the case of *Nicholson v. Leavitt*, (2 Seld. 521,) that "the assignment, to be valid, must either, by express words, or by its necessary legal construction, devote all the property which it embraces, not only absolutely and unconditionally, but immediately, to the payment of the creditors. In *Brigham v. Tillinghast*, (3 Kernan,

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215—220,) the Court of Appeals reversed the decision of the Supreme Court, in 15 Barb. 618, and held that authority to convert an estate into money, or available means, avoided the assignment as being equivalent to a power to sell on credit. The Chancellor, in *Meacham v. Sternes*, (9 Paige, 398, 404, 405,) denies the right of an assignee to send the property away, to be sold on commission. The meaning of the parties to the deed, may be inferred from their own practical interpretation of it. It was so drawn as to leave to the assignees that discretion in the management and disposition of the trust property, which they have exercised. In *Pierson v. Manning*, (2 Gibbs, Mich. 448,) it is held that if an assignment be so drawn as to hinder and delay creditors in its execution, it is a legal presumption that it was framed with that intent, and that a statute, making fraud a question of fact, has no application, when fraud is apparent on the face of the instrument; that it cannot then be rebutted by extrinsic evidence. The application of partnership property to individual debts, and of private property to partnership debts, and the absence of all provisions for taking immediate possession of the property, and making sale of it for cash, without delay, are of this character, even if the assignment had been in other respects properly executed by all the partners. 3. The assignment is not executed by creditors, nor is their assent to it proved, and for aught that appears, the trust, as to this property, was held for the assignors, and was revocable at their will. Such is the common law, unmodified by State legislation. (*Acton v. Woodgate*, 2 Mylne & Keen, 492; *Wallwyn v. Coutts*, 3 Merivale, 707; *Smith v. Keating*, 6 Mann. Grang. & S. 136; S. C. 60 Eng. C. L. 134—157; *McKinnon v. Stewart*, 1 Eng. L. and Eq. 162, 163; *Garrard v. Ld. Lauderdale*, 2 Sim. 1; 3 Id. 14; Burrill, 85, 313, 314; *Widgery v. Haskell*, 5 Mass. 144—154; *Stevens v. Bell*, 6 Id. 339; *Ingraham v. Geyer*, 13 Id. 146; *Russel v. Woodward*, 10 Pick, 407; *Carr v. Dole*, 5 Shep. 358; Burrill, 215; Note 3, 216, 220, 221, Note 5.) Under the provision of the instrument, giving partnership property to individual creditors, and individual property to partnership creditors, there can be no presumption of the assent of any of the creditors. It is in fraud of the rights of one or the other class, and in the absence of schedules, neither class can know whether it is wronged or favored by the provision. The

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reason of the rule for presuming the assent of the *cestuis que trust* fails. (*Drake v. Rogers*, 6 Mo. 317; *Swearingen v. Slicer*, 5 Id. 241; *Duval v. Raisin*, 7 Id. 440; *Burrill*, 308.) 4. No persons are named as Trustees. The assignment is made to two mercantile firms jointly — Russell & Co. and James Purdon & Co. Who composed these firms was not disclosed by the instrument; was not even known here when this suit was brought. Such a trust was not within the scope of the ordinary business of a mercantile firm, and the acceptance of it, by one or more of the partners, could not bind the firm and the partners who did not accept. (Story on Part. Secs. 111—113.)

Even if each member accepted, and became liable for the execution of the trust individually, and the firms turned out insolvent, would the creditors of the Trustee firms in their legitimate business have to share their assets with the *cestuis que trust* of the assignment? The firms may be found solvent, but are the firms bound? If not, who are the Trustees, and how can creditors know them and their fitness for the trust, even to this day? The assignment makes the firms Trustees jointly, not the individual members of them.

Under whatever system of law, then, the Court will test this assignment, it will be found void against the attachment of the Appellant. We think we have fully established, on every ground, that the law applicable to the cause is that of California in its entirety, as it stood when the Respondents appeared in her Courts, setting up title to the property in dispute; that the treaty and Act of Congress, which are set up as establishing a *lex loci contractus*, if admitted to have effect according to their intent, do not purport to establish a *lex loci*, a territorial law, but simply personal statutes, confined exclusively to American citizens; that the constitutionality, extent, force, and completeness of said personal statutes, as respects American citizens, admit of grave doubts; that, at least, it is evident, they offer no remedy for any foreign creditors under the assignment; and that if they be held to establish the common law of England as the law of this case, the assignment is invalid by that test, and void as to the Appellant.

Halleck, Peachy, & Billings, and Gregory Yale, for Respondents.

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I. Does this assignment come under the general rule of international comity, and is its validity determinable by the *lex loci contractus*; or is it within the exceptions to that rule, and its validity to be decided by the *lex fori*?

As a general rule, the law of the place where any instrument relating to personal property, is executed by a person domiciled in that place, governs as to the form, execution, effect, interpretation, and operation, of the instrument. *Lex loci domicilii regit actum.* (Story, Conflict of Laws, 242 — 244.) The repugnancy of the Statute of California, (39th Section of the Act of May 4th, 1852,) to voluntary assignments for the benefit of creditors, must be confined to those made within the State.

Counsel have misstated the reason of the distinction in the rule of comity with respect to foreign bankrupt laws and voluntary assignments. Effect is not given to the latter, "because most of the States have had laws authorizing and regulating them;" but because the *jus disponendi* applies to them, whereas the bankrupt law is a proceeding *in invitum*.

Nor is this assignment excepted from the general rule of international comity. 1st. It is true that contracts opposed to the national policy and institutions of a State, or to the good morals and duties of its subjects, are excepted from the general rule of comity. But these exceptions have each their limitations. Comity is the general rule, and the exceptions are strictly limited so as not to affect the principle which is recognized and established by the rule. (*Greenwood v. Curtis*, 6 Mass. 378.) They must in the first case be limited to contracts, the execution of which would be repugnant to the interests and rights of sovereignty of the interdicting State; and in the second case, those which are founded on moral turpitude, in respect either of the consideration or the stipulation. (Burge, Col. and Foreign Laws, Vol. 3, 779, 780, and authorities referred to.) 2d. It is true, that in certain cases, where the law of a State prohibits particular kinds of voluntary assignments for the benefit of creditors, it has been held that those made in foreign States, and which come within the prohibition, although valid by the law of the place where made, will not be sustained in the forum of the State so prohibiting them. But the exception in those cases is not made on the ground of repugnancy in the laws of the two places. The ex-

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ception, with respect to personal property, when made, has been based on the fact that the foreign assignment was injurious to the rights and interests of the citizens of the prohibiting State, and it has been limited to property within its jurisdiction, at the time of the assignment, and held by the law as pledged for the payment of debts due within the State.

In the last case cited and relied upon by Appellant's counsel, *Varnum v. Camp*, (1 Green, N. J. 326-339,) it was the unanimous opinion of the Court that the merchandise which belonged to the assignor in New York, and was comprehended in the assignment, but had been sent to New Jersey after the assignment was made, was the property of the assignee, and could not be taken by the Sheriff under execution for a judgment creditor in New Jersey.

That decision is conclusive of the present case, even admitting that the assignment of Nye Brothers & Co. is by the laws of California declared fraudulent and void with respect to property situate in this State.

The rule above announced by the Supreme Court of New Jersey is nothing more or less than the ordinary rule of bargain and sale of personal property.

If reduced to possession, actual or constructive, by the purchaser, it is not subject to attachment by the creditors of the vendor. (*Thuret v. Jenkins*, 7 Martin, 353.)

(See, also, *Richardson v. Leavitt*, Lou. Ann. 430; *Whitenwright v. Leavitt*, 4 Id. 352. The same doctrine was held in *U. S. v. Bank of U. S.* 8 Rob. 262; *Black v. Zacharie*, 3 How. 483; *Amor v. Cockburn*, 4 Mart. N. S. 667; *Babcock v. Malbis*, 7 Id.; 137 *Russell v. Gale*, 4 Lou. 183; *Hepp v. Glover*, 15 Id. 461; *Powell v. Aiken*, 18 Id. 321; *Delvach v. Jones*, Id. 447; *Urie v. Stevens*, 3 Rob. 251; *Price v. Smith*, 5 Id. 124; *Bank of St. Mary's v. Morton*, 12 Id. 409; *Oliver v. Lake*, 3 Lou. Ann. 78.)

Nye Brothers & Co. had lost their control over this property. It was in the possession of the assignees, and held by them under a title valid by the law of the place. It was sent by them to California as their own property, under the law of the place from which it was sent. (See Bur. on As. 336; Story, Conflict of Laws, Sec. 411, 3d Ed.)

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We consider the following propositions to be well established principles of public law:

1st. That, by the general rule of international comity, contracts valid by the law of the place where made are valid everywhere.

2d. That voluntary assignments of personal property for the benefit of creditors, are held to be within this rule of national comity.

3d. That the only exception to the application of this rule to such assignments is where the property assigned is within the jurisdiction of the prohibiting State at the time the assignment is made, or has not been reduced to possession, actual or constructive, of the assignees.

4th. That, with respect to property thus within the prohibiting State at the time of the assignment, or not reduced to the possession of the assignees, the attaching creditor must be a citizen of, or domiciled in, the prohibiting State where the property has its *situs*.

5th. Moreover, personal property, situated within the prohibiting State, is considered as pledged by the law only to the debts of the assignor which are there due and payable; and the creditor, even though a citizen, cannot seek property for debts contracted and payable in foreign countries.

6th. Property upon the high seas at the time of the assignment is, under the common law, reduced to the possession of the assignees, *ipso facto*, by the assignment.

7th. To extend the law of the forum to property not within the State at the time of the assignment, would be giving to the law an extra-territorial effect, and to the Court an extra-territorial jurisdiction, which have never been claimed or permitted by Christian States.

It follows, therefore, that the goods, coming here in the possession, and *prima facie* the property of the assignees, could not be lawfully seized by the Sheriff in this case, and cannot be held by him under this execution without showing that the assignees have no title.

But conceding, for the purpose of argument, that it is necessary for us to show the validity of this assignment, we will now proceed to inquire:

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II. What was the law of the place where the assignment was made, and what tribunal was authorized to take jurisdiction and determine upon its validity under that law?

Under this head counsel cited 2 Phillimore on Int. Law, 235, 239, 271; Opinions of Attorney-Generals, Vol. 7, 346, 348, 498, 499, 501; Treaty with China, 1844, Art. 25; Act Congress Aug. 11, 1848, carrying into effect the Treaty; Decree of Robert M. McLane, U. S. Commissioner to China, distributing the judicial authority conferred upon the Commissioner and Consuls, to be found in "The China Mail" of May 15th, 1856.

This decree provides detailed "Rules and Regulations" for the law and equity jurisdiction of the United States' Consular Courts in China, the issuing of writs and processes, etc. It says: "The United States Consular Court may exercise equity jurisdiction where the subject matter complained be a matter of — 1st, Accident and mistake; 2d, Account; 3d, Fraud; 4th, Infants; 5th, Specific performance of agreements; 6th, Trusts. * * As to trusts, equity will superintend and protect the creation of trusts, whether vesting in the Trustee real or personal estate, and take jurisdiction of trusts, whether resulting from an express deed or the force of circumstances and the situation of parties, which latter are implied trusts." The decree provides, in detail, for new trials and appeals from the Consular Courts in all proceedings at law, and adds: "New trials and appeals, shall lie from the equity jurisdiction of the U. S. Consular Courts as from the common law jurisdiction of the same."

We deduce from the foregoing summary of laws and authorities:

1st. That, in the earlier part of the middle ages, merchants and traders, residing in foreign States, were not subject to the local jurisdiction, but only to the jurisdiction of Consuls and other officers appointed by their own States for that purpose.

2d. That, about the middle of the seventeenth century, this rule of general public law was changed throughout Christian Europe, the civil and criminal jurisdiction of foreign Consuls over their resident countrymen passing into the hands of the local authorities.

3d. That in Mohammedan, Pagan, and all unchristian domin-

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ions, Consuls retain the jurisdiction which in earlier times they possessed everywhere.

4th. That the treaty between the United States and China recognizes and establishes, by express stipulations, this general principle of the extritoriality of Americans in China.

5th. That the treaty provides that jurisdiction over Americans in China may be exercised not only by Consuls, but also by other officers, other public functionaries, public officers, and the authorities of the United States.

6th. That the Statute of 1848 (Secs. 1, 2, and 3) gives to the Commissioner and Consuls the judicial authority necessary to carry into effect the provisions of the treaty, without, however, distributing it between them, except in certain cases, but leaving that distribution to be made by regulation.

7th. That cases of insolvency are included among the questions thus left to be distributed by regulation, and that the Commissioner, in 1854, by a decree which is "binding and obligatory until annulled or modified by Congress," assigned to the United States Consular Court equity jurisdiction of all matters of *trust*, whether of real or personal estate, and whether resulting from express deed or otherwise.

8th. That in the exercise of the jurisdiction thus conferred, the Commissioner and Consuls, when acting in their judicial capacity, are to be governed by the law of nations, the laws of the United States, the common law, and the decrees and regulations issued by the Commissioner, until annulled or modified by Congress.

Objections made to this system of law and jurisdiction in China:

1. The first objection to be noticed is, that "It is direct legislation by Congress upon the rights of property and persons of American citizens by a power derived from China." A treaty cannot enlarge the constitutional powers of the Federal Government, or give to Congress the power to pass laws which shall contravene any of the provisions of the Constitution.

But the Constitution does not prevent "direct legislation by Congress upon the rights of property and persons of American citizens" in foreign countries. The reasoning of the Court in

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the Dred Scott case is limited to the States of the Union, and to the Territory which has become a part of the United States. (19 Howard, 449, 450.)

How can the "power to make treaties" and "to regulate commerce," be exercised by the Federal Government, without in some degree affecting "persons and property" of citizens of States and Territories. (*The People v. Gerke*, 5 Cal. 381; *Cherac v. Cherac*, 2 Wheat. 289; *Orr v. Hodgson*, 4 Id. 453; *The Society, etc. v. New Haven*, 8 Id. 464; *Hughes v. Edwards*, 9 Id. 489; *Banks v. Corneal*, 10 Id. 181; *Henks v. Dupont*, 3 Peters, 242; *Ware v. Helton*, 3 Dallas, 230.)

The same rule of decision is applicable to the power of the Federal Government "to regulate commerce with foreign nations," etc. The power given to the Federal Government over any particular subject, cannot be controlled by the legislative enactment of a State, for that would annul and destroy the power itself.

Nor is there any difficulty in enforcing the trusts created by the assignment. The United States Consular Courts in China have the same jurisdiction with respect to Chinese and British subjects resident in China, and non-resident Americans and foreigners, that the Courts of California have with respect to the same persons resident in China, or elsewhere out of the United States. The European, Asiatic, and non-resident American creditors of Nye Brothers & Co. have the same relief, legal and equitable, in those Consular Courts, as they would have had in the Courts of California or of New York, if the assignment had been made in either of those States, and Messrs. Huth & Co. hold in this matter precisely the same relation to the United States Consular Court in Canton as they would hold in ordinary cases of litigation to the Courts of California. Although they are British subjects and non-residents in California, they may invoke the jurisdiction of our Courts over a resident defendant; and, although British subjects and non-residents in Canton, they may invoke the jurisdiction of the United States Courts in Canton, over American citizens resident there.

There is no plainer or better established principle of public law than this, that alien friends may sue in the Courts of the defendant's country.

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The United States Attorney-General, Mr. Cushing, in his official opinion, has fully discussed this question with respect to the jurisdiction of the United States Courts in China. (*Opinions of Attorney-Generals*, Vol. 7, 517—519.)

[Counsel here quoted at length from Mr. Cushing's opinion; but, as the quotations appear in the opinion of this Court, they are omitted.]

These views are carried out in the "Rules and Regulations" contained in the decree of Commissioner McLane. It is especially provided, that the Consular Court shall exercise equity jurisdiction in all matters of trust, express or implied, and of real or personal estate.

III. Is this assignment valid by the laws of the place where it is made?

As preliminary to this discussion, let us, first, inquire how are those laws to be ascertained? And, second, by what are we to be guided in applying them to the present case?

1st. The system of laws by which the validity of this assignment must be tested is composed, as already stated: 1st. Of "the laws of the United States." 2d. Of "the common law;" and, 3d. Of the "Decrees and Regulations" made by the Commissioner.

Strictly speaking, there is no uniform system of common law of the United States; nevertheless, there is a diverse common law in the different States which is the English common law, or at least its great leading principles, modified and adapted to the legislative adjudication and usage of the people of the States. This, says Mr. Cushing, is the common law meant by the statute, and it "furnishes a code of laws for the great mass of civil or municipal duties, rights, and relations, of men, such as, within the United States, are the resort of the Courts of the several States." But, while the great body of this code is generally applicable, there has not been an entire uniformity in the modifications and changes of the English common law, made by the legislation and judicial construction of each of the States. To dispose of this difficulty, continues Mr. Cushing, the statute went one step further, and enacted that the Commissioner might, from time to time, issue decrees and regulations, "which shall have

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the force of law, and supply any defects and deficiencies in the common law and the laws of the United States." (Opinions of U. S. Attorney-General, Vol. 7, 504.) Referring again to the decree of Commissioner McLane, he says: "By 'common law' is intended that law which is to be found in the decisions of the Courts of Justice of the United States, both Federal and State Courts, as distinguished from that law which is found in the statute law of the United States and of the several States. These decisions are to be found in the numerous volumes of American Reports, known as reports of cases decided in the Courts of the United States, and of the several States of the American Union, and they embrace the common law of England, so far as the same has been judicially noticed as evidence of the common law, in the administration of justice in the United States. The Commentaries of Kent and Story on American Law, and the American edition of Blackstone's Commentaries on the laws of England, are referred to as further evidence and explanation of the common law; and no practice of proceeding, and no final judgment, not expressly authorized by the laws of the United States, or the common law as thus defined, or by the decrees of the United States Commissioner to China, should ever have place in a United States Consular Court in China, whether the same be exercising a common law or equity jurisdiction."

The 34th Section of the Judiciary Act of 1789, says: "that the laws of the several states, except where the Constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in Courts of the United States, in cases where they apply," and the 14th Section of the same act empowers the Courts of the United States "to issue all writs not specially provided for by the statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of the law." Chief Justice Marshall, in commenting upon these apparently repugnant provisions of that statute, regards the 14th Section as explanatory of what is meant by the 34th, and that by the principles and usages to which the power of the Court was intended to be limited by the act, he understands "those general principles and those general usages which are to be found, not in the legislative acts of any partic-

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ular State, but that generally recognized and long established law, which forms the substratum of the laws of every State." (*Burr's Trial*, Vol. 2, 482.)

The laws, therefore, by which this assignment is to be tested, are not foreign laws, in the general sense of that term, but laws with which all Courts, whether of the United States or of a particular State, are presumed to be acquainted.

2d. In applying the law of New York or of any other State, we follow the interpretation and construction given to the law by the Courts of that State. So, in applying the above described system of laws in China to a particular case, we should be guided by the adjudications of the Courts whose duty it is to interpret and construe those laws. In this case we have the decision of the Consular Court of Canton, which under the law and decrees had jurisdiction of the matter, upon the validity of this identical assignment, the Court, after a careful consideration of the case, sustaining the assignment as good and valid. This is decisive of the case.

If that Court were to be considered foreign in the general sense of the term, its judgment would be of "universal obligation, as to all the matters of right and title, which it professes to decide in relation thereto." (*Story, Conflict of Laws*, 956, 989; *Kaims on Eq. B. 3, Ch. 8, Sec. 4; French v. Hall*, 9 N. H. 137.)

But this Court is foreign, only in relation to this State — it is a Court established by the United States, in a place over which the laws and jurisdiction of the United States are extended, so far as respects the persons and property in this case. It is not a constitutional Court, in which the judicial powers conferred by the Constitution on the General Government are deposited; but it is a legislative Court, created by Congress, in virtue of the general right of sovereignty which exists in the government, in a territory over which the exercise of this particular power and jurisdiction has been ceded to it by treaty. (*Am. Ins. Co. v. Canter*, 1 Peters, 511 *et seq.*) This is as much a domestic Court as was the Territorial Courts of Florida, referred to in the case just cited, or as are now the Territorial Courts of Oregon or Washington, and its judgments are entitled, in California, to the same respect and authority as the judgments of the Courts of those territories are here entitled to.

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Objections made to the validity of this assignment:

1st. The first general objection is, that no law of the place has been shown allowing voluntary assignments for the benefit of creditors. Nor has any law of the place been shown, or alleged, which prohibits such assignments. The *jus disponendi*, or right to dispose of property by contracts *inter vivos*, has its origin in the law of nature, and is not the offspring of legislation. And where there is no statutory provision prohibiting or regulating the disposition of property by a particular kind of contract, such a disposition will be considered good and valid. "Foreigners enjoy every right which arises from the *jus gentium*. They may, therefore, perform all sorts of acts *inter vivos*. The right to make a testament, active or passive, is, on the contrary, derived from the civil law — *testamenti factio est juris civilis* — foreigners not enjoying what is of civil law, have not this faculty or right." (Pothier, *Traité des Persones*, Part 1, Tit. 2, Sec. 2.)

The French law adopted the maxim of the Roman law, *factio testamenti est juris civilis*. For that reason a foreigner could not dispose of property by testament. He was forbidden by municipal law. But, says Pothier, the right to dispose of property by acts *inter vivos* is founded on the *jus gentium*, the law of nature.

"Where there is no insolvent law, there is nothing to prevent a debtor from making a voluntary assignment of his property in trust for his creditors." (Parsons' *Mercantile Law*, 307.)

2d. An assignment by the resident and managing partner, for himself and in the name of the firm, is sufficient to vest in the assignee the entire property of the firm, wheresoever situate. (See the authorities above referred to on the general doctrine of the *jus disponendi*; *Means v. Hapgood*, 19 Pick. 106, 107; *Deckard v. Chase*, 5 Watts, 23; *Hennessey v. The Western Bank*, 6 Watts & Serg. 310; *Harrison v. Sterry*, 5 Cranch.; *Henderson & Wilkins v. Tompkins*, Brock. 458; Parsons' *Mer. Law*, 175, Note 1.)

But Appellants contend that C. D. Nye, the only other full partner, must be considered as present in Canton at the time the assignment was made, although actually at Shanghai, nine hundred miles distant, with no means of communication except by a sea voyage of ten or fifteen days; and that he cannot be considered as assenting to the assignment, although it is particularly stated in the decree of the Consular Court that it

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"has received the assent and adoption of his, the said Gideon Nye, Jr.'s copartners." Counsel have stipulated that Gideon Nye, Jr. was "the only resident partner, and managing the affairs of the house at Canton," and the evidence shows that C. D. Nye had not, for a long time, taken any part in the management of the affairs of the firm of Nye Brothers & Co. if, indeed, he had not actually ceased to be a partner.

But it is urged that there was no immediate necessity, on the 11th of March, 1856, of making an assignment at that time. We answer, the failure was caused by the return of thirty thousand pounds sterling of protested bills drawn by Nye Brothers & Co. on Huth & Co. which protested bills were returned to Canton on the 8th or 10th of March, 1856, and that two-thirds of the debts of the firm were due to Chinese creditors.

3d. Another objection is, that this assignment is insufficient to convey the real estate either of Nye or of the partnership, and, therefore, it left a part of the property of the assignor in his hands. If this were so, Huth & Co. have no reason to complain, for it left such unassigned realty liable for the payment of the debt due to them. It is shown, however, by Appellant himself, that a subsequent conveyance of the realty to the same assignees, for the same purposes, was made April 29th, 1856, ratifying this assignment, and curing any defects in the manner of its execution.

4th. The assignment says, "in trust, and for the benefit of each and all of the creditors." The use required to be made of the property assigned is sufficiently declared—it was for the payment of each and all of the creditors, without preference or distinction. The necessary legal construction of this is, that the property assigned was devoted "absolutely, unconditionally, and immediately," to this object.

5th. Another objection is, that the partnership funds are assigned "for the benefit of his (Nye's) individual creditors."

It is the evident intent and fair construction of these words that the individual property of Nye is assigned for the benefit of his individual creditors, and the partnership property for the benefit of the partnership creditors.

6th. The next objection is, that "this assignment is not executed by creditors, nor is their assent to it proved." And it is

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argued, that by the common law of England, "unmodified by State legislation," the assent of creditors is necessary to bind the property of the partnership involved in this action. We have shown that the *lex loci contractus* is not the common law of England, "unmodified by legislation," but the common law, as modified by legislation, adjudication, and usage, in the several States, and as resorted to, interpreted, and applied, by the Courts of the United States, to the great mass of civil or municipal duties, rights, and relations, of men. It was this same common law which was applied by this Court in the case of *Billings v. Billings*, (2 Cal. 107,) before the statute was passed regulating assignments in this State. In that case the assignment was not executed by the creditors, nor did they assent to it; on the contrary, the suit was brought by an execution creditor, to set it aside as illegal and void, nevertheless its validity was sustained.

The argument that the assignment was revocable by the common law of England, even if that law, in its unmodified form, had been in force in China, can have no application to this case, because this property was reduced to the possession of the assignees, and sent by them to the consignees, Morgan, Hathaway & Co. In this case the assignment is absolute and unconditional, the assignor neither retaining power to change the trusts nor a control over the deed of trust. (*Fellows v. Com. Bank*, 6 Rob. 242.)

By the common law, the assent of creditors will be presumed where no release or other condition is stipulated for, and the property assigned is for the benefit of all the creditors *pro rata*; nor is it very objectionable to a deed of trust, under the common law, that the *cestui que trust* is not a party to a deed. (*U. S. v. U. S. Bank*, 8 Rob. Lou. 262; *Oliver v. Lake*, 3 Lou. Ann. 78; *Layson v. Rowan*, 7 Rob. Lou. 1; *Halsey v. Whitney*, 4 Mas. C. C. 206; *Brooks v. Marbury*, 11 Wheat. 78; *Brashear v. West*, 7 Pet. 608, 613; *Nicoll v. Mumford*, 4 Johns. Ch. 522; Bur. 308 and Notes.)

7th. Another objection is that no persons are named Trustees, but only mercantile firms, which, not being formed for such objects, cannot legally be made Trustees, as firms, but only as individuals, and therefore they are required to be individually named in the assignment. But counsel have given no authori-

ties in support of this objection, and the position is opposed to the established doctrine of trusts. Trusts, when once created, never fail on account of the non-appointment, disability, incompetency, or death, of the Trustee. In either of these contingencies, a Court of Equity will follow the subject matter of the trust, and provide the proper means for executing it. (Hill on Trustees, 48.)

But it is urged that as the firms, and not the individual members, are named, and as such trusts are not within the ordinary business of a mercantile partnership, neither the firms nor the individual partners are responsible for any neglect or misapplication of the trust funds, and that, therefore, the assignment must be regarded as made to hinder, delay, and defraud, the creditors. This proposition is incorrect, both in its premises and in its conclusion. Partnerships and individual partners are responsible for the acts of a single copartner in the name of the firm, even outside of the ordinary business of the association, where the other partners concur, either expressly or impliedly, in such acts. (Collyer on Partnership, Sec. 390.)

In this case all the partners, (with a single exception,) of both firms were present, and accepted the trust, and immediately issued circulars in the names of the firms to that effect.

In assignments for the benefit of creditors, the assent of the Trustees is always presumed, until the contrary is shown, and the legal title passes without their assent, if made with their knowledge and privity. If such an assignment be made to two or more persons, and one of them accepts the trust, and the others repudiate it, the assignment is nevertheless operative as to the assenting Trustee, unless it contains some condition rendering the assent of all requisite. (2 Kent, Com. 533, notes; *Galt v. Dihrell*, 10 Yerger, 146; *Gordon v. Coolidge*, 1 Sumner, 537; *Neilson v. Blight*, 1 Johns. Cases, 205, *Moses v. Murgatroyd*, Johns. Ch. 129.)

8th. Another objection is "the want of schedules." The authorities referred to contradict the position taken. It is distinctly held, in the cases cited, "that the mere circumstance of a want of schedule, will not render it (an assignment) fraudulent." It may be an *indicium* of fraud, or an "item in the list of circumstances to establish a fraudulent intent," but nothing

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more, if the transaction be fair and possession accompanies the transfer.

9th. The next objection is, that Nye was "employed as agent of the assignees, with a salary." The authorities cited go no further than to make this a badge of fraud, and the finding of the Court is, that there was no actual fraud. (*Billings v. Billings*, 2 Cal. 107.) But the assignee may employ the assignor as clerk, agent, etc. (*Burrill*, 430, 431, 174.)

To the third finding it is objected that there is no evidence that the assignment was delivered. The original instrument was made before the Consul as a judicial act, and became a part of the records of his office, as is the usual practice in Consulates.

This mode of execution and delivery to the officer is, the world over, a delivery to the parties. Moreover, the transcript of that act, under the signature and seal of the Consul, which has the force and effect of an original, is found in the hands of the assignees, and filed by them in this case. The delivery of the property and its possession by the assignees, is conceded by the stipulation.

With respect to the form of this instrument, and the manner of its execution, which have been so much commented on by counsel, it has been decided to be valid by the proper forum of the place where it was made. The Consul followed the common forms laid down in the most approved consular form-books. (See the official work of M. Declercq on Diplomatic and Consular Forms.)

Summary:

1st. These goods, being in the possession of Respondents, and held by them under title *prima facie* valid, the burden of proof rested on Appellants to show a better title in execution debtors, and this he has sought to do by attempting to establish the invalidity of the assignment by which this property was transferred from the execution debtors to the Respondents.

2d. The title of Respondents was acquired in a foreign country, and has been adjudged good by a Court of competent jurisdiction of the country where the parties were domiciled, where the contract was made, and where the property was situated. It must, therefore, be held good everywhere.

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3d. But conceding that the Courts of California may disregard such judgment of the forum *loci rei sitae*, and may re-examine the validity of this assignment, its validity must be determined by the *lex loci contractus*, unless the case comes within the admitted exceptions of the rule of international comity.

4th. It has been shown that this case is not within any of the exceptions to the rule of comity which have been admitted by any Court, even by those Courts which have carried the doctrine of the *lex fori* the very furthest.

5th. The *lex loci contractus* is not, properly speaking, a foreign law, nor the statute of any particular State, nor the English common law; "but that generally recognized and long-established law, which forms the *substratum* of the laws of every State."

6th. The *jus disponendi* of the assignors, not having been limited by any statute, their general right, under the system of laws prevailing in China, to transfer this property to Respondents, in trust for their creditors, cannot be denied. It is sustained not only by the judicial decisions of England and America, but also by the decision of this Court, in the case of *Billings v. Billings*, (2 Cal. 107).

7th. The assignment in this case being sufficient, when accompanied with a change of possession, to vest the title of property in Respondents, their title to these teas can only be impeached on the ground of actual fraud.

8th. But Appellant, after the benefit of a new trial for the express purpose of giving him an opportunity to impeach the *bona fide* character of this assignment, has not only failed to establish any fact showing a fraudulent intent, but Respondents are now fortified by the finding of the Court, sitting as a jury, against the allegations of fraud.

BALDWIN, J. delivered the opinion of the Court—FIELD, J. concurring.

Suit brought to recover damages of defendant for taking certain teas. The case is one of more than usual interest and importance. It involves principles novel in their application in this State, and it has been ably and fully argued at the bar and upon briefs. The general nature of the suit may be thus stated: Nye

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Brothers & Co. were a mercantile firm, composed of citizens of the United States, residents of, and doing business in, Canton, China, before and on the 11th March, 1856. On that day they failed, when Gideon Nye, Jr. one of the firm, the only resident partner, and managing the affairs of the house at Canton, appeared before Oliver H. Perry, United States Consul at Canton, and signed and acknowledged before the Consul this instrument in writing:

"Be it known, that on the eleventh day of March, A. D. eighteen hundred and fifty-six, before me, Oliver H. Perry, Consul of the United States of America, at Canton, China, personally came and appeared Gideon Nye, Jr. a citizen of the United States of America, and at present a resident of the city of Canton, China, and a partner in the commercial house of Messrs. Nye Brothers & Company, residing, transacting, and doing business in the city of Canton, China, and being the only partner in said commercial house of Nye Brothers & Company here present, and requested me to note, that he desires to assign, and does assign, all and singular the real and personal property belonging and appertaining unto the said commercial house of Nye Brothers & Company, whether situate in China or elsewhere, jointly unto Messrs. Russell & Company, a commercial house residing and doing business in Canton, China, and unto James Purdon & Company, also a commercial house, residing and doing business in the said city of Canton, China, in trust and for the benefit of each and all the creditors of the said Gideon Nye, Jr. and the said commercial house of Nye Brothers & Company, and the said appearer declared that he reserves to himself sufficient time to record in this Consulate a full and complete schedule of all the assets and liabilities, whether appertaining and belonging to him personally, or appertaining and belonging to the said commercial house of Gideon Nye, Brothers & Company, of which he is a partner, as aforesaid.

GIDEON NYE, JR. for self and
NYE BROTHERS & Co.

Noted before me on the eleventh day of March, A. D. eighteen hundred and fifty-six, at the hour of two, P. M. this day, in faith whereof I hereunto sign my name and fix my seal of office.

OLIVER H. PERRY, U. S. Consul. [L. s.]

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That at the time of executing this instrument, Nye Brothers & Co. were largely indebted to the citizens and residents of China, and to citizens and residents of the United States, and those of Great Britain, and also to citizens of the United States and Great Britain residing at Canton. The merchandise in controversy was shipped by Nye Brothers & Co. from Canton, to Morgan, Hathaway & Co. at San Francisco, in the ship called the "Berreda Brothers," before their failure in March, 1856, and that the "Berreda Brothers," returned to Canton after the failure, from stress of weather, when the plaintiffs took actual possession of the goods as assignees under the before mentioned assignment of Nye Brothers & Co. and shipped them directly to Morgan, Hathaway & Co. for sale, with instructions to account to them as such assignees for such proceeds, and the seizure of these teas was made by the defendant while in the possession of Morgan, Hathaway & Co. under the consignment of the assignees. After the execution of the assignment, a controversy arose between one A B, a citizen of the United States residing at Canton, and these assignees, before O. H. Perry, U. S. Consul at Canton, in which was involved the question whether or not the assignment was valid; and the Consul held, for reasons given in his judgment or opinion, which is to be found in the record, that it was, and that an assignment, made after insolvency, which divides the assets with perfect equality among all the creditors, is considered by the Court, under its equity jurisdiction, as a valid trust, and will be sustained. That the assignees have, by general and special circulars, notified the creditors and others dealing with the house of Nye Brothers & Co. of the state of assets and liabilities, and their business as assignees in the execution of their trust is still unsettled. The defendant seized the goods by a valid execution, issued on a valid judgment, in favor of *F. Huth & Co. v. Nye Brothers & Co.* defendant knowing of plaintiffs' claim.

Some other facts appear in the record. These relate mainly to the question of fraud in fact, in the assignment, and will be noticed when we come to consider that subject. The case was tried by the judge below, who made a finding of facts and legal conclusions, and gave judgment for plaintiff for the amount claimed. The defendant appeals from the judgment.

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The first point made by the Appellants is that this assignment is void. The argument in favor of this general proposition is, that by the 39th Section of our statute for the relief of insolvent debtors and protection of creditors, (Wood's Digest, 501,) an assignment of this character is absolutely void; that upon this subject, our own legislation has declared a State policy, and that while effect will be given in the Courts of a State to contracts entered into beyond its jurisdiction, this general rule is not based upon any absolute right in a party to such enforcement of the contracts, but is a mere regulation of international comity, and this comity will not be exercised when it is opposed to the interests or declared policy of the State of the forum. And the conclusion of the learned counsel is, that this case falls within the exception just given. There would be more force in this view, if this were an executory agreement to make an assignment in this State, of this character, or if this property were within this State at the time of the assignment. But here the contract, such as it was, was executed beyond the jurisdiction. The property was beyond this State—the parties, also; the actual possession taken, and the title vested in the foreign jurisdiction. The property came into this State with the full effect—whatever that was—which the contract made abroad impressed upon it. It is not even shown that at the time of that contract the property was agreed, or intended to be shipped, as assigned property, to this State; on the contrary, at the time of this assignment, the teas were at sea; they were taken possession of on the return of the vessel, by the assignees, and again transmitted. It cannot be pretended that this policy of our statute is anything more than a conventional rule, established for the regulation of a certain class of contracts and interests. The rule itself is not of natural obligation. It is considered here as the safer and better rule; it is considered elsewhere, and by the common law, as not as conducive to the public welfare as a contrary rule. It does not occupy a more favorable position in this respect than our Statute of Frauds, requiring certain contracts to be in writing in order to prevent perjury, and yet we presume no one would contend, that because, under our system, we refused to give effect to any other contract than one so evidenced, we would refuse to enforce a

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contract, valid in the place where made, because not executed according to our statutory modes; and especially would it not be contended, if a right of property had vested under such law, in the foreign country, that we would not recognize the title here. The truth is, we do not consider this question as one of comity at all. It is a pure question of property. By our general laws, we recognize the duty of government to protect property, and that is property which is acquired by contract, lawful and effectual, to pass title in the place where it is made. It might as well be said that if a man made his money by usury, in California, and carried it into Pennsylvania, the Courts of that State would refuse to recognize his right, because usury is against the policy of Pennsylvania. Or if won at cards in Mexico, where no laws exist against gaming, it would cease to be his property whenever brought into this State.

If this property had been sold by these assignees in China to third persons, it is not a question that the title would be upheld here if the property vested abroad and had been brought here by the purchaser. Why? Because the attributes of property — a thing acquired by a legal mode of acquisition — had been impressed on it — where, is wholly immaterial, or, probably, by what law, unless, indeed, the Courts had to give effect to some worse principle than a rule of the common law of England, or violate some better declared public policy than a section of the statute regulating modes of assignment of property here. The authorities cited have no application to the facts here. The early cases in Massachusetts maintain only the doctrine that where the property is within the State, the Courts will not allow a contract operating on it to be made in another State, the effect of which is to dispose of the property differently from the mode provided in Massachusetts. In other words, Massachusetts will not suffer her own resident creditors to be prejudiced in favor of foreign creditors, by giving the debtor the right to assign the property in the State contrary to the mode she has prescribed for assignments. But Massachusetts has never held that when the property is in New York, and there assigned, and the assignee legally vested with the title, she will not recognize the title when the property is brought within her jurisdiction.

It is hard to see by what rule of justice or of policy, *Hugh*, a

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citizen of London, could claim from the laws of California any greater privileges than he could obtain from his own Courts if this proceeding were pending in England.

The Appellants contend that, in the absence of any proof of the law of the place of contract, our own law must be presumed to prevail, and they cite several authorities which seem to maintain this doctrine. This presumption, if it be one, would present a curious illustration of a fact presumed to exist, when in every single instance, probably, in which the application is made of the presumption, it would falsely represent the real fact. That China had ever passed or given effect to the 39th Section of our insolvent law is rather a violent intendment, but possibly the principle invoked was necessary, as some rule must be had for the determination of matters of litigation, and the convenience or necessity of the case constrains the adoption of the one nearest at hand when the foreign rule is unknown. (See 2 Hill, 202; 12 La. 465; 13 Mass. 147.) Having shown possession and control of this property in China, or on the seas, and the property having been brought into this State by the plaintiffs, by a law of universal application a title *prima facie* good is shown by the plaintiffs. Upon that title so proved, without showing anything more than this possession, the plaintiff would be entitled to recover for a seizure of it in this State, unless the defendant showed a better title in himself or in some person whose right he legally represented. To prove this title he is forced to assail the validity of this assignment. The burden of proof is on him to show the invalidity of it, and, as the invalidity rests upon its illegality, and this depends upon the proper construction of the law of the place of contract, he assumes the responsibility of showing what that law is and how this transaction opposes it. But the Appellant answers this position by the not very satisfactory appeal to the principle of presumption already adverted to, to wit: That the law of the forum is to be taken to be the law of the place of contract, and calls upon the Respondent to show that it is different. We are not satisfied that the rule invoked is properly applicable to such a state of facts as this; that to rebut an inference of title from possession acquired in a foreign country, a party can refer to a local statute of the forum, and demand, as a presumption of law, that the contract under

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which his adversary claims was made subject to its provisions. But, as the facts are all before us, probably the principle is not important enough to the decision to require us to consider it at length, or to pass upon it; for, when all the facts are before the Court, and they are undisputed, it is not very material upon which party rests the *onus* of proof. The solution of this difficulty is attempted by the Respondent, who asserts, in answer to this argument, that the real *lex loci, quoad* this transaction, is the common law of England, that law, in effect, having been established by the treaty between the United States and China, of July 3d, 1844, negotiated by Mr. Commissioner Cushing, and by the Act of Congress passed on the 11th of August, 1848, for the purpose of carrying into effect the provisions of the treaty. This leads us to an examination of the extent and validity of this regulation, since it is claimed to exercise an important, if not controlling, influence over this litigation. It is provided in this treaty that questions between citizens of the United States in China shall be subject to the jurisdiction and be regulated by the authorities of their own government. And this principle seems to be the same which obtains as to British subjects domiciled in that empire. It seems that American citizens residing for the purpose of trade in the ports of China are not regarded as subjects of that government, but that for purposes of government and protection, they constitute a kind of colony, subject to the laws and authority of the United States. An interesting letter from Mr. Cushing to Mr. Calhoun, then Secretary of State, dated September 29, 1844, was written in illustration of this treaty. He says: "The Consuls of Christian States, in the countries not Christian, still retain, unimpaired, and habitually exercise, their primitive function of municipal magistrates for their countrymen; their commercial or territorial capacity in those countries being but a part of their general capacity as the delegated administrative and judicial agents of their nation. * * * In China I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the Empire, while the Portuguese attained the same object through their own local jurisdiction at Macao. I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of the citizens of the United States.

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This exemption is agreed to in terms by the letter of the treaty of Wang Hija; and it was fully admitted by the Chinese in the correspondence which occurred contemporaneously with the negotiation of the treaty. By that treaty, thus construed, the laws of the United States follow its citizens, and its banner protects them even within the domain of the Chinese Empire.

* * * In extending this principle to our intercourse with China, seeing that I have obtained the concession of absolute and unqualified extritoriality, I considered it well to use in the treaty laws of such generality in describing the substitute jurisdiction, as while they held unimpaired the customary, or law of nations, jurisdiction, do also leave to Congress the full and complete right to define, if it please to do so, what offices, with what powers, and in what form of law, shall be the instruments for the protection and regulation of the citizens of the United States."

Mr. Cushing, (Opinion of Attorney-General, Vol. 7, 501,) shows that the treaty, besides conferring on American citizens in China extritoriality in commercial matters, provides, in respect to civil matters: 1. That questions arising between citizens of the United States, in China, shall be subject to the jurisdiction and regulated by the authorities of their own government. 2. That in controversies between a citizen of the United States and China, the authorities of the two governments are to have concerted action. 3. That in controversies between the United States citizen and other persons, not Chinese, the adjustment is to be regulated by the international relations of the United States and the Government or State of that other person.

To give effect to this treaty, the Act of August 11, 1848, was passed by Congress. The "authorities" of the United States, were by this Act directed in respect to their duties and the manner of performance, and the new jurisdiction regulated and defined. The system of administration was constituted by: 1. The laws of the United States, so far as suitable to carry the treaty into effect. 2. The common law, in all cases where the laws of the United States are not adapted to the subject, or are deficient in the provisions necessary to furnish suitable remedies. 3. Decrees and regulations, by the Commissioner, which shall have the force of law, and supply such defects and deficiencies as still

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remain to be supplied, and the regulations, orders, and decrees, made by the Commissioner, with the advice of the several Consuls, must be transmitted to the President, "to be laid before Congress for its revision, but to be binding until annulled or modified by Congress." The first three sections of this statute give to the Commissioners and Consuls the judicial authority necessary to execute the provisions of the treaty, without, however, distributing it among them; but according to Mr. Cushing, this duty of distribution was left to the regulation of the Commissioner and Consuls, under the general power in the statute to which we have referred. These undistributed powers embrace the general doctrine and scope of what, in our system, constitutes equity jurisprudence, and some matters of more special jurisdiction — as insolvency — *habeas corpus*, etc. On the second of October, 1854, Robert M. McLane, being the United States Commissioner to China, with the advice of the United States Consul, issued a decree distributing the judicial power, by which jurisdiction was vested in the Consular Court over equity matters, trusts, etc. After enumerating the heads of jurisdiction, this regulation proceeds: "As to trusts, equity will superintend and protect the creation of trusts, whether vesting in the Trustee real or personal estate, and take jurisdiction of trusts, whether resulting from an express deed or the force of circumstances and the situation of the parties, which latter are implied trusts." It will thus be seen that the Commissioner and Consuls constitute a judiciary for the government of the citizens of the United States in China, and as such, and when so acting, are governed by the law of nations, the laws of the United States, the common law, and the decrees and regulations of the Commissioner, until the latter are modified or annulled by Congress. There having been no express modification or change of the common law, in respect to any rule applying to this matter, by the laws of Congress or otherwise, the rules of the general system known as the common law would seem to prevail over this subject.

It is suggested, though no great stress seems to be laid upon the objection, that Congress had no constitutional power to provide a system so organized and for such objects. But we are not disposed so to hold. It would require an extremely clear case of repugnancy to the Constitution of the United States to

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justify us in holding unconstitutional such a power of protection to American citizens — a power alike essential to the maintenance of friendly relations with a State like China and to secure the rights of our people there, and one, moreover, so long recognized as well by our own government in other instances, as by other christian powers in their intercourse with such nations.

The general authority given to Congress to regulate commerce with foreign nations could, probably, find no more useful or appropriate means of exercise than in treaties and laws withdrawing our citizens domiciled in unchristian nations from the jurisdiction of such governments, and confiding their rights of property and person to judicial officers of their own country, administering, under responsibilities to a common government, laws, with the general spirit and principles of which those citizens are familiar. That government would be weak, indeed, which could not, in this peaceful and unobjectionable mode, with the assent of the foreign power, exercise this wholesome protection and restraint over its own citizens abroad. The case of *Dred Scott*, (19 How. 449,) maintains no such doctrine as that it is cited to sustain; but the general principles there declared seem carefully to exclude the construction given, and to limit their operation to the territories "within the dominion of the United States." In *The People v. Gerke*, (5 Cal. 381,) this Court, in giving effect to the treaty with the kingdom of Prussia, which had direct effect on property in this State in opposition to its laws of descent, went further than it is necessary to go to uphold the treaty and laws in question. Mr. Justice Bryan said in this case: "So far as the authority of the Federal Courts is concerned, they appear to have uniformly administered the law upon the meaning given by construction to the language of the treaty, seeming never to have, in any respect, doubted the power of the General Government to provide by treaty with a foreign power for the mutual protection of the property belonging to the citizens or subjects of each in the territory of the other. The treaty-making power of the Federal Government must, from necessity, be sufficiently ample so as to cover all of the usual subjects of treaties between different powers. If we were to deny to the treaty-making power of our government the exercise of jurisdiction over the property of deceased aliens, upon

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the ground of interference with the course of descents or the laws of distribution of a State where property may exist, by parity of reasoning we should not make commercial treaties with foreign nations, because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the States of the Union.

If the treaty-making power which resides in the Federal Government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, since it is denied to the States, and we must confess our system of government so weak and faulty as to be incapable of extending to its citizens in foreign lands that protection which is most common among a majority of modern civilized nations."

In *Siemssen v. Bofer*, (6 Cal. 250,) the doctrine of *People v. Gerke* was doubted by the late Chief Justice; but the decision has not been expressly overruled. Numerous cases sustain the general principle and reasoning upon which Gerke's case rests. (See 4 Wheaton, 453, and the other cases cited in Respondent's brief.)

In the second place, it is urged with much earnestness that this assignment is void, because no means of enforcing the trusts against the assignees exist in the local jurisdiction. It is said that the only ground upon which assignments for the benefit of creditors are supported is, that Courts of Equity can compel the fair and faithful execution of the trusts they create. But as Huth & Co. English creditors, could not go before the American authorities, they would be without any relief. As this is a matter of local law, pertaining to the *lex loci contractus*, the Appellant should show, as against an assignment seemingly otherwise authorized, the existence of this cause assigned for its invalidity. It is not to be presumed *a priori*, that any system of jurisprudence could be so defective as to withhold some remedy for so flagrant a breach of duty, as the refusal to comply with the obligations of such a trust. We think the point is not sustained. So far as these Consular Courts exist at all, as such they are Courts of the United States, into which, by the general law, an alien friend may enter for redress against a citizen of the country of which the Court is an appendage. Mr. Cushing

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places this subject in a very clear light. He says: "The Chinese will go into the United States Consular Court as plaintiff, and that Court will take jurisdiction of the defendant as an American; and where the demand is by an American against a Chinese, the former must, of necessity, be content with such judicial or executive action of the Chinese Government in the premises as appertains to their institutions, and as, by application, may be required on the part of the United States.

As to the other cases, that of controversies occurring in China, between citizens of the United States, and subjects of any other (christian) government, the treaty provides that the same 'shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China.' (Art. 25.)

Now, we have no special treaty with any of these governments on this point, nor is any needed, or necessarily required, or intended by stipulation under consideration. With all we have treaties of amity, or of ordinary commercial and social intercourse, and that suffices to meet the exigency.

By the tenor of those treaties, as they are construed by the law and usage of nations, an Englishman has the right to sue a resident of America, or an American a resident Englishman, as alien friend, in all places wherever, respectively, the jurisdiction of the other country exists locally, and is complete as to subject matter, persons, and remedial forms. (Fœlix, Dr. Intern, Priv. Tit. 11, Ch. 2.)

The jurisdiction of the United States is complete, as to their citizens in China, and the jurisdiction of Great Britain is complete as to her subjects in China. That the jurisdiction in each case is extraterritorial — that in China it is excepted from the local territoriality, and that it is outside of the territoriality of either Great Britain or the United States — is a fact wholly immaterial to the question. It is a question free of all doubt on principles of international right, and subject only to the single inquiry whether the given country, each proceeding in established legal forms, by whatsoever authority such forms be established, has conferred on its Courts of justice in China jurisdiction *ad hoc*, or whether that remains to be done.

Here, again, the statute is explicit and ample. It confers on

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the Consular Courts jurisdiction of 'all civil cases arising under said treaty.' A demand of an Englishman against an American is a civil case arising under the treaty, as we see.

Therefore a suit may be brought by the Englishman against the American in the Consular Court of the United States, as, undoubtedly, in the Consular Court of Great Britain, it may, consistently with public law, be brought by an American against an Englishman.

If the Englishman were within the territorial jurisdiction of the United States, he might sue, but would also be subject to suit, in the local Courts, as the American might and would be in England. (*Fœlix, Ubi Supra.*) Nay, a suit would lie in the Courts of Great Britain or the United States, between residents, both being aliens in the country. (*Fœlix, Ubi Supra.*)

The regulations adopted by the Consular Courts of the United States are made part of the case. The second rule provides that "when a citizen of the United States, who is a resident in China, or any subject of the Emperor of China, or the citizen or subject of any other State or nation, may have a right to bring suit against a citizen of the United States, in the United States Consular Court in China," etc., etc. If Huth & Co. being Englishmen by residence, wished to sue such of these assignees as were Englishmen, residing in China, in respect to this assignment, we presume there would be no doubt that the local jurisdiction of Great Britain in China, which seems to be similar to ours, would be competent to afford adequate relief.

Having reached the conclusion that the law governing this assignment, and determining its validity, is the common law, it remains to consider the objections urged against it in connection with that system. We understand by the "common law," as used in the Act of Congress, and applied to the arbitrament of controversies between citizens of the United States, that general body of law, which, as Judge Marshall expresses it, is constituted "by those general principles and those general usages which are to be found, not in the legislative Acts of any particular State, but that generally recognized and long established law which forms the substratum of the laws of every State," i. e. every State carved out of the British Colonies. We may look to American as well as English books, and to American as well

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as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law — they are only evidence of law. Mr. Cushing, in the same opinion from which we have quoted, (Vol. 7, 504, Opinions of Attorney-General,) says: "By 'common law,' (in the Act of 1848,) is intended that law which is to be found in the decisions of the Courts of Justice of the United States, both Federal and State, as distinguished from that law which is found in the statute law of the United States and of the States." And this language is incorporated in the Regulations by Commissioner McLane.

The Appellants claim that the assignment by this common law is void upon its face, for several causes which will be examined hereafter. But the Respondents say, by way of answer *in limine*, that this matter is foreclosed, because the Consular Courts at Canton passed upon this question in a controversy there pending, in which case the Consul, Mr. O. H. Perry, held that the assignment was valid. It is urged that the decision of this Court is as conclusive of the questions of local law decided as would be that of any other Court as to the law of its jurisdiction. There would be more force in this argument if the Consular Court were the highest judicial Court of the jurisdiction, but it seems that an appeal lies from the Consul to the United States Commissioner. And we are not aware that the rule which accords the force of definitive exposition of the local law to the decision and judgment of the Courts of the local jurisdiction has ever extended so far as to give that sanction to the judgment of a subordinate tribunal of the municipality or territory. The decision of the Consul is, doubtless, entitled to some weight, but we are not prepared to hold it as conclusive of the general question adjudicated by him. We proceed to consider the objections to this instrument:

1. That it is not the deed of Nye, or Nye Brothers & Co. but it is the paper of the Consul, Nye merely signing his name in attestation of the act of the Consul.

We think there is no weight in this objection. In order to make a trust it is enough that the trust be declared by the party to be charged and signed by him — this seems to have been done.

2. "That it is the act of G. Nye, Jr. alone." But it purports

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to be the act of the firm, and is signed in the firm name. It is urged that there was no delivery shown. But this may be inferred from the acts done and the nature of the transaction, the claim made under the trust, the possession of the paper and of the property. This is not a deed; it is a mere parol assignment and trust. We are not aware of any rule requiring a delivery, as in formal deeds, as necessary in such cases. The making of the trust and its acceptance are sufficient, especially if accompanied or followed by the possession of the property. As no conditions are imposed on the creditors, an acceptance by them is presumed upon the general principle that a party is presumed to assent to acts done for his benefit. (*Nicholl v. Mumford*, 4 John. Ch. 522; Burr. on As. 308.)

3. It places the individual creditors of Nye on a par with the firm creditors in the distribution of the firm assets."

We do not so construe the paper. It is true the assignment is of the property of G. Nye, and of the firm, for the payment of his individual debts and the debts of the firm. But the assignment must be taken and the property administered in reference and according to the rules of law prevailing in the place of contract, and one of the rules of equity jurisprudence is, that the individual property must go to the individual creditors in priority to the firm creditors, and firm assets must go to the firm creditors in priority to the individual creditors of a partner; and there is nothing in the language of this deed which, when taken in connection with the principle, indicates or would give effect to a contrary construction. Nor do we concede that the misdirection of the property, which might be corrected in equity, would *ipsa facto* vacate the deed, though it is not necessary, nor do we decide the point.

4. Nor is the trust void, as alleged, because it is not more fully or particularly declared. A trust of assets or property for creditors of itself suggests specific and well defined duties, and imposes specific and well defined obligations upon the Trustees. They are to hold and take care of, sell, and dispose of the property, so as to convert it, with convenient speed, into money, and distribute and pay the proceeds over to those entitled. This duty and this responsibility would not have been more plainly enjoined or created by express language, giving in detail, the

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course of management and direction of the subject of the trust. What is vague in the contract is made certain by the law, and both are to be taken together.

5. We think the objection that the assignment was revocable is not well taken. After the assignees had taken possession of the property, the title and trust became fixed and executed, and it was not in the power of the assignors to defeat or affect it.

6. The objection to the style of designating the Trustees is not well founded. The Trustees must be designated, but whether by a firm name, or the individual name is not material, if the language used be such, as with certainty, to indicate the persons who are nominated as Trustees. It is not necessary that all the Trustees should assent to act as such. The presumption is of assent, and the assent of one is enough to give effect to the trust, though the rest expressly repudiate. (2 Kent's Com. 533, Notes and Cases there cited.)

7. The want of a schedule of the property is sometimes regarded as a circumstance of fraud, but the absence of a schedule has never, we believe, been held sufficient of itself to avoid a conveyance of this sort.

8. The next proposition is, that the deed is inoperative because one partner has no power to make an assignment of the firm property without the assent of the other partners.

It seems that G. Nye, Jr. was the only resident partner at Canton, and on the eve of some protested bills returning from London, made this assignment without consulting his associates. It is not easy to reconcile all the authorities upon this subject, and able jurists seem divided in opinion in regard to it. We think the weight of authority is in favor of the power. The case of *Harrison v. Sterry*, (5 Cranch, 289,) expressly affirms it, and the facts of that case are very analogous to this. In *Anderson v. Tompkins*, (1 Brock. 458,) Ch. J. Marshall reaffirms the doctrine. *Deckard v. Case*, (5 Watts, 23,) is the same way. The reasoning of Mr. Justice Rogers states with great clearness the principle on which the doctrine rests. He says: "It is a general principle of the law of partnership that the partners are bound by what is done by each other in the course of the partnership business. They are considered as virtually present at and sanctioning the contracts they singly enter into in the course of trade,

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and each is vested with the authority to act at the same time as principal and as the authorized agent of his copartner.

Among the powers most ordinarily exercised by partners is the *jus disponendi*, or the power which each partner has individually of disposing of the joint stock or merchandise. When the assignment is *bona fide*, I cannot doubt the power of one partner to transfer the whole as well as a part of the partnership effects." This doctrine was reaffirmed by the same Court in *Hennessy v. State Bank*, (6 Watts & Serg. 310.) The able and learned author on Contracts and on Mercantile Law and Partnership, after collecting all the American cases on this question, concludes: "If necessary for the protection of creditors, an assignment of all the personal property to a Trustee for their benefit by one partner, if his copartner is absent and cannot be consulted in season, and has, either expressly or by implication, left to him the sole management of the business, is valid." (Parson's on Mer. Law, 175, Note 1.)

It seems to us that the proof tends in this case to establish this precise state of things. Situated in a foreign country, at a great distance from the other partner residing there, we can scarcely conceive a condition in which the implication of the largest discretion ever confided to a partner would more properly result. The other partners do not seem to complain. Indeed, there is some evidence of their subsequent express assent, and the particular exigency existing appears to be sufficient to have authorized the action of the acting partner.

We have already extended this opinion to such length as forbids a detailed examination of other points. We have examined those not especially noticed, and must content ourselves with merely announcing the conclusions to which we have arrived, which are in accordance with those of the Judge below.

The last point to be noticed is, the charge of fraud *in fact*. The Judge has passed upon those matters of proof, and we see nothing to restrain us to reverse his judgment upon them.

The appointing of Nye, Jr. as Agent, with some compensation — the allotting of some furniture to the wife — the want of a schedule, and the control, such as it was, exercised over the joint affairs by Nye after the assignment, do not, in the absence of any proof of original fraudulent design, raise even a presump-

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tion of fraud, in fact, when all the circumstances are considered. Some of these suspicious circumstances are explained — the schedule was subsequently made; there would seem nothing very suspicious in getting a partner conducting a large firm, whose business was extensive and complicated, to assist assignees in bringing the assets to profitable account; to aid in collections and settlements and explaining the affairs; and the compensation was necessary, probably, to get the services of a bankrupt who seems to have surrendered all his property; the compensation seems not extravagant; the furniture was allowed the wife at the instance of many, perhaps the majority, of the creditors, and there is no proof that these subsequent acts, of benefit to Nye or his family, by the assignees were promised, or even contemplated, at the time of the assignment. We could not, upon such evidence, infer a fraud which is not presumed to exist by the law, much less do we feel disposed to overturn the decision of the Court below upon the facts on such proofs.

It is unnecessary to criticise the findings. Enough is found to which we see no good exception, to justify the conclusion, viz.: the validity of the deed; the possession of the assignees; no fraud in fact; the levy and seizure by the defendant, and the value.

Judgment affirmed.

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Prior to the Consolidation Act, the Recorder of the City of Sacramento was entitled to collect the same fees as a Justice of the Peace for services in criminal cases; but he was bound to pay them over to the City Treasurer. Such Recorders are not within Art. 6, Sec. 2, of the Constitution inhibiting judicial officers, except Justices of the Peace, from taking fees. The Constitution, when it exempted Justices from the operation of this restraint meant to exempt, also, those by whatever name called, who are intrusted with the duties assigned by the law to those officers.

Under the Consolidation Act of 1858 — *query*: What becomes of the indebtedness of the County of Sacramento to the City of Sacramento for the services of the Recorder in criminal cases under the laws of the State?

APPEAL from the Sixth District.

From April, 1853, to April, 1856, the defendant acted as Recorder of the City of Sacramento, and during the interval there were had before him one thousand nine hundred and thirty-

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seven convictions for criminal offenses, prosecuted for and in the name of The People of the State of California. Upon the judgments, executions issued against the defendants for costs, and, upon such executions, there were returns of *nulla bona*. The defendant claimed three dollars fee on each of said convictions against the County of Sacramento, and presented his claim for allowance to the Board of Supervisors, and they rejected it.

Judgment for defendant — plaintiff appeals.

P. L. Edwards, for Appellant.

1. Appellant acted under express statutes, and was, *pro hac vice*, a Justice of the Peace. (Comp. Laws, 966, Sec. 35.) 'Recorders of cities are magistrates. (Id. 436, Sec. 103.) For definition of magistrate and peace officer, see p. 511, Secs. 685, 686. 2. As Justice of the Peace, Appellant was entitled to the fees claimed. (Comp. Laws, 512, Sec. 692-694; 512, Sec. 688; 728, Sec. 33; Wood's Digest, 452, 453, Sec. 14.) 3. There is a broad distinction between acts done by a municipal officer in his municipal capacity, and those done by him *ex officio* as Justice of the Peace. All fees collected by him under an ordinance, are paid to the city. (Comp. Laws, 964, Sec. 29.) The city paid Appellant for services as Recorder, but not for his services to the State as Justice of the Peace. (*Bright v. Supervisors of Chenango*, 18 Johns. 243; *Mallory v. Supervisors, etc.* 2 Cow. 531; *Double-day v. Supervisors, etc.* Id. 532; 4 Bac. Ab. 166; Bouvier Law Dic. Title, Fees and Costs.) As to the constitutional question, although the Appellant was Judge of a Municipal Court, he was more, for he was, *virtute officii*, also a Justice of the Peace as to criminal cases arising in the city.

R. F. Morrison, District Attorney, for the Respondent.

1. By the act of 1853, a Justice of the Peace, Mayor, or Recorder, can claim compensation in criminal cases, where they have power to render final judgment, only while acting as Examining or Committing Magistrates. (Comp. Laws, 511, Sec. 688.) The services for which compensation is claimed, are not provided for in this section. They were not cases wherein the Recorder was to examine and discharge, or hold the defendants to answer, but cases in which he had final jurisdiction,

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with power to render judgment of fine and imprisonment. 2. The act of 1855, giving Justices of the Peace three dollars for trying as well as examining each criminal case, does not apply to Recorders. (Wood's Dig. 440, Sec. 17.) 3. The compensation of Recorders is to be fixed by the charter, or when not so fixed, by the government of their respective cities, to be paid by such cities. (Wood's Dig. 156, Sec. 76.) And all fees must be paid to the city. (Wood's Dig. 325, Sec. 695.) Again, the Court of which the Appellant was a Judge, was a Municipal Court, contemplated by the Constitution, and he, being a judicial officer, cannot claim any fees against the county. (Constitution, Art. 6, Secs. 1, 2.)

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

The Appellant was Recorder of Sacramento City, and as such, claims that the county is indebted to him for fees due him for convictions made by him of divers criminals, prosecuted under the laws of the State. The only question presented by the record is, whether he is to be considered as a Justice of the Peace in respect to this claim, and is entitled, as if he were, to the fees.

It seems that the charter of the city of Sacramento, (C. L. 966, Sec. 35,) provided that the Recorder "should exercise all the powers of a Justice of the Peace in regard to offenses committed within the city limits, subject to all the rules governing Justices of the Peace, and have power to administer all oaths known to the law."

The general Act, (C. L. 512, Sec. 693,) declares, "The fees allowed to Justices of the Peace, and other officers having the jurisdiction of Justices of the Peace, * * * shall, when the defendant is convicted, be considered and recovered against him as costs in the suit, and be collected in like manner as costs in civil cases." The next section seems to be equally indicative of the legislative construction, that Recorders were embraced within the purview of the statute allowing fees to Justices.

By the Act of the 10th April, 1855, a Justice is allowed a fee of three dollars, for services and proceedings before him in criminal action or proceeding, whether on examination or trial. (Wood's Dig. 452, Sec. 14.)

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By another Act, (C. L. 728, Sec. 33,) it is provided that where a fee is allowed to one officer, the same fee shall be allowed to the other officers for the performance of the same services when such officers are allowed by law to perform such services, and the compensation is not specifically fixed.

The Act of 1858, (C. L. 511, Sec. 688,) provides "that the magistrate, if he be a Justice of the Peace, or a Mayor, or a City Recorder, may receive for all the proceedings before him to, and including his decision upon, the question of discharging the defendant, or holding him to answer, three dollars; for taking bail after a commitment by another magistrate, one dollar. By section 693, of the Act of 1853, (C. L. 512,) "the fees allowed to Justices of the Peace, and other officers having the jurisdiction and authority of Justices of the Peace, Clerks, Peace Officers, and District Attorneys, shall, when the defendant is convicted, be considered and recovered against him as costs in the suit, and be collected in the same manner as costs in civil cases."

Section 694. "The fees allowed a Sheriff, * * Magistrate, etc. in cases where the defendant is acquitted, or where, being committed, he is unable to pay the costs, shall be county charges, and shall be audited and paid in like manner as other charges against the county."

By Section 695 it is said: "Whenever any officer, except District Attorneys, mentioned in this Act, receives a salary, he shall account for, and pay to the Treasurer of the city of which he is an officer, all fees collected by him under the provisions of this Act."

It is contended that under the 688th Section of this Act, the charge of three dollars could only be made when the defendant was discharged or held to bail, not when he was convicted. We do not so understand it. We can see no reason for such discrimination, which seems, moreover, to be denied by the 694th Section, and the whole Act must be taken together. Nor do the words require so unnatural a construction. The charge was designed to comprehend the fee for all proceedings on the trial, and to leave no room for doubt as to the services comprehended, the words were added, "including his decision upon the question," etc. But these words did not limit the fee to cases in which the decision on discharging or holding to bail was made. The trouble

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was at least as great for convicting as discharging or bailing, and the charge was to be for the proceedings, however they resulted.

The point is made that the Recorder is a judicial officer, and the Constitution inhibits him from taking fees. But we think the Constitution did not contemplate this class of officers as subjects of this inhibition. As a mere subordinate officer of the corporation, to carry into effect its by-laws or ordinances, he is less in dignity than a Justice of the Peace, and cannot be comprehended by a provision which expressly excludes Justices; and we think that the mere addition of the duties of Justices in respect to criminal matters, has no effect in depriving the office of the same qualities in this respect as that of Justice. Besides, as to all this matter, he is really, and in fact, a Justice of the Peace; and the Constitution, when it exempted Justices from the operation of this restraint, meant to exempt all those, by whatever name called, who are intrusted with the duties assigned by the law to those officers.

It is difficult to see why officers of the peace, exercising all the civil and criminal jurisdiction of Justices, should be allowed to take fees, and subordinate officers to Justices should not, when they exercise a portion only of the powers of Justices. Indeed, under the old charter, the Recorder was no more than a Justice of the Peace, administering the local ordinances of a municipal body, except for this addition to the power and dignity of his office, given in the section quoted.

We have no doubt that this is the proper construction of the law. But we do not see that it can be of any substantial benefit to the Appellant. For by Section 695 of the Statute it is expressly provided that the officers mentioned in the Act, (which includes the Recorder,) except District Attorneys, when they receive salaries, shall account for, and pay to the Treasurer of the city, the fees received. The Recorder was a salaried officer of the city. If he received these fees, he held them only in trust for the city, to be paid by him into its treasury. Really, the money belongs to the city, and the officer was only its agent for collection and payment. An ingenious argument has been made by the counsel for Appellant to show that this section does not apply to the fees received by the Recorder as Justice,

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but only to such fees as he received by virtue of his municipal office. But we see no reason for the distinction. These duties are imposed by the law creating the office; a salary is fixed for the whole services to be rendered; the law makes no qualification, but is general in its terms, those terms embracing in their natural meaning the entire subject. The section is found in the law providing fees for these very services. We see no provision for any fees to be paid to the Recorder except these, and Section 695, expressly exempting one officer, would seem to imply very strongly that none others were to be exempted.

The effect of the whole Act is to give this charge in favor of the city against the county, in consideration of the officer paid by the city doing this service for the county. A curious question now arises: What is to become of the indebtedness of the county on this score to the city? The Consolidation Act of 1858 destroys the old city corporation, and vests its rights of property in the consolidated government.

The beneficial right not being in the Appellant, we see no use in remanding the case, for, under the circumstances, it would seem, if he were entitled, at this late day, to receive the money as agent of the old city government or as Trustee for it, the city, through her present representatives, might insist on the right to retain the money, or secure the funds in their own hands. We, therefore, affirm the judgment, without costs to either party.

RIDDLE *et als.* v. BAKER *et als.*

An appeal lies from an order setting aside a final decree in equity and granting a rehearing.

To obtain the aid of Chancery to vacate a judgment a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. If he relies on fraud and deception practised on the Court in managing, procuring, and giving evidence, he must show that, by such practices, he was *defrauded of his opportunity to defend*, and that his defense would, otherwise, have been effectual.

And the sureties on a bond, given by the party in the original suit, to perform any decree that might be rendered therein stand in no better position. They are not parties to said suit, but are bound absolutely by the decree, subject to the single exception — that, if the decree be procured by collusion between plaintiff, their principal, and the defendant, they are not bound.

The matter relied on in the bill in this case could be availed of only by bill of review, with proper averments.

APPEAL from the Fourth District.

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The facts are sufficiently stated in the opinion.

The bill was filed by Bartol, Riddle & Eaton, against Baker, Lockwood, Baldwin & Jenkins. Subsequently, by consent, others were made parties as having some interest in the decree sought to be set aside. Bill prayed an injunction against enforcing the judgment in *Baker v. Riddle*, and new trial in *Baker v. Bartol*. Baker demurred, for want of facts to constitute a cause of action, and that the Court had no jurisdiction of the subject of the action. Subsequently he answered, denying the allegations of fraud, etc.

The case was sent to a referee by stipulation, who reported a judgment to the effect that plaintiffs were not entitled to any relief and that the injunction originally granted, restraining defendant, Baker, from enforcing the judgment obtained by him against Riddle and Eaton, be dissolved.

Shafters, Park & Heydenfeldt, for Appellants: 1st. The order granting a new trial was revisable. (Prac. Act, Sec. 187; 6 Cal. 83; 4 Id. 122.) 2d. This suit is an attempt to review a decree of the Supreme Court, which cannot be done without permission of that Court. (Prac. Act, Sec. 358; 3 Cal. 214; 5 Id. 192; 6 Id. 145; *Stafford v. Bryan*, 2 Paige, 45; *Southard et al. v. Russel*, 16 How. 576; 8 Cal. 32.)

III. The complaint does not state facts sufficient to justify the relief sought.

This is not an original bill to impeach a decree for fraud; such bill lies only where the party has, by some *finesse*, been deprived of his day in Court. (3 Barb. 619; 2 Peere Wms. 74.) It is a bill, "not original" to review a decree where the party has had his day in Court. The bill does not ask a new trial on the ground of newly discovered evidence. In such bills the evidence and the names of the witnesses must be stated, with their affidavits annexed. (3 Graham on New Trial; *Perry v. Cochran*, 1 Cal. 180; *Rogers v. Huie*, Id. 429.)

No surprise is alleged, nor could there be any, for the complaint, in *Baker v. Bartol*, averred the goods to be worth forty thousand dollars, giving Bartol full notice that plaintiff, in that suit, would attempt to prove the very point now complained of, to wit: The excessive value put by Lockwood & Baldwin on the

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goods. (*Turner v. Morrison*, 11 Cal.) When new trials have been granted in equity, on the ground of surprise at evidence, the evidence has related to some point not definitely raised by the pleadings. (3 Gra. 1531, 962, 967; *Smith v. Morrison*, 3 A. K. Marsh. 81; *Burr v. Palmer*, 23 Vt. 254; 6 Cal. 228.)

Affirmatively, the bill claims a new trial on the ground of perjury by subornation. This is no ground, for two reasons: 1st. It is not charged that the witnesses have been convicted of perjury. (3 Gra. 1469, Note; *Respass v. McOlanahan*, Hard. Ky. 346; *Brewer v. Bowman*, 3 J. J. Marshall, 493; *Attorney-General v. Woodhead*, 2 Price, 3, Ex.; *Harrison v. Harrison*, 9 Id. 34, Ex.; *Smith v. Lowey*, 1 John. Ch. 330.) 2d. Perjury of the witnesses is no defense to the original suit—*Baker v. Bartol*. It simply impeaches their credit, and this is no ground for new trial. (16 How. 547; *Livingston v. Hubbs*, 3 John. Ch. 125.) Again: 3d. It is not averred that the original decree has been performed. (*Wise v. Blackly*, 2 J. Ch. 490; *Williams v. Mellish*, 1 Ves. 117; *Markly v. Rand*, 12 Cal.) 4th. No excuse is given for not moving for a new trial in *Baker v. Bartol*, or for the non-production of the evidence on the trial of that suit. (3 Gra. D. W. on New Trials, 1485, 1486; *Phelps v. Peabody*, 7 Cal. 60.)

IV. Interest on the part of the witnesses, Lockwood and Baldwin, is no ground for new trial. (*Tovey v. Young*, cited in 1 J. Ch. 323; *Turner v. Plaite*, 1 Term Rep. 717.) Besides, the witnesses were not proved to be interested. (1 Green. Ev. Sec. 390; Ten Eyck, 5 Wend.) Again, the bill does not state, nor does the proof show, any diligence at the trial to test the competency of the witnesses by examination on the *voir dire*, or by cross-examination. (1 T. R. 717.)

E. Cook and McDougal & Sharp, for Respondents.

1st. Riddle & Eaton were not parties to the suit of *Baker v. Bartol*, and consequently are not in a position to ask a review of that decree, so far as the parties are concerned. 2d. They do not ask to review the judgment obtained against them at law, but they ask that, for reasons which came to their knowledge after judgment against them, Baker be enjoined from enforcing that judgment.

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It is questionable whether, if they had known the facts when the suit was brought against them, they could have set up this defense to an action at law. But the facts were not known to them, and if they had been, they were not obliged to make the defense at law. (*Lorraine v. Long*, 6 Cal. 452.)

A party has a right to a day in Court; these plaintiffs, Riddle & Eaton, have not had theirs. They are not chargeable with Bartol's laches in the original suit. The plaintiffs were mere sureties for Bartol in the original suit, and only liable as such to the extent of sureties for a receiver, or any other naked surety. They are not bound by the decree against Bartol. They had no opportunity to defend the original suit. They had no power to call witnesses and conduct the trial, and the moment they ascertained the facts they filed their bill. (*Carmack et als. v. The Commonwealth, for use of Boggs*, 5 Binney, 184; see also *McKeller et al. v. Howell & Campbell*, 4 Hawks, 34; *Douglass v. Howland*, 24 Wend. 53, and cases there cited; see cases cited on page 55; also cases cited from Virginia and Ohio; *Beall v. Beck*, 3 Harr. and McHenry, Md. 242.)

Here was a fraud committed by the obligee upon the obligor of a bond, and it being a fraud practiced upon them when they were not in a position to guard against it, they should be relieved. If Bartol and the plaintiff, in the original suit, had conspired together to fix a false liability upon the sureties, any judgment or decree, rendered in pursuance thereof, would be set aside. Besides, the obligation of the surety would be void, independent of any trial between debtor and creditor. (*Pidcock v. Bishop*, 3 B. & C. 605, reported in 10 Eng. Com. Law Rep. 276; *Stone v. Compton*, 5 Bing. N. C. 142; see also *Middleton v. Lord Onslow*, 1 P. Wms. 768; *Cecil v. Plaistow*, 1 Anst. 202; *Nerot v. Wallace*, 3 T. R. 17; *Knight v. Hunt*, 5 Bing. 142; *Jackson v. Mitchell*, 13 Ves. 581; *Cockshatt v. Bennett*, 2 T. R. 768; *Jackson v. Lomus*, 4 T. R. 166; *Stark v. Mawson*, 1 Bos. & P. 286. See observations of Buller, J. and Lord Tenterden, C. J. in *Jones v. Yates*, 9 B. & C. 532; *Leicester v. Rose*, 4 East, 372, overruling *Friz v. Randall*, 6 T. R. 146.)

Again: the decree against Bartol did not fix the liability of the sureties. Suppose they had just after the decree against Bartol discovered the fraud they now allege, and had defended

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upon that ground, could it have been urged that they were concluded by the decree against Bartol, and because he had been guilty of laches they could not make a defense which was a direct fraud upon them? They undertook only upon the ground that both parties would act in good faith toward them, and the decision against Bartol cannot affect their rights.

Again: this is not a bill of review, and it was not necessary to apply to the Court for leave to file it or show its performance. They were not parties, and could not apply for a review. But it is an original bill filed for the purpose. (*Sanford v. Head & Merrill*, 5 Cal. 298; 1 Sandf. Ch. 120; *Reisal v. Wood*, 1 John. Ch. 401; *Carneal v. Wilson*, 3 Littell, 90; Story's Eq. Pl. Sec. 426; Comyn Dig. Ch. Chap. 2, Vol. 2, p. 36; Id. T. 7, Vol. 2, p. 109; Id. 3 M. Vol. 2, p. 225; Id. 3 N. 1, Vol. 2, p. 229; Id. 3 W. Vol. 2, p. 257; *Welsh v. Barrett*, 15 Mass. 379.) *Per curiam*. "A new trial is granted; it appearing that the interest of the witness was not known to the plaintiff until after the trial, and that it was known to the defendant, who produced him." If good at law when discovered while the case is *in fieri*, why not good in equity when discovered, after the law side of the Court has lost its power to correct the wrong? (*Dobson v. Pearce*, 2 Ker. N. Y. 156.)

We refer to the following authorities to show that the fraud in procuring a judgment, is not limited to fraud in depriving a party of his day in Court, or indeed to any particular fraudulent contrivance; but, as in all other questions of fraud, depends upon the circumstances of each particular case—the circumstances constituting fraud being as various as are the devices of ingenious and covinous men. (Willard's Eq. 347; 2 Story's Eq. Juris. Secs. 875–877, 880–887; *Countess of Gainsborough v. Gifford*, 2 Peere Wms. 424; *Huggins v. King*, 3 Barb. 616; 7 Paige, 451–459; 19 Conn. 84–88; *Carneal v. Wilson*, 3 Littell, 90; *Reed v. Perry*, 1 Monroe, 256; *Fish v. Lane*, 2 Haywood, 342; *Ambler v. Wild*, 2 Wash. Virg. 36–41; *Barnsby v. Powell*, 1 Vesey, 289; *Chesterfield v. Jansen*, 2 Vesey, 155; *Mitchell v. Harris*, 2 Vesey, Jr. 135; *Bradish v. McGee*, Ambler, 229; *Massell v. Morgan*, 3 Brock. C. C. 74; Mitford's Pl. 73, 237, *et seq.*)

The complaint in this case is not founded on surprise. Neither is the perjury of witnesses, the foundation of our bill.

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False swearing does not necessarily give jurisdiction; but where the truth is suppressed, or a falsehood stated by interested witnesses, acting in concert with the party, and the opposite party, being ignorant of the combination, is injured by such covinous suppression or falsehood, equity will give him relief. Until the fact is ascertained, the subject of the fraud cannot take advantage of it; whenever discovered, the party wronged may ask the aid of equity, and he cannot be guilty of laches, if he makes the appeal upon the first opportunity. It has been said that Bartol had abundant opportunity pending the trial, to have contradicted the witnesses — Lockwood and Baldwin. All that appears on this subject, is the fact that time was given to Bartol to bring forward witnesses, but who can say, that when Lockwood and Baldwin, the Clerks in the establishment, had thus sworn, it was at the time practicable for Bartol to contradict them. The presumption is, that he attempted to do so, but not then having the cue to the true relations of these witnesses, and being ignorant of the conspiracy against him, he was disarmed.

On the hearing the Respondent moved to dismiss the appeal, on the ground that the granting of a rehearing in equity was not the subject of review. The position was conceded, but on the cross-motion to dismiss for want of equity, the whole case was considered. Without discussing the question we still insist that the appeal must be dismissed for the cause assigned, and again refer to the decision of this Court in *Gray v. Eaton*, (5 Cal. 448); *Dominguez v. Dominguez*, (7 Id. 426); *Still v. Saunders*, (8 Id. 286.) It was within the discretion of the Court below to grant a rehearing, either upon petition, or of its own motion. The rule in equity is, that the cause shall go to final decree before review on appeal.

Shafters, Park & Heydenfeldt, in reply:

The bill is a bill of review. The amended bill asks for a new trial in terms. It seems to be conceded that if Bartol was the sole plaintiff, no relief would be due him on the facts alleged, other than a review in the original suit. The question then is, does the fact that Riddle & Eaton have joined in the suit because they are debtors in a dependent judgment, enlarge

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the right of Bartol as against the principal judgment? The question suggests its own answer. The dependent judgment neither adds to, nor detracts from, the strength of the principal judgment. It gives to the alleged perjury of Lockwood and Baldwin no additional point, either in law or morals. If the perjury assigned, in itself considered, is a ground merely for new trial, it can make no difference whether the relief on the basis of it is asked by one or a dozen plaintiffs. The reasoning upon the other side, goes upon the assumption that the plaintiffs, Riddle & Eaton, have an equity distinct from the equity of Bartol, and personal to themselves. But they unite with Bartol in asking that that judgment be reviewed, and a new trial granted on the ground of the perjury alleged in procuring it. The question made is controlled by the maxim *accessorium non ducit sequitur suum principale*. Riddle & Eaton count on Bartol's right — they claim through him, and they are affected with his laches, they take him *cum onere*, and they can claim no relief except such as can be claimed by him, viz: a review. Sureties in replevin and attachment bonds, and in bonds like that given by Riddle & Eaton, are bound by judgments rendered against their principals. We cannot reason from one class of surety contracts to another. Every contract is to be enforced according to its own terms. By the contract of Riddle & Eaton, they agreed to respond, personally, to any judgment that might be obtained against Bartol. When such judgment was obtained, the *casus faderis* had arisen.

This bill contains no charge of collusion between Baker and Bartol; so that *Douglass v. Howland*, (24 Wend. 53,) has no application. So of the other cases cited. The bonds there were not to pay any judgment that might be rendered; but that, if the officer should be guilty of neglect, the sureties would pay all damages, etc.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

A preliminary motion is made by Respondent to dismiss this appeal. The ground is, that the order appealed from is not a final judgment or order, disposing of the merits of the case, but is only a rehearing in equity, which is not appealable matter,

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A decree, final in form and effect, was entered for the Appellants on the coming in of the referee's report; and this decree was, on motion of the Respondents, set aside. The effect of this order was to give the Respondents a new trial. There is no substantial difference between a rehearing in an equity case which opens a decree and places the case before the Court for trial *de novo*, and a new trial in a case at law, tried and decided by the Court. The mode of trial is the same, and the effect of the order the same in both cases.

For convenience and uniformity, we have held that the Practice Act, regulating proceedings in civil cases, applies as a general rule, as well to equity as common law suits. The statute gives a right of appeal from orders granting or overruling motions for new trials; and this is substantially, if not literally, such a motion.

The questions involved in this dispute grow out of this state of facts: Cronin & Markley, once merchants of San Francisco, in 1851 made an assignment of goods to Bartol & McVickar; the assignors owed one Pendleton; he assigned his claim to one Baker, defendant in this suit, who held for himself and one Jenkins. Baker, in 1854, filed his bill against Bartol — McVickar then being dead — charging fraud in the assignment, and that these assignees had received over thirty thousand dollars from the assigned property — goods — over and above all incumbrances, etc. which sum, it is charged, was, or should be, subject to the claim of the plaintiff. This claim had been reduced to judgment. Bill prayed appointment of receivers. The Court, by its order, directed Bartol to submit to the appointment of a receiver, or to give bond to perform any decree that might be rendered against him. Bartol gave the bond, and plaintiffs here, Riddle & Eaton, were his sureties. This case was tried in November, 1855. Lockwood and Baldwin were witnesses on the trial, and swore for the plaintiffs, fixing, by their testimony, the value of the goods assigned at forty thousand dollars. The case was decided for plaintiffs. Defendants appealed to Supreme Court; decree affirmed. (See 6 Cal. 483.) No stay of proceedings was had, and Baker, soon after the decree, sued Riddle & Eaton on their bond; got judgment. Case appealed to Supreme Court; judgment there affirmed. (7 Cal. 551.) After this affirmance

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the plaintiffs filed this bill, alleging that the decree was obtained on the testimony of these two witnesses, Lockwood and Baldwin; that this decree was procured by conspiracy, fraud, and perjury; that the defendants secretly conspired together to obtain the decree, well knowing that there was no legal or equitable foundation for the same; that fraud, deception, and imposition, were practiced upon the Superior Court in the managing, procuring, and giving, the evidence upon which the decree was obtained; and, in this connection, the plaintiffs allege some facts not material, as to the manner of the obtaining of this claim by Baker; then that Jenkins, Lockwood, and Baldwin, were Clerks of Cronin & Markley; that they were to get, for being witnesses, a part of the recovery; that they were to swear falsely to the value of the goods; that they did so swear; that a judgment was obtained on their testimony; and that the plaintiffs only knew of these facts after the judgment was affirmed in the Superior Court on the bond. The bill prays for an injunction.

Several very formidable points of exception are taken by the defendants to this proceeding—to some of which it has vexed the characteristic ingenuity of the counsel for the Respondent to give a plausible answer. But it is not necessary to consider these questions, as, in our judgment, another point, arising on the proofs, is clearly fatal to the whole case.

Upon the trial of the case of *Baker v. Bartol*, before Judge Shattuck, these facts appear: That the case was continued several times at request of defendant; when called for trial and the evidence closed on the part of the plaintiff the defendants procured a postponement to get in evidence; after this period elapsed, and the defendant not appearing, one or more adjournments were had before Bartol arrived; when he arrived he said that he had evidence which would explain and contradict the evidence that had been introduced by the plaintiff, and that he must have it there; the case was again adjourned. No such evidence, after all these delays, was procured, and the case was decided after being fully argued.

It seems that the only matter of controversy was the value of these goods. There appears to have been no insuperable difficulty to procuring full proofs on this subject, for, even on the trial of this suit below, occurring a long time after the first,

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various witnesses, who seem to have had knowledge on the subject, gave testimony in respect to the value, and their estimates differ very much as to what that value was. Lockwood and Baldwin were not examined on their *voir dire*, or otherwise, as to their interest, nor was any attempt made to discredit them. The question arises on this state of facts: Could Bartol, under the circumstances, at this late day, after all the litigation and all these opportunities for litigating these questions, file a bill to set aside the decree thus rendered and thus affirmed on the ground of fraud recently discovered, as to the mode or circumstances in which the testimony was procured against him on the trial? We are at a loss to see upon what principle. Chancery would only interpose to vacate a solemn judgment (alleged only to be wrong in part, too,) upon the ground of irreparable injury done to a party who had no other means of relief against it. But a party, to obtain the aid of Chancery must show that he has exhausted all proper diligence to defend at law, or to defend in Chancery if the first suit was in that form. The fraud or practices of the other party are no excuse to him for not attempting to counteract them. He must show that he was defrauded of his opportunity to defend, and that his defense, which, but for the practices of his adversary, would have been effectual, was, by such practices, rendered unavailing.

To hold that a party may stand by, and, discovering improper practices, or illegitimate arts, in the management or conduct of his case by his antagonist, neglect to countervail them when in his power, or when he sees incorrect or even perjured testimony offered, refuse to go further with the case, and then rely upon the fact that this course has been pursued as a ground for avoiding the judgment, would make litigation perpetual. The very object of a trial is, to afford each party an opportunity of contesting fully all the proofs and all the principles of law relied on by the other side; and if false testimony be introduced, it must be met and combatted, when that is practicable, at the trial, or as soon after as possible — if the falsity is not, and could not, with all proper diligence, be discovered before. In this case no such efforts appear to have been made. The defendant, Bartol, had full notice by the pleadings of what was alleged and what would be attempted to be proven against him. The issue of fact

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was extremely simple. It involved the value of certain goods. The knowledge of this value did not lie exclusively with the plaintiffs' witnesses. By the showing made years afterwards, it appears that evidence on this subject could have been obtained from other sources. These assignors were merchants, whose business and stock were known to their customers and to their competitors in trade. The Court extended unusual liberality and indulgence to the defendant. Long delays intervened after he was fully apprised of the precise case made against him. He did not even cross-examine the plaintiffs' witnesses as to their relations to the case; nor did he seek to contradict them by other proofs. The case was tried and decided — appealed, and decided again. That, upon these facts, the defendant could not, if, under any circumstances he could, have filed a bill like this to vacate this affirmed judgment, can scarcely be contended. The ready answer to his application would be, that he had not done all he could to avoid that which he now, without such efforts, seeks to annul. Indeed, this matter would not be sufficient ground for a motion for a new trial, for newly discovered evidence, in an ordinary case.

But it is urged that these plaintiffs, his sureties, to answer the decree, stand on better ground. We do not think so. We admit, that if there had been collusion between Bartol and the plaintiffs to get and suffer this judgment, the case might, and probably would, be different. But there is no pretense of such collusion. It has been observed that the obligation of these sureties is to answer the decree of the Superior Court. The decree was for the payment of the money sued for. They contested their obligation in the Court below, and lost the case, and then, on appeal, lost it again.

There liability was collateral to the main suit; but it was made by the terms of their obligation to depend upon its issue. They were not parties to the original litigation, any more than a surety on appeal is a party to the suit in the Appellate Court. They had no rights in Court as contesting parties. They assumed the responsibility of a contestation by other parties, and of the result of a controversy which they could not control. If the suit were mismanaged, if — for example, not otherwise — incompetent counsel had been employed, if the defendant neg-

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lected or made default, or mismanaged his case, they had no right to retry it, or to deny the obligations of their undertaking. They chose, in plain language, absolutely to bind themselves in a given event; the event happened, and they are charged. To hold otherwise would be to hold that the surety in an appeal bond or undertaking, could demand a retrial of everything tried in the suit, or, what is the same thing, in effect, that a party giving such an obligation, could, in the name of the surety, hold himself practically absolved from the judgment, at least, without further trial. It would be the interest of a party to make mistakes and be guilty of negligence, since this would afford a pretext for opening the judgment and trying anew the suit decided against him. In order to hold so dangerous a doctrine, we would have to interpolate new conditions in the bond, and to expunge the terms therein written. We think the surety in such a bond stands in the shoes of his principal, so far as the definitive force of the judgment is concerned, subject to the single exception, that if the judgment be procured by collusion between the plaintiff and defendant, he is not bound.

Several other points we think equally fatal to the Respondents; but this one is enough. We think that the matter relied on in the bill could only be availed of by way of bill of review, and that this bill is fatally defective as such. But it is not necessary to elaborate this point, or to refer to any others; for what we have said is conclusive of the merits.

The order granting the new trial is reversed, and the decree dismissing the bill reinstated.

Ordered accordingly.

See Ploo v. Webster, Sheriff, and his sureties, post.

BENSLEY *et al.* v. THE MOUNTAIN LAKE WATER COMPANY.

WHERE a bill avers that plaintiffs are the owners, and in possession of a tract of land, that defendants are insolvent and threaten to, and will, enter upon said land, and, by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiffs' title, injunction lies.
Before private property, condemned for public use, can be taken from the owner, just compensation must be paid or secured to him.

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- A party, after procuring an order for the condemnation of property to public use, cannot lay by for four years without complying at all with those requirements of the proceeding which are of service to the owner, and then without notice, give effect to the previous and initiatory acts, through which he derails his title.
- He who relies for title upon an extraordinary mode of acquisition given him, not by the will of the owner, expressed or implied, but against his will and by the mandate of the law, must show strict compliance with those statutory rules from which his title accrues.
- No title, nor any right of possession, comes from the mere condemnation of private property for public use. Just compensation actually made, or secured according to law, is a condition precedent.
- And such compensation must be made within a short period, or the privilege of taking the property under the condemnation will be deemed abandoned.
- A *bona fide* purchaser of land, without notice of proceedings pending for its condemnation, at the time of purchase, no notice of *lis pendens* being filed, is not affected by the proceedings.

APPEAL from the Fourth District.

The case is sufficiently stated in the opinion of the Court.

The Court below first granted a preliminary injunction restraining the Sheriff from putting defendants in possession of the premises in dispute under the order or judgment of June 29th, 1857; and further ordering, that, if the Sheriff had already executed the writ of possession, the defendants should surrender the premises to plaintiffs.

The bill was filed on the 8th day of August; defendants entered on that day, and the injunction being served, the premises were surrendered to plaintiffs.

At the hearing the injunction was made perpetual, and the order of June 29th, 1857, vacated. The injunction issued against plaintiffs was dissolved. Defendant appeals.

Thos. C. Hambly and *Elisha Cook*, for Appellant.

1. The decree of Court adjudging to us the land was conclusive upon plaintiffs, because made on notice to them. Notice of this proceeding was made upon Holland, the Attorney on record of Emerson. Notice to one was notice to both tenants in common. (5 Esp. N. P. Cases, 196.) Notice to one is deemed evidence that it reached the other, (7 East, 155.) so that it must be inferred that his notice reached and included Bensley as well as Perkins. In such a case no *lis pendens* could legally be filed; this was not a proceeding which affected the "title," only the possession of the land; as it is only when the money is to be distributed that any question of ownership arises. The sole

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counsel for the company on record was William G. Wood, and George C. Bates appeared there *adversely* to the company and for the city of San Francisco, and others who were claiming the land as against the Mountain Lake Water Company. 2. The dismissal order was made on the application of Bates, who had no authority, and had this order been made "in the matter of the Mountain Lake Water Company," instead of the other suit, it would not have discontinued it. But, further, this order of the Judge, so far as discontinuance goes, is wholly extrajudicial and of no effect. He had no right to embody any such language in the order. 3. The withdrawal of the money from Court would not dismiss the proceeding. The possession of the property does not depend upon the payment of the money. The petition, survey, and report of the jury, give the possession, and not the payment of the money; therefore, the withdrawal of the money would not dismiss the proceeding; to do that they must appear clearly the intention. (*Bloodgood v. Mohawk & Hudson Railroad*, 14 Wend. 51; *Lovering v. The Philadelphia, Germantown, and Norristown Railroad*, 8 Watts & Serg. 459; *The Borough of Harrisburg v. Crangle*, 3 Watts & Serg. 460; Acts 1850, Secs. 17, 18; *Davidson v. The Boston and Maine Railroad Company*, 3 Cushing, 92.) 4. There never was any abandonment. Abandonment is a question of fact for the jury. (*Whitcomb v. Hoyt*, 6 Casey's Penn. 411; *Hurd v. Curtis*, 7 Met. 94; *Arnold v. Stevens*, 24 Pick. 106; 14 Eng. L. & Eq. 412; *Heath v. Biddle*, 9 Barr, 273; *Wilson v. Watterson*, 4 Id. 214; *Pickard v. Bailey*, 6 Foster, N. H. 166.) 5. Injunction does not lie. (14 Ohio, 353; 5 Geo. 576.)

McDougal & Sharp, also, for Appellant, said: If the effect of the order of December, 1853, be as contended for, it involves the following positions as true: 1st. That a Court, of its own motion, may dismiss proceedings of this kind without notice to the corporation, and without its being represented. 2d. That an order made in one suit or proceeding may operate an efficient order or judgment in another, between different parties. 3d. That an Attorney of an adversary interest may control the right to which he is antagonistic, by his own suggestion.

The question of abandonment is one of law. There is no foundation here for this pretense, as the amount of work done and the one hundred and fifty-thousand dollars expended, show.

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Shafters, Park & Heydenfeldt, for Respondent.

There are four grounds, upon either or all of which the jurisdiction of a Court of Equity to grant the relief prayed for may be maintained:

1. Considering the plaintiffs as parties in possession, and further considering that the trespasses contemplated and threatened, were in legal contemplation irreparable in damages, and further, considering that the defendants were insolvent, we have a case within the equity jurisdiction. (*Merced Mining Company v. Fremont*, 7 Cal. 317, and the cases there cited.)

2. A Court of Equity has jurisdiction to restrain railway companies, and other like corporations, from entering upon and appropriating private lands, where there has not been a full and exact compliance with all the conditions made by the statute prerequisite to the right. Here, it is true, the purpose was not to do irreparable damage by cutting down, or digging out and carrying away, things which are deemed of the substance of the inheritance; but the purpose was more comprehensive, viz: the dispossession of the citizen from the whole of his inheritance, and a definitive appropriation of it by the corporation to its own use. (*Stone v. The Commercial Railway Company*, 18 Eng. Chan. 122; *Agas v. Regent's Canal Co.* Coop. 77; *River Dan Navigation Co. v. North Midland Railway Co.* 1 Railw. Cases, 153, 154, and in *Kemp v. London and Brighton Railway*, 1 Id. 504; *Bonaparte v. The Camden and Amboy R. R. Co.* 1 Bald. C. C. 232.)

3. The defendant company were claiming title to the land by virtue of certain judicial proceedings terminating in the judgment of June 29th, 1857. The plaintiffs as owners and possessors for the period of more than four years, were in a position to test the validity of that judgment by proceedings in Chancery, and on the well understood principle of *quia timet*.

4. Courts of Equity have jurisdiction to set aside judgments and decrees where the Courts by which they were rendered have exceeded their jurisdiction, or where the judgment was procured by fraud upon the jurisdiction, or upon the *res*, if the proceeding was *in rem* or *quasi in rem*, or where it takes on the character of what is popularly known by the name of a "snap judgment." (Sto. Eq. Pl. Sec. 426.)

But the general question, in which all others center, is: Did

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the company at the filing of the bill, have a then subsisting right of entry on the "Emerson Tract," derived from the judicial proceedings manifested in the pleadings and proofs, and under which alone the defendants claim?

1. If the proceedings were regular so far as they went, then it is insisted that they were dismissed by the Court on the 17th of Dec. 1853, while they were yet inchoate—the final "rule" spoken of in the Act of 1851, not at that time having been entered up and recorded in the office of the County Recorder.

2. But if the order of December 17th, 1853, did not work a dismissal of the proceedings in condemnation, then it is insisted that on that day, or thereafter, and before the final order, taken June 29th, 1857, the proceedings were voluntarily abandoned by the company. The point is made that "abandonment" is a question of fact. In some of the cases it has been so treated, and in others it has been treated as a question of law. But there is a distinction that harmonizes all the cases, and which is in fact recognized by them all. Where the evidence is in conflict, or if not in conflict, if the facts proved or given are ambiguous or indecisive, the question is for the jury under instructions. But if the facts proved or given are clear, uniform, and decisive, and are on the principles of right reason wholly incompatible with the truth of any other hypothesis than that of abandonment, the question then becomes one of legal conclusion. But so far as this case is concerned, it matters little whether it is treated under the one aspect or the other. We are in chancery, and the facts as well as the law are alike with the Court. (*Green et al. v. Covillaud et als.* 10 Cal. 317. On the general question of abandonment we cite *Van Loan v. Kline*, 10 John. 180; *French v. The Braintree Man. Co.* 23 Pick. 216; *Phillips v. Shaffer*, 5 Serg. & R. 214; *Davis v. Butler*, 6 Cal. 510.)

3. That payment of the money assessed as damages for the land is a condition precedent to the right to take possession. (See Constitution of the State of California, Art. 1, Sec. 8; *San Francisco v. Scott*, 4 Cal. 114; *McCann v. Sierra Co.* 7 Id. 121; and *McCauley v. Weller*, 12 Id. 500.)

4. Or if the appropriation was successful and valid as against Emerson, then it is insisted that it is at least invalid as against the plaintiffs, his successors in the title, because they are *bona fide*

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purchasers, without notice of the proceedings. It is charged in the complaint that there was no *lis pendens* filed, and the answer admits it. Emerson deeded the whole tract to Perkins, October 22d, 1860. Perkins conveyed two-thirds undivided to Bensley & Wright, May 16th, 1854. Both of these conveyances are alleged, and neither of them is denied. It is alleged that both deeds were on valuable consideration, and that averment is not denied. The matter of the Mountain Lake Water Company presented a case fully within the terms of the Practice Act, Sec. 27. The action "affected the title to real property," and no *lis pendens* having been filed, "the pendency of the action was not constructive notice to a subsequent incumbrancer or purchaser." No notice, in fact, is proved by the defense.

It is no answer to the objection now under consideration that the proceeding was *in rem*. It was an action "affecting the title to real estate," and, therefore, notice of *lis pendens* was due to third persons, even though it was *in rem*. But the argument proves too much, for all actions affecting the title to real property are *in rem* or *quasi in rem* — more *in rem* than they are *in personam*, and hardly *in personam* at all, except it be in the matter of damages and costs. The result of the reasoning is an utter nullification of the statute.

There may be a distinction taken, perhaps, between actions brought to vindicate an existing title to real estate (Practice Act, Sec. 263) and actions brought to perfect or transfer, or create such title, as in cases of foreclosure, partition, or condemnation, as here. In this last class of cases that notice of *lis pendens* is necessary in order that *bona fide* purchasers may be bound, there can be no question. True, there is no such provision in the Act of 1851, but it is found in the general rule. (Practice Act, Sec. 27.)

As to the objection that defendants were put in possession by the Sheriff under the order of August, 1857, and that the Court could not dispossess them by preliminary injunction, we say: 1. If the company had acquired the possession of the premises without judicial intervention, by their own unaided act, there might be doubt as to the power of a Court of Equity to turn them out by injunction, though there would be none as to its power to restrain them from committing waste or doing irre-

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parable damage while in. But if we are right in our main positions, or right in any of them, the first usurpation of judicial power is found in the order turning us out and putting the company in, and the victims in that first usurpation may well oppose it to the complainings of the alleged victims in the second. The possession, which they wrested from us under color of judicial proceedings, was of four years' standing. It had been peaceable; obtained by contract and conveyance from Emerson, whom the company have accredited as the owner of the title. 2. But there are cases in which a Court of Equity has power to compel a party to surrender possession of land. (*Champion v. Brown*, 6 Johns. Chan. 401.) It has it, or it has not. If it has it, and can turn us out now by virtue of it, even if the main question of right is with the plaintiffs, as defendants seem to claim, then the Court below had the same power by parity, and did not misapply it in foreing the company to surrender. But if the Court below did not have the power to expel the defendants, then this Court cannot have the power to expel the plaintiffs, but must leave the defendants to their remedy at law by ejectment. But should the Court enjoin us to evacuate, still if the Court holds that the plaintiffs are in the right on the principal questions presented by the case, the defendants should be restrained from committing any waste or damage on the premises. Besides, defendants should have appealed from the order. (Practice Act, Sec. 336.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The plaintiffs below, Respondents here, filed this bill, averring that they are the owners of certain lands, lying in San Francisco County, and situate at the mouth of Lobos Creek; that their title comes from one Emerson, who originally held the same, and that the plaintiffs have jointly possessed these lands since the 16th day of May, 1854; that the defendants, on the 29th day of June, 1857, obtained an order or judgment in the Fourth District Court, for the condemnation of these lands for the use of defendants. It is alleged that this judgment of condemnation is void, or should be so declared. The plaintiffs say that this judgment was irregular, and they assign the particular

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grounds, which, they say, avoid it. They aver that the proceedings were dismissed before this final order, thus assailed, was made; that they were voluntarily abandoned before this time; and the bill charges that the company threaten to enter under the order, that they will, unless prevented, proceed to make excavations, embankments, and structures, on the land, and divert valuable springs and streams thereon, and that the company, and Scannell, the Sheriff, acting under the order, are insolvent. An injunction was granted, according to the prayer of the bill. The plaintiffs claim to be in possession, and they assert, as the natural consequences of the act they seek to enjoin, besides that a cloud upon their title is created, irreparable injury, by insolvent persons entering upon their property and despoiling it of the substance of the inheritance. They say that this is an irreparable damage, and that the remedial principle of equity jurisprudence, which makes this a matter of chancery jurisdiction, applies in full force to such a case. If this state of facts be maintained, there seems to be no doubt in reason and on authority of the propriety of the equitable interference. (See *Stone v. Commercial R. R. Co.* 18 Eng. Chan. 122; *Agas v. Regent's Canal Co.*, Cooper, 77; *Bonaparte v. The Camden and Amboy R. R. Co.* 1 Bald. C. C. 232.)

It is necessary to a proper understanding of the questions involved in this issue, to consider the facts shown by the record. That the title to this property was in Emerson is conceded; for the defendants claim to have a right of entry by virtue of proceedings condemning it as his. The only question, then, is whether they have so proceeded as to subject it legally to their use or dominion. It is not necessary to question the right of the State Government, by virtue of its eminent domain, to take private property for public use in an authorized manner, nor, as a corollary or consequence of this general governmental power, to authorize its agents, whether corporate bodies or individual, to exercise this high sovereign prerogative. But it is just as indisputable that this right can only be exercised in pursuance of law, and in conformity to the Constitution. A citizen is entitled to hold his property free of any interference, except through the taxing power, from the government, or his fellow — subject to this one qualification — that when it is necessary for the pur-

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poses of the public, it may be taken from him, provided the government so taking, or authorizing others to take it, shall make the owner just compensation; which must be paid or secured to him before he is deprived of his possession. This has been decided in many cases, and recently by this Court in the case of *McCauley v. Weller*, 12 Cal. 500.

The defendant in this case is a corporation organized under the Act of April 22, 1850, for the purpose of introducing fresh water into the city of San Francisco, from the Mountain Lake, situated in the vicinity of the city. One Merrifield was authorized by a city ordinance to introduce the waters of the Lake into the city for the period of twenty-five years ensuing the first day of January, 1853, and by that day the work was to be done. Afterwards, Merrifield assigned his rights to this company. The city authorities extended the period for the completion of this work from time to time, until September, 1857. After this time, it is charged in the bill, and not denied, that the work, not having been completed, the Board of Supervisors passed a resolution declaring the privileges at an end.

On the 15th of June, 1853, the company filed a petition in the Fourth District Court, to condemn the lands in question. Commissioners were appointed, June 24, 1853, who reported August 23, 1853, as to the value of the lands — among others, that the land of Emerson was worth, with crops, etc. \$3,000.

On December 25th, 1856, the company, without notice to the plaintiffs, procured an order confirming the report of 1853. On the 29th of June, 1857, without notice to plaintiffs, the company procured a final order or judgment condemning the lands, and directing that defendants should be let in possession on payment of the three thousand dollars. Emerson was once the owner and in possession of a part of the lands sought to be condemned — this being that in dispute here. Perkins and Bensley, claiming through Emerson, have possessed the land jointly since October, 1853.

Before this final judgment of confirmation, viz: on 17th of December, 1853, an order was entered on the minutes of the Fourth District Court, reciting, that it appeared to the Court, that said company did not intend further to proceed to obtain possession of the lands named in their petition, and dismissing the action; and it is charged in the bill, and not denied, that, on

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the same day, the company withdrew the deposits of money theretofore made with the Clerk of the Court for the payment of the assessed damages, and, also, the collaterals deposited with the Clerk by the company, for the securing of the damages.

Some question is made as to the authority by which this order was made, and, also, whether it were made in or for this proceeding; but we regard these questions as not very important. It is very certain that the money paid into Court as damages for the land comprehended these three thousand dollars assessed by the Commissioners, for Emerson's land. It is just as certain that this money was received by the executive officer, or with the approbation of this officer of the company, and with knowledge of the source and authority of the repayment. Nearly four years passed without any action to restore the money, or further steps being taken to give effect to the appropriation of this property, or to perfect the title. The question then is, whether a party, knowing of an order purporting to show an abandonment of proceedings, for the condemnation of property, and giving effect to it by receiving benefits and advantages accruing through such order, can, after the lapse of several years, be heard to allege that such an order was unauthorized, and the fact it recites untrue. But to steer clear of any disputed facts, the broader question may be made, whether the party, after procuring an order for the condemnation of property, to public use, can lay by for four years without complying at all with those requirements of the proceeding which are of service to the owner, and then without notice give effect to the previous and initiatory acts, through which he derails his title. This statutory power of taking property from the owner, without his consent, is one of the most delicate exercises of governmental authority. It is to be watched and guarded with jealous scrutiny. Important as the power may be to the government, the inviolable sanctity, which all free constitutions attach to the rights of property of the citizen, constrains the strict observance of the substantial provisions of law, which are prescribed as modes of the exercise of the power, and to protect it from abuse. All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the

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owner, expressed or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues. Accordingly, all tax laws are construed rigidly, and must be closely followed, in order to divest or vest title. It would be strange if a petty charge could not be laid upon property for its protection and the support of government, without strictly following the laws imposing the tax, and yet the whole property be taken by the law in fee and forever, without this same strict observance of legal rules. No Court has gone further than this in the doctrines asserted upon this subject, giving this salutary protection to private rights. (See 7 Cal. 4; *McCauley v. Weller*, 12 Cal. 500.)

It is a mistake to suppose that any title comes from mere appropriation of another's property, or from the taking of the legal proceeding to condemn it. The Constitution is express. Private property shall not *be taken* for public use without compensation. The compensation precedes the title. The compensation must be adequate. But adequate—when? Of course, when the property is *so taken*. The right to take on the terms adjudicated—which is a compulsory statutory sale—accrues from the legal proceedings—the petition—the report—the confirmation; then the price becomes fixed. But no right of entry—much less a title—accrues so far. The party condemning, the representative of a State, is then *in a condition to be* a purchaser; the other party is in a situation of a vendor making an agreement of sale on condition precedent, but retaining his title and possession until payment. The property is rated according to its cash value; the money is expected to be paid at once or within a short period. It cannot be pretended that a party thus trading with another without this latter's consent, can also fix the terms of the payment, any more as to time of payment than as to price. If this were so, all an insolvent company, having this right, need do, would be to condemn property prospectively valuable, and wait for years, until the property quadrupled its value, and then claim it under its first valuation. Even in respect to executory agreements, we held in *Green v. Covillaud*, (10 Cal. 317) as had been held before, that the party seeking an enforcement of a contract of sale of real estate must be prompt in

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the compliance with his obligations, and that a delay of payment — in that case of twenty-two months — unexplained, was fatal to his right to enforce the contract. The rule in such a case as that cannot be more strict than in this.

If we were to hold that by force of these proceedings, in 1853, this company had a right to wait until 1857, and then insist upon giving them effect, we must necessarily hold that the property condemned need not be paid for according to its valuation or real value in 1857, the time when really taken, but may, in effect, be paid for according to its assessed value in 1853, when proceedings were first instituted, and be paid for, not in cash, but on four years' credit, without security. Nay, more, that it might be taken at the mere option of the company, without any sort of obligation on their part to take it, if they chose to decline, as, possibly, they might, if it deteriorated in value. It would be a unilateral contract, binding one party, but not binding the other; and, translated into plain English, would mean: "If we (the company) choose, we will take your (Emerson's) land four years hence, by paying for it what is now assessed as its value. You are to keep it for us, and not sell it, for all that time; but if it declines in value or we do not choose to take it, we will not do so." No sane man, if left to his volition, would make such a trade, and we think we have shown that the law is not so unjust or arbitrary as to make such a bargain for a citizen when it subjects him to its power.

The report and assessment of the Commissioners are only effectual to fix a price for the property, for the purpose of enabling the company to take it at that price at the time of, or within a short period after, the assessment and the confirmation of the report. To entitle the company to take the property on those terms they must avail themselves of the privilege within the proper time. The lapse of a reasonable time without availing themselves of the privileges was itself an abandonment of all claim to it. To say the very least, when a year had passed and no offer made, the proceedings were effectually discontinued. The assessment had become *functus officio*; just as if an offer had been made to the company by Emerson to take the property at a price agreed on, and no answer had been made by the company for that period. The company had no right in 1857 to

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revive the old initiatory proceedings of 1853, and claim to give effect to the attempted condemnation of the latter year. The payment of the money to the Clerk, and its subsequent withdrawal, left things where they were before the payment. A payment which, by the act of the party, is ineffectual, is, in law, no payment at all.

The argument which opposes these views is, that, by the mere fact of condemnation, a right of entry and possession accrued to this company without any payment or provision of payment, and several authorities from other States are cited to sustain this proposition. Perhaps it is a sufficient answer to state that, by the very terms of the order of 1857, possession was not to be taken except upon or until after payment. The authorities cited rest upon peculiar statutes or constitutional provisions of the States in which the cases were decided. There is nothing in the legislation of this State which gives any right of possession until the compensation is made, nor, if we may indicate our ideas of policy, should there be in any State. To all just ideas of individual rights there can be no doctrine more abhorrent than the notion that any free government had delegated to a private corporation a right to go upon the lands of a citizen and dispossess him of his freehold, and coolly inform him that after a while it will remunerate him for his property when it finds it convenient to pay him; but, in the meantime, he must content himself with being disseized and rely upon the faith and ability of the disseizor to make him reparation. (See 18 Wend. 9; 3 How. Miss. 240.)

2. It is said, too, that the company denies that Emerson has any title. If this be so, why was he made a party, and why are not only himself but his successors in interest sought to be affected by these proceedings? Why, at this late day, is the amount of damages assessed in 1853, offered to be paid to him or them? But is not possession in 1853, by Emerson, and subsequent deeds to, and possession under, them by his vendees, evidence of title as against those pretending to none, except through these proceedings against him?

We have held, upon the soundest authority, that the compensation must be first tendered or paid, or at least, satisfactorily provided, before any right to the property can be acquired, or

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any right of possession destroyed. And if isolated instances of departure from these conservative principles could be found, we should certainly regard them rather as warnings than as examples. But we feel confident that no well considered case can be cited which holds that, under a statute similar to our own, a corporation may take possession of a man's property, and put him off with a mere promise or undertaking that it will afterwards pay him for it. The authorities are all collected in the excellent work of Mr. Smith on Const. and Stat. Constr. 476, *et seq.* and the conclusion of the author is as we have given it.

3. Equally fatal is the other point — that the property had changed hands since the commencement of these proceedings; and that, so far as appears, these plaintiffs were purchasers without notice of any claim to the land on the part of the defendant, who had filed no *lis pendens*, and had by its conduct induced the idea that it had abandoned this attempted condemnation of the land. A notice of dismissal of the proceedings certainly was no notice of the existence of the claim.

Decree affirmed.

On petition for rehearing, the following opinion was delivered by BALDWIN, J. — TERRY, C. J. concurring:

The petition for a rehearing reviews several portions of the opinion, which constitute but little, if any, part of the controlling reasons of the conclusion. We attached no importance to the action of the Board of Supervisors, though their action was stated as one of the facts in the case.

We supposed, that, as the Commissioners assessed to Emerson three thousand dollars, for land in his possession and injury to the crops, and these three thousand dollars were alleged to have been paid into the Court, we might assume that the title was recognized to be in the tenant in possession, to or for whom compensation for the land was proposed to be made by the defendant.

When we spoke of notice to the plaintiffs, we spoke of legal notice — not of loose conversation on the street or elsewhere. If any notice is required to give effect to judicial proceedings, it is notice in that authentic shape which binds parties to the result of a judicial inquiry.

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We supposed, too, when a man deposits so large a sum as three thousand dollars in Court, that he is, of course, to be considered as aware of the fact that he has deposited it, and if it be withdrawn by order of Court that he knows of the withdrawal; and that it must be presumed, if nothing more is heard of the money for four years, when he makes another tender of the same sum, that he has received back the money first deposited; and, especially, if he does not deny a specific allegation that he *did* withdraw it, that this presumption is conclusive.

The main principle upon which we went in the opinion is this: that, after proceedings for a condemnation, which proceedings result in an assessment of damages, the money must, within a reasonable time, be paid or deposited; and if four years intervene before such an act is done, the proceedings must be held to be discontinued; and that a deposit does not mean merely formally putting the money into Court and then withdrawing it.

That a party is not bound to wait, after a deposit and withdrawal of the money for years to see whether the party seeking to condemn it intends completing the process by which alone he can get title. This proposition is wholly independent of the question whether the value of the property rises or falls in the meantime; though, if it be stationary, the difference is the difference between money and four years' credit and the difference between an immediate forced sale on the terms the law annexes, and a sale to take place at the convenience of the person condemning the land.

We did not overlook the point that the injunction order restored the plaintiff to the possession.

This was irregular. But the case was *tried* on the merits, and the plaintiff *then*, according to our view of the case would have been entitled to an order of restitution of a possession improperly taken under color of these illegal proceedings.

This being so, the Court of Equity only erred as to the time of making this order; the whole record being before us in a chancery case, we would not reverse for an error which does no legal damage, merely because the Court did at first irregularly, what at last it would have been bound to do.

Rehearing denied.

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GENERALLY a party seeking to rescind a contract, must restore the other party to the condition in which he was before the contract was made.

Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value. Plaintiff sold his interest in this claim to defendant for greatly less than its value. Held: that in a suit by plaintiff against defendant, to set aside this sale for fraud and for an account, etc. an averment that defendant is indebted to plaintiff, on the account, in a sum greater than that paid by defendant for the mining claim, is, in effect, an offer to place defendant in *statu quo*, as per the rule of law.

Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case there is no discretion in the Court, the change being matter of right.

The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed, by motion to change the venue, at the proper time and place.

The Court is not bound of its own motion to change the venue. *Vallejo v. Randall* overruled so far as it conflicts.

The late Superior Court of San Francisco had no jurisdiction of a suit affecting real estate situated outside the city limits, if this point arose on the complaint, it would be fatal. And, probably, if the fact that the property was beyond the city, appeared anywhere in the record, it would be fatal.

Mining claims are real estate within the Practice Act defining the venue of civil actions.

The Superior Court of San Francisco had jurisdiction of a suit to settle the accounts of a partnership formed for the purchase of mining claims, where both parties resided in said city: but could not by its decree affect the title to, or any interest in, the claims themselves.

The Superior Court not having jurisdiction, the Fourth District Court taking the case, by operation of law, from the former Court, possessed no greater powers in the case than the Superior Court.

APPEAL from the Fourth District.

For case, see opinion.

The Court below first having overruled the demurrer, sent the case to a Referee "to take an account of the value of the interests in certain mining claims which were sold by the plaintiff to the defendant, as mentioned in plaintiff's complaint, at the time of such sale; also, the excess of such value over and above the price paid by the defendant for the same mining interests; also, to take and state an account of the dividends declared from such mining interests, which plaintiff was entitled to receive and collect, and which were due and unpaid to the plaintiff at the time of such sale."

Upon the coming in of the report, finding one thousand five hundred and twelve dollars and fifty-eight cents due plaintiff, and upon the hearing of the cause, the Court decreed that the sale mentioned in the complaint was fraudulent, and that in

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consequence thereof, plaintiff was entitled to recover damages as per report of Referee, with two hundred and thirty dollars and fifty-six cents costs.

After motions to set aside report of Referee, and for new trial, were overruled, defendant appealed.

S. H. Dwinelle, for Appellant.

I. The Superior Court erred in overruling the demurrer to complaint. (*Hunt v. Silk*, 5 East, 449; 1 T. R. 133; *Weston v. Downs*, Doug. K. B. 23; Story on Sales, Sec. 427; *Tisdale v. Buckmore*, 33 Maine, 461; *Coolidge v. Brigham*, 1 Met. 549, 550; *Jennings v. Gage*, 13 Ill. 610; *Burton v. Sewart*, 3 Wend. 236; *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 Id. 319; *Gloucester Bk. v. Salem Bk.* Id. 32; Prac. Act, Sec. 18; *People v. Gillespie*, 1 Cal. 342; *Vallejo v. Randall*, 5 Id. 461; *Meyer v. Kalkmann*, 6 Id. 582; *Walker v. Sedgwick*, 8 Id. 398; *McKeon v. Bisbee*, 9 Id. 137; Const. of Cal. Art. 6, Secs. 1, 4, 6; "Act concerning Courts of Justice," etc. passed 1853. See Comp. Laws, 741, Sec. 19; Id. 743, Secs. 33, 34; 1 Blk. Com. 44; Hilliard on Real Prop. Vol. 1, 51; *Lord Culler v. Rich*, Bullers Nisi Prius, 102.)

II. Neither that Court nor the Fourth District Court had jurisdiction of the subject matter of the action. (Pr. Act, Sec. 18, and cases cited.)

III. The Superior Court ought not to have proceeded with the trial after it appeared that the subject matter was real estate in Yuba County.

S. M. Bowman, for Respondent.

I. The right to work a mine is a privilege; it implies no right to the soil. The Legislature has treated it as personal property. (Act 1857, 347; *McClintock v. Dryden*, 5 Cal. 97; *Hicks v. Bell*, 3 Id. 227; *Irwin v. Phillips*, 5 Id. 140; *Stokes v. Barrett*, Id. 36; *Tartar v. Spring Creek Co.* Id. 395.) But the Court below did not act upon the title to the claim. It simply compelled defendant to account.

S. H. Gray, also, for Respondent.

1. This is a bill in equity to settle a partnership and to annul a bill of sale which was void *ab initio* for fraud, and not an action

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for the recovery of real estate, and no tender was necessary, the allegations of the bill being equivalent to a tender.

2. The miner's interest is but a franchise, and a franchise is not real estate. The action, therefore, is not local. (5 Cal. 97; 3 Id. 227; 5 Id. 140, 36, 395; 1 Hilliard on Real Prop. 8; 2 Black. Com. 20; 2 Sandf. Sup. Ct. 560.)

BALDWIN, J. delivered the opinion of the Court — FIELD, J. concurring. TERRY, C. J. also concurred, except as to that portion of the opinion which overrules *Vallejo v. Randall*, 5 Cal. 461.

This was a bill, filed in the late Superior Court of San Francisco, to set aside a contract of sale made between plaintiff and defendant for a certain mining claim in Yuba County. The bill charges that plaintiff and defendant were engaged as partners in the purchase of mining claims; that the defendant was the active and managing partner, to whom the business was intrusted; that he became acquainted with the value of the claim, of which plaintiff was ignorant, and that defendant made false representations of the value to plaintiff, upon the faith of which the plaintiff sold to him at a price greatly below the real value. The bill further charges that profits and moneys properly belonging to the partnership came to, and are in, the hands of defendant, to an amount exceeding the sum — some four hundred dollars — paid by defendant to the plaintiff. Bill prays cancellation of the deed to the claim, account, etc.

The defendant demurred on two grounds:

1. That there was no tender to defendant of the sum received on the sale sought to be set aside.

2. That this being an action affecting real estate, the San Francisco Court had no jurisdiction.

The first point is not well taken. The general principle that a party seeking to rescind a contract must restore the other party to the condition in which he was before the contract was made is unquestionably correct. But we understand the bill offers in effect to do this. It alleges that the defendant is indebted to the plaintiff in a greater sum than that paid by the defendant. This money, in the hands of the defendant himself, is as good security to the defendant for this sum due him as the defendant could desire. The plaintiff risks his case upon the

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issue of the investigation and settlement of the accounts; but, if he is right in his allegation, a Court of Equity would not require him to pay money to a party who owes him in order to enable him to wage his rights against his debtor.

2. Assuming, as we do, and as, in principle, we have held, that mining claims are real estate within the meaning of the Practice Act defining the venue of civil actions, a demurrer would not be the proper mode to take advantage of the error in bringing the case in the Court of the wrong county. If this suit had been originally brought in the Fourth District Court, it would not then have been a question of jurisdiction at all—though some *dicta*, probably, may be found in previous decisions to that effect. District Courts are Courts of general jurisdiction in all matters given them by law, wherever those matters may be locally situated, or wherever the parties may reside; but, for convenience, parties have a right to a trial of particular cases in particular counties. This is a mere privilege, which may be waived by those entitled to it. It must be claimed at the proper time and in the proper way. It is not, by our statute, matter in abatement of the writ, but a mere privilege of trial of the suit in the given county. The party desiring a change of venue should move the Court to change the place of trial, and then the Court, in the proper case, has no discretion to refuse the motion. It seems to be made by the statute a matter, in such cases as this, of peremptory right. We think the Court is not bound, of its own motion, to change the venue, and overrule so far the case of *Vallejo v. Randall*, (5 Cal. 461,) if that case is to be so construed. It is, however, urged, that the Superior Court of San Francisco had, by the law creating it, only jurisdiction of cases affecting real estate lying within the limits of the city. And so the Act expressly declares; for this is an enabling Act, creating a Court, which owes its whole life and powers to the statute. It has just such jurisdiction as the Act gives—no more. The grant of jurisdiction of cases of real estate in the city is equivalent to an exclusion of jurisdiction over real estate situated anywhere else. This point arising on the complaint, was so far fatal to it. Indeed, the fact appearing anywhere on the record would probably be fatal, for the Court had no authority or power over the subject.

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3. As the parties, plaintiff and defendant, resided in San Francisco, we do not see why the Superior Court had not jurisdiction of the settlement of this partnership account. But it could not, by its decree, affect the title to this mining claim, or any interest in it, by setting aside the sale or affirming the title of the plaintiff to be untouched by it. Nor was it proper to decree to the plaintiff the real value of the mining claim. The fraud vitiated the sale, but it did not create another sale, or make the defendant take the property at its true value.

The objection, moreover, arose upon demurrer, and, if well taken, the defendant had a right to insist that it should be passed on correctly before he was put to answer, or stand on his defense. The main and leading object of the bill evidently was to set aside this deed for fraud; the settlement of the partnership accounts, if not auxiliary to this purpose, was a secondary matter. The averment as to the state of the account, indeed, seems to be incidentally made. We have already seen that the mining claim was beyond the jurisdiction of the Court. The Superior Court not having jurisdiction, the Fourth District Court, taking the case by operation of law from the former Court, possessed no greater powers in the case than the Superior Court. It did not pretend to act by virtue of its original jurisdiction, but only as the successor of the Superior Court. These views are conclusive of the questions on the record.

As the plaintiff may amend his bill and seems to have a good cause of action in the forum below for a portion of his claim, we reverse the decree and remand the case to be proceeded in according to the principles of this opinion.

Ordered accordingly.

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AN assessment of land as "balance of land on Rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars," is sufficient; it appearing on the roll that the part of the ranch not assessed was comprehended within the plat of a town, certain lots in which were assessed on the same list to the same owner. The Board of Equalization has no power to raise the valuation of land as fixed by the Assessor, without notice to the owner. The general notice, of the sitting of the Board, by publication, does not amount to the notice required. If the Board raised the tax without proper notice to the owner, their action is void, and the assessment remains in full force.

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APPEAL from the Seventh District.

Bill for injunction against the collection of taxes. The injunction was granted after notice. On the trial it was dissolved, and the complaint dismissed. Plaintiff appeals.

Crockett & Crittenden, and Shattuck, Spencer & Reichert, for Appellants.

I. An injunction is the proper remedy. (Black. on Tax Titles, 567-571; *Burnett v. Cincinnati*, 3 Ham. 73; *Bank of U. S. v. Osborn*, 9 Wheat. 738; *Anderson v. State of Mississippi*, 23 Miss. 459; *Lyon v. Hunt*, 11 Ala. 295; *Dyer v. Branch Bank of Mobile*, 14 Id. 622; *Palmer v. Boling*, 8 Cal. 388.)

II. The proceedings of the officers charged with the assessment were fatally defective, and the Sheriff had no authority to sell any land of the Appellant's. (*Ferris v. Coover*, 10 Cal. 632; *Powell v. Tuttle*, 3 Comst. 401; *Hughey v. Howell*, 2 Olm. 231; *Isaacs v. Wiley*, 12 Vt. 607; *Brown v. Veazie*, 25 Maine, 362; *Watcher v. Powell*, 6 Wheat. 119; Black. on Tax Titles, Chap. 2; Revenue Act, 1857.)

1st. There was no sufficient description of the land in the original assessment roll. (*Lafferty's Lessee v. Byers*, 5 Ham. 458; *Lessee of Massie's Heirs v. Long et al.* 2 Id. 287; *Treon's Lessee v. Emerick*, 6 Ohio, 392; *Douglass v. Dangerfield*, 10 Id. 152; *Eggleston v. Bradford*, 10 Id. 312; *Turney v. Yeoman*, 16 Id. 24; *Richardson v. State*, 5 Blackf. 51; *Tallman v. White*, 2 Com. 66; *Ronkendorff v. Taylor's Lessee*, 4 Pet. 350; *Raymond v. Longworth*, 4 McLean, 481, and 14 How. 76; *Moore v. Brown*, 4 McLean, 211; *Ballance v. Forsyth*, 13 How. 18.) 2d. The act of the Board of Equalization in increasing the assessment was void. If the Board could have considered the question of value at all, there being no sufficient description, and hence no valuation, they could only do so upon complaint, and after notice, and upon proof, and the regularity of their proceedings must appear of record. (*Rex v. Cook*, 1 Cowp. 26; *Gilbert v. Columbia Turnpike Company*, 3 John. Cases, 107; *Davison v. Gill*, 1 East, 64; *Smith v. Hillman*, 1 Scam. 323; *Sharp v. Spier*, 4 Hill, 86; *Atkins v. Kinman*, 20 Wend. 249; *People ex rel. Deafries v. Supervisors*, 10 Cal. 344; *Commonwealth v. People of Cambridge*, 4 Mass. 627;

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Commonwealth v. Coombs, 2 Id. 490; *Commissioners, etc. v. Clau*, 15 J. R. 537; *Whitney v. Clinton*, 14 Conn. 72.) A portion of the tax being thus illegal, the whole was so, and the Sheriff had no authority to collect any part of it. (*Clark v. Strickland*, 2 Curtis C. C. R. 439; *Stetson v. Rempton*, 13 Mass. 272; *Bangs v. Snow*, 1 Id. 181; *Dillingham v. Snow*, 5 Id. 547; *Libbey v. Burnham*, 15 Id. 144.) 3d. There was no description of the property in the duplicate assessment roll delivered to the Sheriff. That roll was his only authority to collect any tax from the Appellants, or to sell their property. The authorities above cited established that an execution so levied, is levied on nothing, and that under such a levy the Sheriff could sell nothing.

Jackson Temple, for Respondent.

1. Plaintiff's remedy was *certiorari* to correct the action of the Board of Equalization in so far as the Board had exceeded its jurisdiction. The proper corrections could be made, and the Board directed to charge the parties with the tax really due. (8 Cal. 58; 19 Wend. 56.) The description of the land assessed is sufficient. (*Palmer v. Boling*, 8 Cal. 384.) Appellants are estopped from denying the correctness of the description. The assessment is presumed to have been made in the usual way, *i. e.*—the Appellants gave a list of their property. (Wood's Dig. 615, Sec. 3.) The return was made within the time required by law, and the assessment roll was delivered to the Clerk of the Board of Supervisors, and kept by him in his office open to public inspection. (Wood's Dig. 617, Sec. 7.) Appellants did not go before the Board to have it corrected.

2d. The Board had power to change the valuation. (Wood's Dig. 695, Sec. 12; 693, Sec. 6; 617, Sec. 8.) Errors made by the Board, in their judicial capacity — they having jurisdiction — will not vitiate the assessment. (*Henderson v. Brown*, 1 Caine, 92; *Easton v. Calendor*, 11 Wend. 91; *The People v. Collins*, 19 Id. 56; *Haynes v. Meeks*, 10 Cal. 110.) They acquire jurisdiction of the person, by giving the notice, and by the law fixing the meeting of the Board. Every person listed is brought into Court. (*Hambleton v. Dempsey*, 20 Ohio, 168.) But if the assessment was illegally raised, the only effect is, perhaps, to render the members of the Board personally liable. (*Livingston v. Hollen-*

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beck, 4 Barb. 10; *People v. Supervisors Alleghany*, 15 Wend. 198.) The tax is a debt due from the tax payers to the State. (*Moore v. Patch*, 12 Cal.) A portion of the amount claimed is acknowledged to be due—the collection should not be enjoined, until a tender has been made. (*Robinson v. Gaar*, 6 Cal. 273; *Hardenbergh v. Kidd*, 10 Id. 402; *Weber v. San Francisco*, 1 Id.)

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. and FIELD, J. concurring.

Bill filed to enjoin the collection of taxes on a tract of land in Sonoma.

Two grounds are mainly insisted on:

1. That the property was so imperfectly described on the assessment roll as to be incapable of identification.
2. That the Board of Equalization increased the valuation of the land taxed, by more than one-half, without notice to the owner.

The facts raising the first of these questions are, that a number of lots in the town of Petaluma were listed and assessed as the property of Appellants, plaintiffs below, by the Assessor of Sonoma County, on the assessment roll of 1858. The lots were separately assessed. Then follows a further assessment of the property, to the Appellants, in the following words: "Balance of land on Rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars." The town is on a part of this ranch. Before the assessment, the Appellants had sold, not only a great many town lots, but several parcels of land lying outside of the town. The whole ranch contained originally four leagues, or some seventeen thousand seven hundred acres. Is this a sufficient description? Considering the description given to amount to this, "ten thousand acres of land being the remainder of a ranch called Arroyo de San Antonio, originally containing seventeen thousand seven hundred and ninety acres; that part not assessed being comprehended in the plat of the town of Petaluma," it would be sufficient in a deed to pass the title; and, within the case of *Palmer v. Boling*, (8 Cal. 388,) properly taxable by this description. We do not feel disposed to disturb that decision. The fourth section of the Act, (Wood's Digest,

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616,) quoted by the Appellants, refers only to *public lands*, outside of a city, town, etc. as the context shows.

The other question is more difficult. The eighth section (p. 617) provides: "The Supervisors of the County shall constitute a Board of Equalization, of which Board the Clerk of the Board of Supervisors shall be Clerk. The Board of Equalization shall meet on the second Monday in August, and shall continue in session, from time to time, until the business of equalization presented to them is disposed of; *provided, however*, that they shall not sit after the second Monday in September. The Board of Equalization shall have power to determine all complaints made in regard to the assessed value of any property, and may change and correct any valuation, either by adding thereto or deducting therefrom, if they deem the sum fixed in the assessment roll too small or too great, whether said sum was fixed by the owner or the Assessor." We think it would be a dangerous precedent to hold that an absolute power resides in the Supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to a great abuse. The general principles of law applicable to such tribunals, oppose the exercise of any such power. The publication of notice of the sitting of the Board amounts to no protection to the owner; for the sessions of the Board are, or may be, from the first Monday in August until the second Monday in September, and it could scarcely be expected that every tax-payer is to wait upon the Board all this time to see if his taxes are to be increased. The words of the statute seem to require a complaint, or some proceeding analogous to this; at least, that there is to be something, however informal, in the nature of a controversy or contestation, or in the nature of a judicial inquiry. There can be no considerable difficulty in giving this notice, and we think the best interests of the State require it. We are not disposed to hold these tribunals to any great strictness of procedure; but any degree of strictness, probably, would be better than to give such arbitrary power to a Board, as would authorize it, without notice or evidence, or opportunity to the tax-payer to be heard, to increase his taxes indefinitely, without any right of appeal. The case in 20 Ohio, 172, seems to be against this view, but the ruling of the Court on this point was not necessary to the de-

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cision of the case, and the decision was influenced by other statutory provisions than the one which seems analogous to that in our Act. The Act of Ohio, too, appointed a single day as the time of the meeting of the Board. But according the weight of a direct adjudication to this decision, (which, however, is without explanation, and merely the conclusion of the Court,) we think it stands opposed to reason, justice, and sound policy, and to those general principles which allow a party a reasonable opportunity to be heard before his rights of property are affected by the action of any tribunal.

We hold, therefore, that the action of the Board is void in raising the tax. This leaves the assessment in full force, and we perceive no difficulty in the Tax Collector's proceeding to collect the tax. The other questions have been either determined by us before, or are not considered necessary to the decision.

The order dissolving the injunction is reversed, and the case is remanded, with directions to the Court below to dispose of the case in pursuance of this opinion.

GLADWIN *et al.* v. GLADWIN *et al.* GARRISON *et al.* INTERVENORS.

AN outstanding liability as surety or indorser for another, together with an express promise by such surety or indorser, to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount on demand.

APPEAL from the Twelfth District.

For case, see opinion.

Defendants were insolvent. The case was tried by the Court; the defendants, Gladwin, Hugg & Co. not answering, the contest was between plaintiff and intervenors. Judgment was entered for plaintiff against defendants, and that the intervenors take nothing by their intervention. Intervenors appeal.

Crockett & Crittenden, for Appellants, cited (*McKenty v. Gladwin, Hugg & Co.* 10 Cal. 227; *Taafe v. Josephson*, 7 Id. 352; *Ryan v. Daly*, 6 Id. 238.) The antedating of the note sued on — the manufacture of a present cause of action out of debts not due — the con-

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verting of an accommodation contingent liability into a debt due — the agreement that plaintiff should sue out attachment by way of securing the debt; these facts, appearing without explanation, were a fraud in law upon the other creditors. (1 S. & P. 139; 9 Porter, 39; *Chenery v. Palmer*, 6 Cal.; 5 Cow. 548; 4 John. 356; 15 Id. 458; 8 Ala. 694; 7 Id. 142; 14 Id. 537; 9 Id. 704; 21 Vt.; 6 Wash. 599, and Cases; *ex parte Foster*, 2 Story, 131; Id. 340; Watts & Serg. 138; *In the matter of Hunt*, 7 Wend. 240; 6 Rob. 101; 7 Id. 61; *Cheever v. Hays*, 3 Cal. 471; *Groschen v. Page*, 6 Id. 138.)

Hall McAllister, for Respondents.

The case of *McKenty v. Gladwin, Hugg & Co.* is not in point. That whole decision turned upon the fact that McKenty had taken a note on the 16th June, 1857, antedated to the 4th June, 1857, and drawing interest, from date, at the rate of two and one-half per cent. per month, until paid; that there was no consideration for the interest, and that McKenty included said interest in the note knowingly, and with the intention of enforcing said note according to its terms.

An outstanding liability as surety or indorser for another, together with a contract, or express promise, by such surety or indorser to the principal, that he will make the debt his own, pay it, and relieve the principal therefrom, is a good consideration for a promissory note by the principal, payable on demand, for an equal amount. This proposition settles the case. (*Little v. Little*, 13 Pick. 426; *Cushing v. Gore*, 15 Mass. 69; *Hazeltine v. Guild*, 11 N. H. 390; *Brewster v. Bours*, 8 Cal. 501; *Dana v. Stanford*, 10 Id. 269; *Eastman v. Cooper*, 15 Pick. 279; *Toussaint v. Martinnant*, 2 Term, 100-104; *Martin v. Court*, 2 Id. 640.)

TERRY, C. J. delivered the opinion of the Court — FIELD, J. concurring.

Defendants, Gladwin, Hugg & Co. gave to the plaintiff a note to cover the amount of liabilities incurred by plaintiff by indorsements made for the accommodation of Gladwin, Hugg & Co. At the time of executing the note, Gladwin, Hugg & Co. were about to fail, and the note was given for the purpose of enabling plaintiff to secure himself by attaching property. The

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consideration of the note was the liability incurred by plaintiff as the indorser for defendants, and his express promise to assume and pay such liabilities. The note, which was dated the 17th of May, was delivered to plaintiff on the 18th, and an attachment issued on the same day, which was levied on the property of Gladwin, Hugg & Co. Subsequently, an attachment issued at the suit of Garrison & Co. against Gladwin, Hugg & Co. and was levied on the same property. Garrison then intervened in this action, and seeks to acquire precedence over plaintiff's attachment, on the ground that the note given to plaintiff is within the statute of frauds and void as to the conditions of the maker.

It appears from the evidence and finding of the Court below, that there was no actual fraud in the transaction, and the question involved is, whether the promise of plaintiff to assume and pay certain liabilities which he had incurred as indorser for defendants, and which were not at the time due, was a sufficient consideration to support a promissory note on demand.

We think the case is within the principle announced by this Court in *Dana v. Stanford*, (10 Cal. 269.) In that case an insolvent, in order to secure a sum due, and, also, to protect his grantee against outstanding liabilities incurred as accommodation indorser, executed a mortgage upon his entire property. This mortgage was held to be good as against the creditors of the insolvent, and we can see no reason why a party who may create a lien on his property to secure a creditor or surety may not execute a note which will enable the party to acquire a lien by legal process.

But the precise question here presented has been passed upon in the highest Courts of our sister States. The case of *Little v. Little*, (13 Pick. 426,) is in all respects analogous to the one at bar. A note on demand was executed in favor of plaintiff to cover the amount of outstanding liabilities incurred by plaintiff for the accommodation of the maker. These liabilities were not at the time due, and the note was executed to enable the plaintiff to secure himself by attachment. A subsequent attaching creditor contested the validity of the note, and plaintiff was nonsuited. Upon appeal the Court said:

"In many particulars the case resembles *Cushing v. Gors*, (15

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Mass. 73.) We think the fair deduction from the principles laid down in that case is, that an outstanding liability as surety or indorser for another, together with a contract or promise, express or implied, by such surety or indorser to the principal, that he will make the debt his own, and pay it, and so indemnify the principal, is a good consideration for an express promise to pay an equal amount on demand."

The case of *Cushing v. Gore*, was much stronger than the case at bar. It was a suit upon a promissory note for five thousand dollars, and a check upon one of the banks in Boston for two hundred. The note was given on the 18th day of January, 1817, and was ante-dated January 5th: the note was intended to cover the amount of liabilities incurred by the payee as indorser for the maker, and was given to enable the payee to secure himself by attachment. On the same day on which the note was executed suit was instituted, and an attachment issued, which was levied on the goods of defendant. Subsequently, the same goods were attached by other creditors, upon demands which fell due before either of the three notes so indorsed by the plaintiff became due, and the defendants contended that this operated as a fraud upon the other creditors, giving an undue advantage and preference to the plaintiff. And the defendant, Gore, who alone appeared to defend, held himself bound, in justice to those other creditors, to take this ground of defense to the present action. On this point the Judge instructed the jury "that the defendants, when they were enabled to pay all their debts, might, by our laws, give a preference to any one creditor, by paying or giving him security; and that as they might do this by assigning to the plaintiff any of their goods, so they might do it by giving a note to anticipate the day of payment, and so enable him to attach their goods." Upon appeal, Parker, C. J. in delivering the opinion of the Court, said: "It is objected by the counsel for the defendants, that there was no legal consideration for this note; there being merely a liability on the part of the plaintiff to pay the notes which he had indorsed. We think, however, that such a consideration is good, and sufficient to support an express promise.

Whether the plaintiff should be called upon, or eventually be obliged to pay, was contingent when he indorsed the defendant's

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notes; but, there is no doubt, if he had refused to indorse them without receiving a promissory note of the defendants, to enable him to secure himself when danger should be apprehended, the defendants would be prevented from denying the validity of their promise. In the present state of the mercantile world, it would excite great surprise if we were to decide that a note deliberately given to an indorser, for the very purpose of enabling him to secure himself against the effect of his indorsement, would not answer the purpose for which it was intended. * * * But if there were any doubt of the principle, to the extent mentioned, we think that when an indorser has, either expressly or impliedly, undertaken to pay the note by him indorsed, there can be no question that such an undertaking is a good and valuable consideration for a promissory note."

The case of *Haseltine v. Guild*, (11 N. H. 390) is to the same effect, and we have seen no decision to the contrary. The cases cited by Appellant differ in several important respects from the one at bar. In *Ryan v. Daly*, (6 Cal. 238,) it was admitted that the judgment was confessed for the purpose of preventing the collection of plaintiff's demand. In *Taaffe v. Josephson*, (7 Cal. 353) attachment was issued upon several promissory notes, one of which was not due, and this fact was held to vitiate the judgment. In *McKenty v. Gladwin*, 10 Cal. 227, a note bearing interest at two and one-half per cent. was executed for the amount of the debts not due and bearing no interest. The note was antedated for the purpose of receiving a larger amount of interest upon it. The Court said, "In this case it was only necessary to determine two questions:

1st. Was there any consideration for the interest secured to be paid by this note? If there was no legal consideration for this interest, and the note should be enforced according to its terms, it would unjustly take from the other creditors and give to the plaintiff the amount.

2d. Was this result *knowingly intended* by the plaintiff?

In regard to the first question, the proof is conclusive. The plaintiff himself was examined as a witness by the intervenors, and Mr. Hugg, one of the defendants, was examined as a witness for the plaintiff, and, from their testimony, it was clear that the entire consideration for which the note was given was com-

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posed of certain known and specified items, not one of which was due, and not one of which drew interest. And, as to the second question, we cannot see how there could exist a doubt. If we take it to be true, for the sake of the argument only, that the plaintiff intended to collect this interest, knowing at the time that none of the demands he held against the plaintiff drew interest, and therefore that he was not entitled to any, it is difficult to conceive how the intervenors could more conclusively prove the fact of such intention than they did by the testimony of the plaintiff himself and the defendant, Hugg. The eight different items constituting, together, the entire principal sum for which the note was given, were clearly known to plaintiff, who added them together and himself drew the note. It must have been known to plaintiff that none of these items were due, and that none of them drew interest. That he intended to collect the interest and appropriate it to himself is clear from his own testimony: "I do not know why I dated it on the 4th of June, except that I would receive ten days' interest on the amount.

* * * I do not know that I had any other motive for antedating than that I should receive interest for ten days." And, when suit was brought upon the note, the prayer of the complaint was for judgment, including principal and interest.

In this case the parties seem to have acted with perfect good faith. The plaintiffs had incurred large liabilities by indorsements for the accommodation of defendants. The defendants were naturally anxious to secure plaintiffs against loss on account of such liabilities, and for that purpose executed the note sued on, upon the express promise of plaintiffs to discharge the liabilities incurred on behalf of defendants, and which promise, it appears, had been complied with.

This, as we have seen, constitutes a sufficient consideration to support the promise to pay on demand and to enable plaintiffs to recover upon the note. Judgment affirmed.

WHITNEY *et al.* v. BUTTERFIELD *et al.*

In the service of process the Sheriff is responsible only for unreasonably, or not reasonably, executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else.

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Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because defendant is about to leave the State, or remove his property, and the like.

A writ placed in the Sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired.

Where one writ of attachment was placed in the Sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a Deputy at a quarter past twelve on Monday morning, the Sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the Sheriff was not guilty of negligence in executing the first writ — no special circumstances being shown.

The mere omission of a Deputy to inform the Sheriff of having process in hand is not such negligence as to charge the Sheriff, in case a writ last in hand was executed first.

The Sheriff and his Deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the Sheriff impossibilities, or to impose unconscionable exactions.

APPEAL from the Fourteenth District.

Suit against a Sheriff and his sureties for damages in not levying an attachment with due diligence.

On the 4th of April, 1857, plaintiffs sued out a writ of attachment, in the Twelfth District Court, against Abbott & Edwards, residents of Nevada City. On the next day, Sunday, between the hours of nine and ten, P. M. the writ was placed in the hands of defendant, Butterfield, the Sheriff, with instructions to levy, as soon as possible, on certain property of said Abbott & Edwards, which was named. About fifteen minutes after the hour of twelve, A. M. of Monday, the 6th day of April, 1857, Clark & Co. brought suit, by attachment, against said Abbott & Edwards in the Fourteenth District Court, in and for Nevada County, and put the writ in the hands of one Bidwell, a Deputy of Butterfield. This writ was levied on all the property of Abbott & Edwards in Nevada City and County, about one o'clock, A. M. of said 6th day of April.

The attachment of plaintiffs was levied at eight o'clock in the morning of the same day.

Subsequently, plaintiffs and Clark & Co. obtained judgments in their respective suits; the property attached was sold in due course of law, and the proceeds being more than the judgment of plaintiffs, but less than that of Clark & Co. were paid over to the latter upon their execution.

In September, 1857, plaintiffs issued execution, which was returned *nulla bona* by Boring, the then Sheriff. They also issued another execution, and placed it in the hands of Butterfield, ex-

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Sheriff, with directions to levy upon any property in his hands belonging to Abbott & Edwards, or to be found in said county, etc. Butterfield returned that he had no property in his possession or under his control belonging to them.

At the date of the levy of said attachments and said executions, Abbott & Edwards had no property other than that seized.

In July, 1857, they applied for a discharge in insolvency.

The answer denied negligence.

The case being submitted to the Court upon an agreed statement of facts, plaintiffs had judgment for the amount of their judgment against Abbott & Edwards. Defendants appeal.

Buckner & Hill, for Appellants.

1. There was no want of diligence on the part of the Sheriff in levying plaintiff's writ. (Wood's Dig. 680, Sec. 3237.) He was not bound to levy, without special instructions, until return time. (2 Caines, 243; 4 Johns. 450; 16 Id. 287; Crocker on Sheriffs, etc. 165; Practice Act, Sec. 141; *Tucker v. Bradley*, 15 Conn. 46; *Bassett v. Boumar*, 3 B. Mon. 325; *Commonwealth v. Magee*, 8 Barr, 246.) This writ could not be executed on Sunday. (*Bland v. Whitfield*, 1 Jones' Law, 122; 9 Porter, 151; Wood's Dig. 157, Art. 704.)

2. The writ first served has priority. (Drake on Attach. Secs. 225, 218, 260; *Johnson v. Graham*, 6 Cal.)

McConnell & Niles, for Respondent.

1. The Sheriff ought to have levied plaintiffs' writ first, because he received it first, and the lien of plaintiff has priority. (*Edwards v. Hernon*, Note to Practice Act, Sec. 125; *Larned et als. v. Vanderberg*, 7 How. Pr. 379; *Lambert v. Baulding*, 18 Johns. 814; *Beals v. Allen*, Id. 363; *Van Winkle v. Udell*, 1 Hill, 559; *Slade v. Van Vechton*, 11 Paige Ch. 21; 17 Johns. 116; 5 Cow. 390; 1 Barb. 542; 2 Comst. 451; *Hunt v. Hooper*, reported in 5 Kinny's Law Com. 110; *Drew v. Lamison*, 11 Adolph. & Ellis, 529; 2 Johns. Ch. 283; 17 Johns. 483; 12 Id. 403; 18 Id. 363; *Payne v. Drew*, 4 East, 523; *Saunders v. Bridges*, 5 Eng. C. L. 235; *Smallcourt v. Buckingham*, 1 Salkeld, 320.

2. The writ could be received on Sunday. (3 Chitty's General Pr. 104; Tidd's Pr. 106, 216; 3 Blac. Com. Sec. 290; Sir Wm.

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Moore's Case, 2 Ld. Raymond, 1028; 13 Wend. 425; *Drury v. Defontaine*, 1 Taunt. 131; *Bloxome v. Williams*, 3 Barn. & Cres. 232; *Rex v. Whitnash*, 7 Id. 596; *Gess v. Putnam*, 10 Mass. 312; *Sayles v. Smith*, 12 Wend. 57; *Story v. Elliott*, 8 Cow. 28; *Swaine v. Broome*, 3 Burrows, 1596; 1 W. Blac. 528; *Rex v. Brotherton*, 2 Strange, 702; 9 Coke, 66 b.; 14 Eng. C. L. 270.)

TERRY, C. J. delivered the opinion of the Court — FIELD, J. concurring.

This question touches the liability of the Sheriff for not levying an attachment put in his hands on Sunday; the goods of defendant having been seized by his Deputy on Monday, though the last writ came to his hands early on the same day, and was levied on the property which was disposed of by the last writ — so that the first remained unsatisfied. The principles which determine this case we think somewhat different from those argued at the bar.

The Sheriff's liability rests on his breach of official duty. As he is bound to perform his duty, so is he responsible to every one who may be injured by his failure to discharge it. In respect to the execution of process these official duties are well defined by law. The law is reasonable in this, as in all other things. It holds public officers to a strict performance of their respective duties. It tolerates no wanton disregard of these duties. It sanctions no negligence; but it requires no impossibilities and imposes no unconscionable exactions. When process of attachment or execution comes to the hands of the Sheriff, he must obey the exigency of the writ. He must, in such cases, execute the writ with all reasonable celerity. Whenever he can make the money on execution, or secure the debt by attachment he must do it. But he is not held to the duty of starting on the instant after receiving a writ, to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances. But this reasonable diligence depends upon the particular facts in connection with the duty. If, for example, a Sheriff has execution against A, and has no special instruction to execute it at once, and there is no apparent necessity for its immediate execution, it would not be contended that he was under the same obligations to ex-

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ecute it instantaneously as if he were so instructed, and there were circumstances of urgency. So in respect to an attachment. If an attachment were sued out on the ground of a defendant's fraud, or his being in the act of leaving the State, or removing his property, the very fact of the issuance of the attachment, or the making of the affidavit, would seem to indicate to the officer the necessity of immediate action. But, generally, in the absence of special circumstances, an attachment issued for the security of a debt, under the old statute authorizing such a process, does not stand upon a more favorable footing, so far as regards the necessity of immediate service, than an execution.

It is true the statute, (Wood's Dig. 183, Sec. 125,) directs that the Sheriff "shall execute the writ of attachment without delay;" but this was not intended to introduce a new rule. The expression, "without delay," does not mean that the Sheriff shall, the instant he receives process of this sort, lay aside all other business and proceed to execute it, unless some special reasons of urgency exist. The rule is thus stated by the Supreme Court of New York, in *Hinman v. Borden*, (10 Wend. 367): "A Sheriff is bound to use all reasonable endeavors to execute process." It is true that some authorities hold the rule with more strictness. In *Lindsay's Executors v. Armfield*, (3 Hawks, N. C. R.) the Sheriff was held liable for not levying from 7th October to 1st November, following—no explanation being offered for the failure. Mr. Justice Hall says, "The law declares it to be the duty of the Sheriff to execute all process which comes to his hands, with the utmost expedition, or as soon after it comes into his hands as the nature of the case admits," and cites Bacon Abridg. Sheriff N. That author holds the doctrine in the same language as that quoted. Mr. Justice Henderson, in the case in Hawks, states the doctrine a little different. He says, "The Sheriff should proceed with all convenient speed to levy the execution." The learned American editor of Bacon cites, in support of the doctrine of the text, several cases, which we have examined. None of them sustain the rule in its strictness, even if we are to regard the doctrine of Bacon as laying down a different rule so far as the liability of the Sheriff is concerned, from that held in Wendell and other cases; for Bacon says, in the next sentence to that quoted, that

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the "Sheriff must not show any favor, nor be guilty of *unreasonable delay*." In *Kennedy v. Brent*, (6 Cranch, 187,) C. J. Marshall holds that the Marshal is bound to serve the process as soon as he reasonably can.

The question of unreasonable delay, is a mixed question of law and fact, each case depending on its own circumstances; for, as we said before, the speed with which the Sheriff must proceed may depend upon the apparent necessity for quick action. But we have found no case which holds that the mere delay of a few hours, without some showing of special urgency has been held sufficient to charge the Sheriff. If we suppose, then, that the process reached the hands of the principal Sheriff at one o'clock on Monday morning, we do not perceive that the Sheriff would have been liable — nothing else appearing — for failing to levy it before. But the particular facts of this case make it stronger for the Sheriff. The attachment of plaintiff was placed in the principal Sheriff's hands on the night of Sunday, between nine and ten o'clock. But it did not legally come to his hands as Sheriff and for service until twelve o'clock. Fifteen minutes after twelve the other attachment came to the hands of the Deputy; of this, it seems, the Sheriff had no notice; and the Deputy levied it at or about one o'clock. It seems, then, that the laches of the Sheriff in delaying this levy for an hour at midnight, is the foundation of his liability. This would be too harsh and unreasonable a requisition. It is plausibly argued that the Deputy and his principal are the same person in law; and that the attachment in the hands of the defendants is, in legal effect, in the hands of the principal; and, consequently, the case is that of an officer having a senior writ and levying a junior writ on the property of the defendant. But the answer to this argument is, that here the question is one of diligence; and that it cannot be contended that the mere omission of the Deputy to inform the principal of his having process is such negligence as to charge him.

We have seen that the Sheriff is not absolutely responsible for not executing process of this sort. He is responsible for unreasonably or not reasonably executing such process. But the test is, was a failure, in the absence of any special circumstances, to execute ~~this~~ process, unreasonable, or did it subject the Sheriff

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to responsibility for the debt? We may, in this connection, leave out of question this discussion as to the day, (Sunday,) on which the writ of the plaintiff was received. It is certain that for all judicial purposes, Sunday is no day at all. The Sheriff need not, on that day, indorse on the writ the fact of its reception. If given to him on that day, he did not receive it as an officer, but as the mere agent of the plaintiff. He could do nothing with it on that day. He might, if he chose, recognize the receipt of it, but it imposed on him no higher or other duties than if he had received it on the next day. He, for all practical purposes, so far as respects this writ, was not the Sheriff at all on Sunday. But we may safely concede, for all the purposes of this suit, that he received the process on the next day, and even at the beginning of that day. Was he bound, then, on this assumption, to go on and execute the writ, immediately after having received it, no peculiar necessity or apparent reason being shown why he should do so? No authorities have been cited to show that a Sheriff is bound to quit everything else, immediately on receiving an attachment or execution, and proceed to levy.

The Deputy had received Clark & Co.'s attachment early in the morning of Monday; perhaps at the very instant which marked the period which separated Sunday from Monday in the computation of time. But though Whitney's writ was in the hands of the Sheriff before this time; yet the Sheriff could do nothing with it — did not legally even receive it in his official capacity before. His connection with the writ of Whitney, as Sheriff, commenced at the very time — at the utmost — when his Deputy had the writ of Clark. But if Clark had no writ, we do not see that the Sheriff would have been bound to go at once, on the instant, when Monday commenced, and levy on the property of the defendants in attachment. Nor was the Sheriff bound to the degree of diligence which required him to communicate to his Deputy the intelligence that he had received the writ of Whitney before the Deputy levied the process of Clark. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy, and the attachment first levied, by our statute, has the priority.

But, probably, we might put this case on a broader ground. The Sheriff could no more officially receive a writ on Sunday for

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service on Sunday than he could execute it on Sunday. Both these acts are of the same general character, and equally within the prohibition of the statute. Not receiving it then as Sheriff, he received it as the mere agent of the plaintiff. He so received it, not to execute it on Sunday, or to deal with it as a writ coming to him on that day as an officer. He might have been bound, as an agent, to deliver it to the Sheriff, or to treat it as delivered when he could act. But this was a personal, not an official, contract; it was a mere bailment which bound him, probably, as a man, but did not bind him as a Sheriff, and, if he chose to disregard it entirely, we do not see that he would be bound as an officer. It is not necessary to press this point, for the reason that if he was bound to consider it as placed in his hands on Monday, at one o'clock, there was no such negligence in failing to execute it before, as to subject him to liability. It is true that it may be urged that the Sheriff and the Deputy are one person in law; true, so far as this, that the Sheriff is responsible for the acts of the Deputy; but no one would contend that if a Sheriff has a Deputy at a remote precinct of a county, and a writ is placed in his hands, and he executes it on property in his precinct, that the Sheriff would be responsible for this, if the consequence were to deprive B of the recovery of a claim, as the result of this levy — B having put a writ in the hands of the Sheriff at the county seat, an hour before the writ was placed in the hands of the Deputy. Whitney trusted the Sheriff to consider that the writ would be in his hands on Monday, and to receive and execute it as if it were handed to him on that day; but even if it had been, the Sheriff was not bound to get out of his bed, (no special circumstances existing,) on the morning of that day, at one o'clock, and immediately proceed to the execution of the writ. It would be unjust to hold the Sheriff to this degree of diligence, and, we think, illegal.

We reverse the judgment and remand the case.

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THE PEOPLE *ex rel.* BLANDING v. BURR *et als.* CONSTITUTING THE BOARD OF FUND COMMISSIONERS UNDER THE ACT OF APRIL 20, 1858.

THE Legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves.

The only limitation upon the taxing power of the Legislature is the provision for equality and uniformity found in the 13th Section, of Article 4th, of the Constitution.

The Legislature can impose a general tax upon all the property of the State, or a local tax upon the property of particular political subdivisions, as counties, cities, and towns. The cases in which its power shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised, is co-extensive with its power of taxation. It may appropriate them to claims which have no legal obligation, and are founded only in justice. The power of appropriation which the Legislature can exercise over the revenues of the State for any purpose, which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town, for any purpose connected with their present or past condition, except as such revenues may, by the law creating them, be devoted to special purposes. In creating the law imposing the tax, it can prescribe the objects to which the money raised shall be applied. It is only for the convenient administration of the government that the State is divided into counties, cities, and towns.

The powers of a municipal corporation may be increased, restricted, or repealed, by the Legislature at will, saving only vested rights.

The fact that the Legislature has once exercised its powers in limiting the extent of taxation in municipal corporations, under the 37th Section, of Article 4th of the Constitution, does not prevent the Legislature from again exercising its power by enlarging the authority to tax.

The Act of April 20th, 1858, authorizing the issuance of bonds by the city and county of San Francisco, is valid.

The clause in the Act, requiring the action of the Board of Examiners to be submitted to a vote of the people in a contingency, does not make the Act any the less a law. The Act took effect as a law immediately, and was not dependent on the action of any other body.

Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the Legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain; and among others, the voluntary act of the parties upon whom they are designed to operate.

THE case is stated in the opinion of the Court.

Hoge & Wilson, for Appellants.

I. The Act of April 20, 1858, is constitutional.

1. The 37th Section, of Article 4th, of the Constitution, is not a limitation upon the power of the Legislature. (*Grant v. Courter*, 24 Barb. 240; *Cook v. City of Rochester*, Id. 487; *People v. Mayor of Brooklyn*, 4 Comst. 440.)

2. The act is a mere exercise of the taxing power. (*Thomas v. Leland*, 24 Wend. 66; *Town of Guilford v. Supervisors of*

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Chenango, 3 Kern. 143; *Same case*, 17 Barb. 615; *First Municipality of New Orleans v. Orleans Theater Company*, 2 Robinson, La. 209; *Shaw v. Dennis*, 5 Gilman, 415; *City of Bridgeport v. Hous. R. R. Co.* 15 Conn. 492; *Inhabitants of Norwich v. County Commissioners of Hampshire*, 13 Pick. 60; *Truchalut ads. City Council of Charleston*, 1 Nott & McC. 227; *People v. Mayor of Brooklyn*, 4 Comst. 419; *Wilson v. Leland*, 2 Peters, 661, 662; *Id.* 412; *Cass v. Dillon*, 2 Ohio, 613; *Morris v. The People*, 3 Denio, 392; *Grant v. Courter*, 24 Barb. 237; *Benson v. Mayor of Albany*, *Id.* 248; *Clark v. City of Rochester*, *Id.* 446; *Sharpless v. Mayor of Philadelphia*, 21 Penn. — particularly opinion of Judge Woodward; *Moers v. City of Reading*, *Id.* 188; *B. R. Co. v. Commissioners of Clinton County*, 1 Ohio, 7; *Id.* 134; *Slack v. M. and L. R. R. Co.* 13 B. Mon. 1; *People v. Williams*, 8 Cal. 101; *McDonald v. Griswold*, 4 Cal. 352; *Burnett v. Mayor, etc. of Sacramento*, 12 Cal. 76; *Hunsacker v. Borden*, 5 Cal. 288; *State, to use of Washington County v. B. & O. R. R. Co.* 12 Gill & Johns. 436, affirmed in 3 Howard, 534.)

II. The municipal government of San Francisco is a mere creature of the Legislature, subject to the entire control of that body. The State is divided, in the administration of government, into counties, towns, cities, and incorporated villages. To these various political subdivisions the State, for the purpose of government, delegates many of her powers. They all bear the same relation to the State, and are equally within her control. (*C. W. & Z. R. R. v. Comm'rs Clinton Co.* 1 Ohio, 89; *People v. Morris*, 13 Wend. 337; *People v. Mayor of N. Y.* 25 Wend. 680; *People v. Draper*, 25 Barb. 370.)

III. The whole subject of taxation belongs to the Legislature alone. Its exercise cannot be controlled by the Courts. In the absence of constitutional restriction, the taxing power is unlimited and reaches the whole property of the State. The Legislature may levy and apportion a tax upon any particular locality or division of the State, and is the exclusive judge of the propriety and justice of its own actions. It may recognize claims which cannot be enforced at law, and may provide for their payment by taxation upon any of the political subdivisions, according to its own notions of justice and of public benefit.

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IV. As to the assumption that the Act of 1858 is not in itself a law, but a mere proposition, to be submitted to the people, as to whether it should take effect or not as a law, we say, the assumption is not true. The Act is not submitted to the people at all, nor is any provision of it, nor is its validity in any way made to depend upon a vote of the people. It is the report of the Board of Examiners that is to be submitted to the people, if demanded. The question whether bonds should be issued in accordance with the report of the Board of Examiners, and no other, may be submitted to a vote. This particular law, therefore, is not within the principle contended for by the counsel. But there is nothing in the point itself. (*Grant v. Courter*, 24 Barb. 242; *Clark v. City of Rochester*, Id. 468; *Moers v. City of Reading*, 21 Penn. 202; *Cinn., Wilm. and Zanesville Railroad v. Comm'rs of Clinton Co.* 1 Ohio, 87; *Hitchcock's Opinion*, 20 Ohio Append.; *Stack et al. v. Mayor and Lexington R. R. Co.* 13 B. Mon. 23; *People v. Reynolds*, 5 Gil. 10.)

Wm. Blanding, also, for Appellants.

I. The Act in question is substantially a Funding Act, such as has been sanctioned in England and America, and particularly in California. (*Washington v. Page*, 4 Cal. 389; *People ex rel. Tallant v. Board of Supervisors of San Francisco*, 12 Id. 300; *People ex rel. Tallant v. Tillinghast*, 10 Id. 584; *People ex rel. Lane v. Bond*, Id. 563; *People ex rel. O'Donnell v. Board of Supervisors San Francisco*, 11 Id. 206.)

II. The Legislature has power to levy a tax to pay these bonds. (*McCulloch v. The State of Maryland*, 4 Wheat. 316; *Nogues v. Douglass*, 7 Cal. 65; *Town of Guilford v. The Board of Supervisors of Chenango Co.* 3 Kern. 143; *Shaw v. Dennis*, 5 Gil. 405; *Thomas v. Leland*, 24 Wend. 65; *City of Bridgeport v. Hous. R. R. Co.* 15 Conn. 475.)

Yale, for Respondents.

I. The Act of the 20th of April, 1858, was not in itself a law, passed by the Legislature; nor was it merely to take effect upon the happening of an event, dependent upon a certain condition; but was a mere proposition, to be submitted to the people under a certain condition, as to whether it should take effect or not as

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a law. (*Barto v. Himrod*, 4 Seld. 483; *Johnson v. Rich*, 9 Barb. 680.)

II. The terms of submission to the vote of the people were accompanied by an illegal condition. The submission was made to depend upon the will of five hundred electors, whose names should be found upon the assessment-roll as tax-payers. This is, in effect, submitting the question to five hundred men.

III. The main ground of refusal rests upon the illegality of the claims passed by the Board of Examiners upon which bonds are demanded, and the want of power in the Legislature to render them valid against the corporation or against the tax-payers.

1. It was made the duty of the Legislature, under the Constitution, to restrict the corporation of San Francisco from the creation of a debt beyond the amount limited in the charter. (Const. Art. 4, Sec. 37.)

2. The Legislature performed that duty, and it then became as obligatory as a constitutional provision, incorporated in the Constitution. (Charter of 1851, Art. 3, Sec. 5; Charter of 1855, Sec. 32.)

3. All debts contracted beyond the sums fixed in the Charters as the maximum, are absolutely void, under the Constitution and Charter. And being void, the Legislature could not make them valid. (*Ketchum v. City of Buffalo*, 4 Kernan, 356, 376, 379; *Moore v. Patch*, 12 Cal. 265; *People v. O'Donnell*, 11 Id. 206; *People v. Johnson*, 6 Id. 499; *Nogues v. Douglass*, 7 Id. 65; *Dennis v. Maynard et al.* 15 Ill. 480.) The Legislature cannot dispose of the property of the Corporation, and vest it in the State. (*Territt et al. v. Taylor et al.* 9 Cranch, 52; *Morse v. Smith*, 2 Cal. 554; *Hampshire v. Franklin*, 16 Mass. 84; *Newall v. The People*, 3 Seld. 9; *Wells v. City of Weston*, 22 Missouri, 387. For English Funding System see McCulloch's Com. Dic. 689, and Encyclopedia of Commerce, Vol. 1, 763, Title Funds, by I. Smith Hamans.)

4. Upon general principles contracts in violation of a statute are void, so that all these claims certified to be bonded are independent of the constitutional restriction. (*Rodman v. Munson*, 13 Barb. 63; *Newell v. The People*, 3 Seld. 9; *Bell v. Quinn*, 2 Sand. 146.)

5. The provisions in the Constitution and Charters of 1851

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and 1855, limiting the creation of the debt, constituted a contract with the tax-payers, during the existence of those Charters, that they should not be called on to pay a larger tax for the city indebtedness than authorized by the Charters, which contract the Act of 1858 violates, by the imposition of an additional tax to pay for the excess. (See the general principle stated in *New Jersey v. Wilson*, 7 Cranch, 164; and *State Bank of Ohio v. Knoop*, 16 How. 369.) The law could not have a retroactive operation.

6. The operation of the Act of 1858, is to take the property of the tax-payers of the city, without due process of law, and to appropriate it to another for a private purpose.

FIELD, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This was a proceeding to obtain a peremptory *mandamus* upon the Respondents, constituting the Board of Fund Commissioners, under the Act of April 20, 1858, to compel them, in compliance with the provisions of the Act, to issue to the relator bonds of the city and county of San Francisco for the amount of his claim, as allowed by the Board of Examiners. Two of the Respondents — the Auditor and Treasurer of the city and county — in their return to the alternative writ, avow their readiness to issue the bonds in conformity with the Act, but allege that the Respondent Burr, the President of the Board, refuses to sign them, and that they cannot be issued without his signature. The Respondent Burr, in his return, bases his refusal on the alleged illegality of the claims allowed by the Board of Examiners against the city of San Francisco, and the alleged want of power in the Legislature, by the Act in question, to give them validity, and to render them binding upon the corporation.

No objection is taken to the regularity of the action of the Examiners. It is admitted that they conformed in all respects to the provisions of the Act, and discharged their duties with strict impartiality and faithfulness. No claim was approved by them which was not evidenced in the required form, or founded upon a valuable or meritorious consideration. The illegality alleged is, that the claims were created in contravention of express prohibitions in the charters of 1851 and 1855. The char-

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ter of 1851 vests the government of the city in a Common Council, consisting of a Board of Aldermen and a Board of Assistant Aldermen; and in the 5th Section of Article 3d provides as follows:

“The Common Council shall not create, nor permit to accrue, any debts or liabilities which, in the aggregate with all former debts or liabilities, shall exceed the sum of fifty thousand dollars over and above the annual revenue of the city, unless the same shall be authorized by ordinance for some specific object, which ordinance shall provide ways and means, exclusive of loans, for the payment of the interest thereon as it falls due, and also to pay and discharge the principal within twelve years; but no such ordinance shall take effect until it shall have been submitted to the people and receive a majority of all the votes cast at such election; and all money raised by authority of such ordinance shall be applied only to the object therein mentioned, or to the payment of the debt thereby created; *provided*, that the present debt of the city, with the interest accruing thereon, shall make no part of the fifty thousand dollars aforesaid.”

The charter of 1855, in like manner, vests the government of the city in a Common Council, consisting of similiar Boards, and in its thirty-second section provides, that “the Common Council shall not create, nor permit to accrue, any debt or liability which, in the aggregate with all former debts or liabilities, exclusive of the funded debts, shall exceed the sum of twenty-five thousand dollars over and above the estimated annual revenue of the city at the time of incurring such debt or liability,” and contains various clauses intended to give effect to this prohibition.

These provisions are construed by the counsel of the Respondents as a legislative restriction upon the powers of the municipal government, fixing a limit beyond which it could not go in the creation of any debt or liability; and hence it is argued that all claims exceeding this limit are without legal obligation, and consequently incapable of confirmation by legislative enactment. It is not necessary for the determination of this proceeding to give a construction to these provisions, for, assuming the construction of the learned counsel to be correct, and that the claims were without legal obligation, we cannot perceive any

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constitutional objection to their recognition by the Legislature as a just debt to be assumed by the city. The claims approved were not created for purposes outside of the charters, but for objects warranted by them; and it is not pretended that they were not founded upon considerations which would be deemed valuable and sufficient as between individuals. The objection to the claims is not to their character, but to their amount. By the Act of April 20th, 1858, the Legislature has provided for a change in their form, and their ultimate payment by the city.

The Act provides that bonds shall be issued to the holders of the approved claims, (upon the surrender of such claims for cancellation,) in the name of the city and county, be signed by the Commissioners in their official capacity, bear date as of the first of January, 1858, draw interest at the rate of six per cent. per annum, and be redeemable and payable within thirty years from their date, and that an annual tax shall be levied for the payment of the interest, and after 1866 a further annual tax for the creation of a sinking fund for the extinction of the principal. The effect of the act is to give numerous outstanding claims a common form, and to convert a present liability, real or asserted, into a deferred debt, and to provide a fund for its extinguishment. The question presented, is not one of power in the Legislature to impose upon the corporation the payment of claims for which no consideration has been had, but of power to provide for claims meritorious in their character, for which an equivalent has been received, and from the payment of which the corporation could only escape upon strict technical grounds. That the Legislature can provide for the payment of claims, invalid in the forum of the law, but equitable and just in themselves, would seem unquestionable. It may become, for example, of the highest importance to a municipal corporation that counsel should be employed to defend its rights of property assailed by different parties, but its charter may not confer authority to employ the counsel or to meet his charges. Professional services rendered under such circumstances, would not constitute a legal charge upon the corporation, but that it would be competent for the Legislature to authorize the payment of the charge, and the imposition of a tax for that purpose, no one will deny. Or, take a still stronger case—a city has issued, in pur-

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suance of law, its bonds — the annual interest is maturing, and the sources of revenue upon which it relied to pay the same have failed, and it has no power to borrow the money within the requisite time, but individuals possessing the means come forward, and at the request of its authorities, advance the necessary money to protect the honor and good faith of the city. A claim for reimbursement would not, under the circumstances, in face of positive prohibitions of the charter to raise money, except in a particular way, be valid and binding, but that the Legislature could authorize its payment, and the raising of the means by taxation without trenching upon any constitutional restrictions, is clear. The action of the Legislature in reference to the approved claims under the Act of April 20th, 1858, is of a similar character, and must rest for its validity upon similar grounds. There is nothing in the act compulsory upon the holders of the approved claims; they are not bound to surrender them and receive bonds in their place; this is entirely optional with them. The act, therefore, impairs no right which they may have possessed heretofore, even were the claims valid and binding upon the city. In that view the act is of a beneficial character to the holders in the available form of the claims it furnishes, and in the security it gives for their ultimate payment; much more so upon the assumption with which we are considering the case, that the claims never possessed any legal obligation. The question then, is, whether the direction to levy an annual tax for the interest, and, after 1866, for the principal of these bonds, was a legitimate exercise of the taxing power of the Legislature.

The only limitation upon this power is contained in the 13th Section of the 11th Article of the Constitution, which simply provides for equality and uniformity in the taxation. There is no restriction as to the amount of the tax which may be imposed, or the purpose to which the money raised shall be applied. The security against the abuse of the power of the Legislature is to be found in the wisdom and sense of justice of its members, and their relation to their constituents. It can impose a general tax upon all the property of the State, or a local tax upon the property of particular political subdivisions, as counties, cities, and towns. The cases in which its power shall

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be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised, is coextensive with its power of taxation. It may appropriate them to claims which have no legal obligation, and are founded only in justice. Of the propriety of the appropriation, as of the expediency of the taxation, it is the sole judge. With the exercise of the power in either case, the judiciary cannot interfere. The power of appropriation which the Legislature can exercise over the revenues of the State for any purpose, which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city, or town, for any purpose connected with their present or past condition, except as such revenues may, by the law creating them, be devoted to special purposes. In passing the law imposing the tax, it can prescribe the objects to which the moneys raised shall be applied. It is only for the convenient administration of the government, that the State is divided into counties, cities, and towns. These political subdivisions are mere instrumentalities, with powers more or less enlarged according to the requirements of the public. Their powers are subject to be increased, restricted, or repealed, at the will of the Legislature, according to the varying exigencies of the State; vested rights acquired thereunder, as under all laws, only, remaining unaffected. In directing, therefore, a particular tax by a municipal corporation, and the appropriation of the proceeds, the Legislature only exercises a power through its subordinate agent, which it could exercise directly. In creating the corporation, or by subsequent legislation, it could authorize specific taxes for specific purposes; as, for instance, for the salaries of its Mayor or Supervisors. The character of the purpose — when there is no constitutional inhibition — cannot affect the power. With the expediency or policy of the purpose the judiciary have nothing to do.

The views we have expressed are fully sustained by numerous adjudications. The case of *The Town of Guilford v. The Board of Supervisors of Chenango County et als.* is one of them, and is directly in point. (3 Ker. 143.) The facts out of which that

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case arose are these: Certain persons, by the names of Cornell and Clark, were elected in 1838, Commissioners of Highways of the town of Guilford, and, as such officers, by direction of the voters of the town, commenced a suit against a certain turnpike company for entering upon and taking possession of a public highway and bridge in the town, without having the same appraised and paid for as private property. In the suit, the Commissioners were cast, and, in consequence, subjected to the payment of costs, besides the fees of their own counsel. They then presented their claim for the expenses incurred by reason of the suit, to the auditors of the town for allowance, but those officers refused to audit it. They then applied to the Court for a *mandamus*, but the application was denied, on the ground that they had a remedy by an action at law. They then brought their suit against the town and failed, the Supreme Court holding that the Commissioners did not possess authority, by virtue of their office, to bring the suit against the turnpike company; that the electors of the town could not, by resolution or otherwise, authorize the suit in the name of the Commissioners; that the resolution, if passed at a town meeting, did not bind the town; and that, as a consequence, the Commissioners could not sustain the action for the costs and expenses incurred by them. The Commissioners had thus failed to establish their claim at law, and were in the same position with that of the holders of the approved claims in the case at bar, assuming the position of the Respondent that such claims were without legal obligation. They accordingly applied to the Legislature for relief, and, in February, 1851, an Act was passed, submitting to the electors of the town to determine what amount of compensation, if any, should be awarded to them for the costs and expenses they had incurred.

Under this Act the electors, by a large majority, decided against the claim. In the following year the Commissioners again applied to the Legislature for relief, and in February, 1852, another Act was passed, requiring the County Judge of Chenango County to appoint three Commissioners to take proof of and determine the amount of the cost and expenses which had been incurred in the suits with the turnpike company, and accruing from their non-payment; and to render an award thereon,

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and making it the duty of the Supervisors of the county to cause the amount of the award to be levied upon the taxable property of the town of Guilford, and to be collected for the benefit of Cornell and Clark, in the same manner as other taxes were collected by law. The award, under the Act, was rendered, and thereupon the town instituted suit to restrain the Board of Supervisors from levying and collecting the money, and to prohibit Cornell and Clark from adopting any means, under the Act of the Legislature, to enforce its collection, on the ground that the Act was unconstitutional and void. The Court, at a special term, decided the law unconstitutional and void, the proceedings under it of no avail, and directed a decree perpetually enjoining the parties from taking any steps for the collection of the award. On appeal, the Supreme Court, at a general term, reversed the decree, holding the law constitutional and valid. (18 Barb. 616.) Opinions were delivered by two of the Justices, Crippen and Gray. Mr. Justice Crippen, in his opinion, says: "There being no prohibitory constitutional restriction, the Legislature possesses the undoubted power to levy taxes upon particular districts, counties, towns, or other distinct localities, as may seem just and right, according to the benefits derived from the objects of such imposition. This principle is fully asserted and maintained by the Court of Appeals, in the case of *The People v. The Mayor of Brooklyn*, above cited. Also, see *Thomas v. Leland*, (24 Wend. 65.) It cannot be regarded as an open question since the decision of the Court of Appeals. The Legislature, acting upon the principle of these cases, passed the Act, on the 5th of February, 1852, for the purpose of affording relief to Cornell and Clark, against the manifest injustice to which they had been subjected by a refusal of the town to comply with a plain moral obligation resting upon it, but which could not be reached by the strict rules of the common law.

My conclusion is that the Act in question was eminently right and proper to reach the exigency of the case, and fully authorized by the fundamental law of the State. The Legislature possessed the right to pass the law, and the merits of the claim of Cornell and Clark furnish strong and palpable reasons for the enforcement of its provisions." Mr. Justice Gray, in his opinion observes: "The Court could not relieve them, (the Commis-

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sioners of Highways,) because the electors acted without statute authority, and hence there was no legal obligation on the part of the town, as such, to pay.

The moral obligation was not, and could not be, passed upon, by the Court, for the reason that the whole question turned upon the construction of a statute. An appeal was then made to the Legislature, who were of opinion, upon the facts established before them, that Cornell and Clark had acted in good faith in prosecuting the suit brought by them for the benefit of the public, and because, by strict legal rules, no remedy could be had by them in Court, they authorized a public tax to be levied for their relief, and apportioned upon that portion of the State which instigated the litigation, and for whose benefit it was intended. * * I have never heard it doubted, that whenever a moral obligation exists on the part of the government to relieve one of its citizens, sufficient to support a promise, if the same state of things existed between individuals, the Legislature has the right to recognize the obligation, and discharge it by the imposition of a tax. The Legislature being the only department of the government that can provide the relief, and being unrestricted in the exercise of their taxing power, except as to the mere manner of passing bills for that purpose, must of necessity be the exclusive judges, when the interest or the honor of the government justify a tax, and of what portion of the State ought in justice to pay it."

The decision of the Supreme Court was taken to the Court of Appeals, and was there affirmed, Mr. Justice Denio, using in his opinion, the following language:

"The Legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires, or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the tax-paying citizens of the State, or among those of a particular sec-

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tion, or political division. It is well settled that the authority to raise money by the exercise of the taxing power is not in conflict with the constitutional provisions protecting private property from seizure. The two principles co-exist in the Constitution, and it is not difficult to distinguish between them." (3 Kernan, 149. See, also, as illustrative of the same doctrine, the following cases: *Thomas v. Leland*, 24 Wend. 66; *Shaw v. Dennis*, 5 Gilman, 415; *City of Bridgeport v. Hous. Railroad Co.* 15 Conn. 492; *Inhabitants of Norwich v. County Commissioners of Hampshire*, 13 Pick. 60; *Tuchalee ads. City Council of Charleston*, 1 Nott & McC. 227; *Wilson v. Leland*, 2 Peters, 661, 662; *Id.* 412; *People v. Mayor of Brooklyn*, 4 Coms. 419; *Morris v. The People*, 3 Denio, 392; *Grant v. Courter*, 24 Barb. 237; *Benson v. Mayor of Albany*, *Id.* 248; *Clark v. City of Rochester*, *Id.* 446; *Sharpless v. Mayor of Philadelphia*, 21 Penn. 147 — particularly opinion of Judge Woodward; *Moers v. The City of Reading*, *Id.* 188, etc.; *Cass v. Dillon*, 2 Ohio, 613; *Railroad Co. v. Commissioners of Clinton Co.* 1 Ohio St. Rep. 89; *Id.* 184; *People v. Morris*, 13 Wend. 337; *The People v. Mayor of New York*, 25 Wend. 681; *People v. Draper*, 25 Barb. 344; *The State, use of Washington Co. v. Baltimore and Ohio Railroad Co.* 12 Gill and Johns. 436.)

The only clause of the Constitution to which we are cited by the Respondents is contained in the 37th Section of Article 4, which he enjoins upon the Legislature the duty to restrict cities and incorporated villages in their power of taxation and of contracting debts. By this clause it is contended that the Legislature, having once exercised its powers in limiting the extent of taxation in municipal corporations, is prohibited from conferring any greater authority to tax property. We do not perceive in the provision in question any restriction upon the actual control of the Legislature, over the whole subject of municipal taxation at all times. Certainly there is none in express terms, and none can be fairly implied from the end to which the action of the Legislature is by the provision to be directed — the prevention of abuses in assessments and in contracting debts. "The restriction contemplated," says the Supreme Court of New York, in speaking of the clause in the Constitution of that State, corresponding in exact language with the one in our own, "was meant to be exclusively under legislative discretion and control, and to

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be effected by statute, and not by the organic law. Where a duty in respect to a particular thing is enjoined by the Constitution upon the legislative branch of the government, and the mode of doing it is left exclusively to legislative discretion, even though the authority may have been previously exercised by the Legislature, no limitation is thereby set to legislative power, nor can an intention be implied on the part of the framers of the Constitution, or the people who adopted it, to restrict the law-making department in the manner of discharging the duty. No just or logical implication can arise that in the section under review it was intended to restrain the Legislature, when dealing with the subject of municipal power, from conferring upon municipal governments new and enlarged powers, in respect to taxation and the creation of debts, if, in its wisdom, good government and the welfare and interests of the community to be affected were to be thereby promoted." (*Grant v. Courter*, 24 Barb. 241; *Clark v. The City of Rochester*, Id. 487.)

It only remains to consider the objection taken by the Respondent to the form of the Act. It is assumed that the Act is not in itself a law passed by the Legislature, but a mere proposition, to be submitted to the people under a certain condition as to whether it should take effect or not as a law. The objection was not urged upon the attention of the Court on the argument, nor is it taken in the return of the Respondents. It is put forth for the first time in the brief of the counsel, filed since the argument. We do not, however, for that reason, pass the objection by without notice, as, if true in fact, it is not merely technical, but one which goes to the entire efficacy of the Act. The clause in the Act upon which the objection rests is that which provides that if within the period intervening the publication of the report of the Examiners and the succeeding general election, a "petition in writing be presented to the President of the Board of Supervisors, signed by at least five hundred qualified voters, residents in said city and county, whose names are found in the assessment-roll as tax-payers, for the year one thousand eight hundred and fifty-eight, requesting that the question of issuing bonds, according to the report of said Board of Examiners, may be submitted to, and determined by, the qualified electors of said city and county, then such question shall be so submitted

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and determined at the next general election, to be held on the first Wednesday of September, A. D. one thousand eight hundred and fifty-eight, in such mode as the Board of Supervisors shall, by order or regulation, prescribe, and subject to the general laws regulating elections. If no petition signed by the requisite number of qualified persons be presented to the President of the Board of Supervisors as aforesaid, the assent of the people to the issuing of said bonds shall be presumed, and in that case, and also in case it be so determined by a majority of the electors voting at the general election, as aforesaid, then the said bonds shall issue as hereinafter provided."

It appears from this clause, that the only question which was to be submitted to the people, if demanded, was that of issuing bonds *according to the report* of the Examiners. Of the many provisions of the Act, no other was, in any respect, made dependent upon the vote of the people, and this was only in effect a submission upon a certain contingency of the action of the Board. Upon that, if desired, the people might pass. The act itself took effect as a law immediately, and was not dependent upon any other body. Not so the act considered in *Barto v. Himrod*, cited by counsel, from 4th Selden, 486. The act in that case was made to depend entirely for its force upon the vote of the people. One of its sections, in terms, provided that the electors should determine, at the annual election, *whether the act should or should not become a law*.

The act in question authorized the issuance of the bonds upon the condition that objection to their issuance was not interposed in a specified manner. As an emanation of the legislative will, it was perfect in all its parts. The condition upon the exercise of the authority was imposed by the Legislature itself, and involved no delegation of legislative authority. Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the Legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain; and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not the less perfect and complete when passed by the Legislature, though future and contingent events may determine whether or not they shall ever take effect. In anticipation of

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invasion, or insurrection, or local disturbance, or other emergencies requiring the exercise of special powers, Acts are constantly passed, and yet no one has ever questioned their validity as laws, because dependent in their operation upon occasions which may never arise. So the Legislature may confer a power without desiring to enforce its exercise, and leave the question whether it shall be assumed, to be determined by the electors of a particular district. The Legislature may determine absolutely what shall be done, or it may authorize the same thing to be done upon the consent of third parties. It may command, or it may only permit; and in the latter case, as in the former, its acts have the efficacy of laws. So in the present case the commissioners were required to issue bonds to the holders of the approved claims, subject only to the condition that objection was not taken to their issuance in a particular manner. The authority in them was ample, and the obligation perfect, subject, it is true, to be suspended only upon one event, which has never happened. We confess our inability to perceive the force of the objection taken by the learned counsel of the Respondent to the validity of the act in question; and the authorities cited by him do not support his position. "Half the statutes on our books," says the Supreme Court of Pennsylvania, in noticing a similar objection to an Act of the Legislature of that State, "are, in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such a discretion is the making of the law. New privileges, conferred on a public corporation, need not be absolute and peremptory, so as to force them on the members against their consent. When individuals or corporations are merely authorized to do a thing, the doing of it necessarily depends on their own will; and we can see no reason why the acceptance of a new power, tendered to a public corporation, may not be made to depend on the will of the people, when it is expressed by themselves, as well as when it is spoken by the mouths of their officers and agents." (*Moers v. City of Reading*, 21 Penn. 202.) And on a similar question, the Supreme Court of Ohio observes that the true distinction "is between the delegation of power to make the law, which necessarily involves a

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discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made." (*The Cincinnati, Wilmington, and Zanesville Railroad Co. v. Commissioners of Clinton County*, 1 Oh. State R. 88; see, also, *Grant v. Courter*, 24 Barb. 242; *Clark v. City of Rochester*, Id. 467.)

From the conclusions to which we have arrived, it follows that the District Court erred, and its judgment must be reversed, with instructions to enter judgment for the relator on the demurrer, and to award a peremptory writ, commanding the Respondents to sign and issue bonds to the relator for the amount of the claims held by him, which were approved by the Examiners under the Act of April 20th, 1858, upon the surrender of such claims for cancellation.

Ordered accordingly.

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Upon plaintiff's statement of his case, the Court intimates that, conceding the facts, he cannot recover, and the plaintiff then offers to prove his allegations; whereupon defendant admits they could be proved, and demurs to the evidence. *Held*: that this is not a demurrer to the evidence. It is rather deciding the case on the demurrer, or as on demurrer to the complaint, or as on motion for nonsuit.

If one man makes a bargain with another for land, the latter claiming the title and the right to sell it, and this is done in the presence and at the instigation of a third party who has the title, the third is estopped from setting up the title as against the purchaser, and all persons in privity with such third person are likewise estopped, unless they are purchasers for valuable consideration, without notice.

All the title which a vendor of land has at the time of his deed passes to the vendee, as against volunteers or donees, even though the deed, under which the vendor holds, be unrecorded.

APPEAL from the Sixth District.

Horace Smith for Appellant.

I. Demurrer to evidence is abolished by the code of practice. (1 Whitaker's Practice, 735.)

II. Should this judgment be reversed, then Appellant is entitled to final relief without any further trial. A demurrer to evidence, unlike one to a complaint, is an admission of all the facts averred,

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not for a particular purpose, but for all the purposes of the case. The facts themselves, and not merely the statement thereof, are admitted, and that for all purposes.

Heydenfeldt, on the same side.

C. A. Johnson, for Respondent, Seymour. 1st. Did Snodgrass purchase with notice of the defendant Margaret Seymour's title? If he did, that ends the case. 2d. If he did not purchase with such notice, still he is remediless in a Court of Equity, in the present form of the action. The title deeds were all duly recorded long anterior to the plaintiff's purchase. The defendant, Kleas, is not the plaintiff's vendor or grantor, but stands in the position of a third party, and the plaintiff, as against her pre-existing paper title, purchased and took with notice. (*Wood's Dig. Art. 369.*) Again, a vendor of real property, much less a third party, like Mrs. Seymour, in this suit, when the title is a matter of public record, cannot be guilty of fraud, either actual or constructive, in reference to title. (*Woodman v. Freeman*, 12 Shep. 25 Maine, 531; *Fisher v. Boody et al.* 1 Curtis Cir. Court, 206.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This case, when it came on for trial, was, after the plaintiff's statement of his case, summarily disposed of by the Court, by its intimation that, conceding the plaintiff's statement to be true — that is, that he could establish the facts stated in the bill — he was not entitled to recover. We do not consider this a demurrer to the evidence. It was rather deciding the case on the demurrer, or as on demurrer to the complaint, or as on a motion for a nonsuit. We mention this for the purpose of saying that if we remand the case on the ground of error in the judgment below, it will be sent back for a new trial.

It is only necessary to look into the bill to see whether the plaintiff has any cause of action; for if he has, and could have introduced any legal proof to sustain the complaint, he was entitled to do so.

The bill states that in January, 1859, at request of defendant, Ricketts, and defendant, Margaret Seymour, (then Kleas,) the

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plaintiff contracted with and purchased from Ricketts a third of a lot in Sacramento City for one thousand eight hundred dollars, and Ricketts executed a deed accordingly. Before and at the time of this purchase of Margaret and Ricketts, they declared to him, in the presence of each other, that Ricketts was the owner of one-third and Margaret of the other two-thirds of this lot, and plaintiff acted and paid his money on this assurance; that, before this, one Gardner had levied an attachment for some four hundred dollars, due by note made by these defendants, on this property, and got judgment; that this judgment was a lien upon this property at the time the plaintiff bought from Ricketts, and plaintiff afterwards, at the request of these defendants, paid it off. This was a part of the consideration money paid by plaintiff to Ricketts for the property. Bill avers further, that in November, 1853, these defendants made a note to — — — for one thousand dollars, at six months, five per cent. per month interest, and a mortgage was executed to secure this debt on this property; on this, plaintiff paid five hundred and fifty dollars, as a part of the price of the land; and that the balance of this one thousand eight hundred dollars, due by plaintiff, was paid by him to Ricketts, and divided between him and Margaret. The bill proceeds to state that in January, 1856, plaintiff caused, for the first time, a search to be made of the records for this lot, and then first discovered that Ricketts and Margaret Seymour had "no regular title," from John A. Sutter or his grantees, to the east half of this lot; but the title to this lot was in one Mumford; that Ricketts had only an undivided one-half interest in the east half of the west half of said lot, and that the title to the east half of Lot Number One, and the west half of Lot Number Two, and this undivided half interest in the east half of the west half of Lot Number Two, was in Margaret; that prior to plaintiff's purchase, the said Margaret had made a deed to Ricketts for the same; that the deed was not recorded, and after the purchase redelivered to Margaret fraudulently, and then by them destroyed; that Margaret, after the plaintiff's purchase and payment for it, in September, 1854, conveyed the whole of her title to her daughter Elizabeth Kleas — made a defendant — to the east half of the Lot Number One, the west one-half of Lot Number Two, and the undivided one-half interest in the east

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one-half of the west one-half of Lot Number Two; and this deed was without consideration and in fraud of plaintiff — Elizabeth well knowing the declarations of Thomas and Margaret as to the interest of Thomas, made at the time of plaintiff's purchase. Margaret afterwards intermarried with one Seymour — made defendant.

It is not necessary to go into an examination of the precise relief to which the plaintiff would be entitled upon these facts, assuming that he can make them out. The only question is, whether he is entitled to any. The case is so narrowed down to this simple statement: If one man makes a bargain with another for land, the latter claiming the title and the right to sell it, and this is done in the presence and at the instigation of a third party who has the title, is not the third estopped from setting up the title as against the purchaser? We think he is, and that all persons in privity with such third person are likewise estopped, unless they are purchasers for valuable consideration, without notice. But there is another fact stated, to wit: that Ricketts had a deed from Margaret at the time of this purchase, for a portion of this property; this deed was not recorded, but this was immaterial, so far as these parties and their rights were concerned. The subsequent redelivery of the deed and its destruction by Margaret did not affect the rights of the plaintiff, who took his title before this redelivery. Whatever right Ricketts had at the time of the deed passed to plaintiff. The subsequent deed by Margaret had no force to convey the property to mere volunteers and donees. The plaintiff would seem to have a good remedy in Chancery to clear his title of these alleged fraudulent obstructions, and, by a decree of the Court, to have it secured to him free from the possibility of subsequent sale, by these grantees, to a future purchaser—as the effect of such alienation might be to deprive him of his rights, if the vendee had no notice of them. We repeat that we do not decide anything here as to the form or measure of the plaintiff's relief, but only that *the complaint shows title to some relief*. We intimate, of course, no opinion on the facts as they really are, but assume them for the purpose of this decision, as they are stated in the complaint.

Decree reversed and cause remanded to be tried *de novo*.

Ordered accordingly.

Steinbach v. Leese.

STEINBACH v. LEESE *et als.*

PENDING a suit by two joint owners of land to recover possession, one conveys his half to the other, taking back a mortgage for the purchase-money, conditioned to become due when the mortgagor recovers possession by the suit, or compromise, or when he parts with his title. *Held:* that the mortgage does not become due by a sale of half the land to counsel employed to recover the possession, together with sales of most of the other half to various parties.

Such sales do not render a compliance with the conditions of the mortgage impossible. A recovery of the property by the vendees would meet the terms of the contract and make the money due.

If the property in the hands of the mortgagor could be charged with the payment of the sum sued for only upon the happening of an event in future, there is no reason why it should be sooner liable in the hands of the vendee. The vendees of the mortgagor succeed to his rights in the property, subject to such conditions and burdens as attach to it in his hands, but to no other.

APPEAL from the Twelfth District.

For case see opinion.

D. W. Perley, for Appellant.

1st. The complaint does not state facts sufficient to constitute a cause of action. 2d. The instrument purporting to be a mortgage, on which the action is founded, never did become a lien or legal or equitable charge on the land set out in the complaint. 3d. The action was prematurely brought, and before any personal liability attached against the defendant, Leese. 4th. If any decree or foreclosure could be properly made, it could only be of such portion of the land in controversy as Leese had sold and conveyed to parties in actual possession. 5th. If Leese had actually sold out and conveyed the whole premises to parties in possession, the demand of twenty thousand dollars would not, even then, have constituted a lien on the land, but only a personal demand against him.

The complaint is defective in the following particulars:

1st. It is not averred that Leese was successful in the suit then pending for the recovery of the property. 2d. It is not averred that he has effected any compromise with the opposing claimants for the said property. It fails to show that the money was due at the time the action was instituted; because it is not averred that Leese has entered into, or taken possession of, the premises, by virtue of the judgment of any Court; because it is not averred that he has obtained possession by virtue of any compromise with the opposing claimants to the said property; because it is not averred that he has consummated any compro-

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mise with the opposing claimants for the relinquishment of his or their claim, to the said property. (*Jewell v. Thompson*, 2 Litt. 52; 1 Salkeld, 65; *Bowen v. Ogden*, 3 Harr. 124; 1 Saund. on Ev. 202; 1 Chitty, 322; Story on Con. Sec. 32; *Tartar v. Hall*, 3 Cal. 263; 4 Id. 47; *Shrove v. Adams*, 5 Id.)

The vendees of Leese would occupy his place, become clothed with all his rights, and subject to all his liabilities, so far as the property itself is concerned.

Campbell & Pratt, for Appellant, Clark.

B. S. Brooks, for Respondent.

I. The frame of the complaint is simple. The ground of relief is a unit. We say that the debt was to become payable upon the doing of Leese of a certain act — realizing a certain benefit, entering into possession or compromising — and we aver that he has, by his own proceedings, precluded the possibility of the events ever happening; that he has deprived himself of the power of doing what he, in effect, undertook to do, viz: To prosecute the claim to effect, and to enter, when entry was given, or compromise. He cannot recover possession of the whole, because he has alienated one-fourth in severalty. He cannot compromise the whole, for he has alienated seven-eighths of the residue, and he does not now hold more than one-eleventh or one-twelfth of the original claim, and can neither compromise nor get possession of the whole. It being clear, then, that the money can never become due, according to terms of the instrument, in consequence of the acts of the promisor, the debt is due instanter. (*Berwick v. Swindles*, 30 Eng. Com. Law, 251; Chitty, 635, 636, 638; *Sands v. Clark*, 8 C. B. 751, 762; *Newcomb v. Brackett*, 16 Mass. 165; *Williams v. The Bank of United States*, 2 Peters Ch. 102; *Delamater v. Müller*, 1 Cowen, 75; *Frost v. Clarkson*, 7 Cow. 27; *Hogan v. Shee*, 2 Esp. 522; *Giles v. Edwards*, 7 T. R. 181; *Raymond v. Bearnard*, 12 Johns. 274; *White v. Snell*, 5 Pick. 425; 9 Id. 16; *Moon v. Guardians, etc.* 3 Bing. N. C. 814; 5 Rep. 3 Mod. 285.)

II. We might contend that the mortgage had become due by its terms, because the defendant, Leese, has made some compromises. The third contingency is upon effecting any compromise with adverse claimants. The reason is obvious, because

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when he has released to a party in possession his title to a specific parcel, the other contingency can never happen, for he cannot then recover any portion of that lot in ejectment. Now the bill shows, and the answer admits, that he has sold specific parcels by metes and bounds, and the parties to whom he sold, or those claiming under them, are now before the Court setting up their titles — their adverse titles — Alcalde grants.

III. The defendant's counsel contends, that admitting our construction of the contract to be correct, and that Leese cannot perform his contract, yet that his vendees may.

If he had assigned the whole interest it would even then have been questionable whether the contract would not have been broken. But this is not the case. He has sold out certain parcels in severalty. He has conveyed a large part of the residue in divers fractional interests to various parties, and he retains a small fractional interest in the residue. If he cannot perform certainly they cannot. There is no community of interest. They are not tenants in common with Leese, and cannot join with him in any proceeding to carry out the intention of the contract. If the position is correct that there must be a recovery of possession of the whole, it is just as impossible to his vendees now as it is to him.

The record imparted to these defendants full notice of all that we claim. The first vendee knew that by taking that conveyance he was defeating the object of the contract between Leese and Vallejo. He knew the legal effect of it, and that by that very act he made the whole mortgage due. Those who took conveyances from Leese subsequently to this, took notice of that also, for the deeds were all recorded.

Defendant's counsel takes the position that if the sales made by Leese to the defendants who are in possession can be regarded in the light of "any compromise," that then the mortgage could only become due as to those lots, and then in a *pro rata* proportion.

1. We are not informed what that *pro rata* proportion is, nor how it is to be ascertained. Whether it is to be regulated by the territorial proportion of those lots to the whole claim, or by the proportion of their respective values; nor if the first, how

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the territorial proportion is to be ascertained, for the lines of the grant do not correspond with the present survey of the city, and a large part of the claim necessarily takes in a part of the public streets. 2. But those were the first parcels alienated, and it is a rule of equity, that when property mortgaged is alienated in parcels, the mortgage is to be enforced upon them in the inverse order of their alienation.

TERRY, C. J. delivered the opinion of the Court—FIELD, J. concurring.

This is a proceeding to foreclose a mortgage on certain property in San Francisco.

The complaint alleges that Leese and Salvador Vallejo were joint owners of the premises, under a grant from the Mexican Government; that in August, 1850, Vallejo conveyed to Leese his moiety of the property, and at the same time, and as part of the same transaction, Leese executed the mortgage declared on; the condition of which is, that Leese shall pay to Vallejo the sum of twenty thousand dollars, "in the event that the said party of the first part shall be successful in a certain suit now pending for the recovery of said property, as above described, or in the event that he shall effect a compromise with the opposing claimants for the said property; the said sum of twenty thousand dollars to be paid when the said Leese enters into and takes possession of the said premises, by virtue of the judgment of any Court, or by any compromise that may be entered into by the said Leese and the opposing claimants to the said property, or when said Leese shall consummate any compromise with the opposing claimants or the relinquishment of his or their claim," and it was also agreed that "in the event the said Leese shall enter into any compromise with the opposing claimants to the aforesaid property, for the relinquishment of, or withdrawal of, his or their claim to the said property, then he is to become personally responsible to the said party of the second part for the said sum of twenty thousand dollars."

The complaint further alleges, that in August, 1853, Leese conveyed to Gregory Yale one-half of said property for the nominal consideration of thirty thousand dollars, but really in consideration of Yale's services in prosecuting his claims to the

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property; that Leese made other conveyances to different persons of portions of the same property, retaining but a small interest therein.

That, by reason of these conveyances, Leese has "entirely precluded himself from the possibility of performing his agreement or undertaking," and that the sum of twenty thousand dollars became due and payable to Vallejo, under the agreement, on the 17th of August, 1853 — the date of the conveyance to Yale; that the other defendants, grantees of Leese, have interest in the property, which is "subsequent and subject to the lien of the plaintiff," and prays for a sale of the property to pay this sum due upon the mortgage, and a personal judgment against Leese for any deficiency," etc.

To this complaint a demurrer was interposed, which was overruled, and, after a trial of the issues made by the pleadings, a judgment was rendered for plaintiff, pursuant to the prayer of the complaint.

It will be perceived, from the terms of the instrument, that the sum mentioned was to be paid only upon the happening of one of the contingencies expressed in the instrument. It seems that Leese and Vallejo were the joint owners of real property which was held adversely by others. Leese, in effect, agreed to assume all the risk and expense of the litigation necessary to recovery upon the title, and agreed to pay a sum to his cotenant if he succeeded in the litigation, or effected a compromise with the adverse parties, by which he secured the possession, or parted with his title to the premises.

It is not alleged that Leese has "succeeded in the litigation which was pending at the time of the contract," that he has "entered into possession of the premises by virtue of the judgment of any Court," or that he has "consummated any compromise with the opposing claimants for the relinquishment of his or their claim." Yet these were conditions precedent to plaintiff's right to recover. It is said, however, that having by his own acts rendered the performance of the conditions of the contract impossible, therefore the conditions are dispensed with and the contract is absolute; the premises being admitted, the conclusion is irresistible; but we think the assumption that the acts of Leese set out in the complaint, have rendered impossible

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a compliance with the conditions of the contract, is erroneous. It is difficult to understand how the conveyance to Yale could be construed into a breach of the covenant to Vallejo. It seems to have been made in furtherance of the very object of the contract. The consideration of the agreement, says the complaint, was the services of Yale in prosecuting the claim. The employment of counsel was absolutely necessary to the conduct of the litigation, and certainly the adoption of a mode of compensation which was calculated to stimulate the zeal of counsel, by making his compensation depend upon the success of his efforts, could not injuriously affect Vallejo.

Nor do we perceive that the other conveyances mentioned amount to a breach of the terms of the contract, or render it impossible that the event upon which the sum was to become due to Vallejo should occur. In construing a contract, it is necessary, in order to arrive at the meaning and intention of the parties, that we should consider the situation of parties, the motive which led to, and the object sought to be obtained by, such contract. Leese and Vallejo claimed title to valuable property, which was held adversely, and about which a suit was pending. The motive of Vallejo, in entering into the contract, was to avoid the risk and expense of doubtful litigation, and the object to be attained was the maintenance of the grant to Leese and Vallejo, the recovery of possession by the owners of the grant, and the payment to Vallejo of the price agreed on. It was not necessary that Leese himself should recover; a recovery by any one claiming under him would sufficiently meet the requirements of the contract.

The vendees of Leese succeeded to his rights in the property, subject to such conditions and burdens as attached to it in the hands of their vendor, but to no other; and if the property in the hands of Leese could be charged with the payment of the sum sued for, only upon the happening of an event in *future*, we see no reason why it should be sooner liable in the hands of the vendee.

It is not alleged that possession of the property has been acquired by any of the grantees of Leese, that the title has passed to the adverse holders, or that the efforts to establish the grant

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and recover under it, have been abandoned or suspended, in consequence of the conveyances from Leese.

We think the complaint does not contain facts enough to authorize a recovery, and that the demurrer should have been sustained.

Judgment reversed and cause remanded.

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A SPECIFIC allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same; and no evidence of the contract would be necessary.

A contract, under Section 817, Practice Act, for the transportation of passengers from San Francisco to New York is an entirety, whether the entire voyage is to be performed in one vessel or not.

And a breach of such contract at any point, as leaving the passenger on the Isthmus, renders the vessel liable.

State Courts have jurisdiction in such cases, as per *Warner v. Uncle Sam* (9 Cal. 697).

APPEAL from the Seventh District.

Action against the defendant for breach of contract alleged to have been entered into on the part of defendant, by her agents and owners, to transport the plaintiff and his family, consisting of his mother-in-law and two children, to New York *via* Nicaragua, averring a deviation—transportation to Panama and detention there for seventeen days. Also, that plaintiff suffered greatly through mental anxiety—expended large sums of money in board, lodging, etc. at Panama, and suffered greatly through loss of time; also, averring damage by reason of sickness suffered by his daughter, and expenditure of large sums of money caused thereby.

The deviation is charged to have been willful on the part of agents and owners of defendant. Plaintiff demands judgment for ten thousand dollars damages and costs.

The complaint is verified, and is answered on the part of the defendant by Charles H. Baldwin, agent to the contract, as follows:

“That as to the contract alleged and set forth in said complaint, the defendant has no knowledge respecting the same, nor any information respecting the same, and the defendant there-

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fore denies the existence or the making of such contract, and controverts each and every allegation in the complaint in reference thereto.

And whether the said plaintiff, or his family, or any or either of them, took passage in the said steamer Uncle Sam, for San Juan del Sur, and were transported to Panama, as stated in said complaint, the defendant has no knowledge or information sufficient to form a belief, and therefore denies the same," etc.

Plaintiff, having introduced his proof, rested; when, on motion of defendant, a nonsuit was granted, on the ground that the contract was not proved as alleged.

Whitman & Wells, for Appellant.

The answer does not deny the contract liability. (Pr. Act, Sec. 46; *Curtis v. Richards & Vantine*, 9 Cal. 33; *Humphreys et al v. McCall et al*. Id. 59; *San Francisco Gas Co. v. The City*, Id. 483; *Edwards v. Lent*, How. Pr. 8, 28; *Thorn v. N. Y. Central Mills*, 10 Id. 19; *Chapman v. Palmer*, 12 Id. 37.)

Delos Lake, for Respondent. The question upon the sufficiency of the answer should have been made in the Court below, either by demurrer, as was done in the case of *Curtis v. Richards*, (9 Cal. 33,) or by motion to strike out the answer as sham or frivolous under Sec. 50 of the Practice Act.

The dictum to the contrary in *Humphreys v. McCall*, (9 Cal. 59,) is clearly wrong. (Sec. 68, Pr. Act.)

The fair interpretation of sections forty-six and sixty-five of the Practice Act, taken together, is that the general issue or a general denial, pleaded to a sworn complaint, is void. But the same consequences by no means follow when the answer contains a specific denial defectively stated. In such case, if the plaintiff elects to go to trial without objection to the error of mere form, he waives all objections to the sufficiency of the answer.

But, if the objection be available at the trial, the question remains whether the plaintiff can omit to notice it there and proceed with his proofs on the theory that the answer is sufficient, and for the first time spring the objection in the Appellate Court.

Now, although admissions in the pleadings may, under our

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system, be read as evidence to the jury, yet, it must appear that their attention was called to it in some way during the trial. (*Wilks v. Forest*, 2 Duer, 317.) But the denial in the answer is positive. The language is, "denies the existence or making of such contract." What precedes this positive denial is merely surplusage.

This case was argued twice. The first opinion, delivered by BURNETT, J. — TERRY, C. J. concurring, is as follows:

This suit was brought to recover damages for the non-performance of a contract to transport the plaintiff and his family from San Francisco to New York. Upon the trial the plaintiff was nonsuited, from which judgment he appealed.

1. It is insisted by the counsel of defendant that there was a fatal variance between the contract alleged and that which was proved. But upon looking into the answer, there is no proper denial of the contract as alleged in the complaint. (*Humphreys v. McCall*, 9 Cal. 59; *Curtis v. Richards*, Id. 33.)

2. The second ground relied upon to sustain the judgment of nonsuit is that the contract declared on being for the entire transportation to New York, there was no lien on the Uncle Sam for the breach of it, and no suit could, therefore, be sustained against the vessel.

The code provides that "all steamers, vessels, and boats, shall be liable for non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees." (Sec. 317.)

It will be seen that under this provision the contract for transportation must be made with the "owners, masters, agents, or consignees," of the vessel. It is perfectly competent for the persons mentioned to make a contract for the transportation of persons or property from any one port to another; and the contract, when made, is an entirety, and must be enforced as such. The language of the clause is general, and not restricted to the single case where the entire voyage is to be performed by one vessel. If we give the clause the construction contended for, the logical result must be that no suit could be maintained

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against the vessel, unless, by the terms of the contract, that vessel was to make the entire voyage.

In this case the contract was entire, and a failure at any point was a violation of the contract, for which the vessel was liable. The contract itself was made with the agents of the owners, and they had as much right to bind the vessel for the entire contract as for a part.

In case the defendant was only liable for the mal-performance which might occur between the ports of San Francisco and San Juan del Sur, and the vessel on the Atlantic side only liable for a violation on that part of the route, who would be liable for a violation of the contract on the Isthmus? And if the contract had been violated on all these different portions of the entire route, then three different suits would have been necessary upon the same contract. In that case, the owners of the vessel might well complain that an entire cause of action had been split up into three different parts, to their injury.

3. The question of jurisdiction was decided by this Court in the case of *Warner v. The Uncle Sam*, (9 Cal. 697.)

Judgment reversed, and cause remanded for further proceedings.

The second opinion was delivered by *TERRY, C. J.* — *FIELD, J.* concurring.

This was an action for the breach of a passenger contract.

The Court below non-suited the plaintiff, on the ground that the contract was not proven as set out in the complaint.

This was an error; the specific allegations of the contract in the complaint was not sufficiently controverted by the answer, and no evidence on this point was necessary under the rule announced by this Court in the *San Francisco Gas Co. v. City of San Francisco*, (9 Cal. 453.) The defendants can amend their answer so as to require further proof than was necessary under the answer as it now stands. Judgment reversed, and cause remanded.

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WATERMAN *et al.* v. SMITH.

On the 21st January, 1842, the Mexican Government granted to the Indian Chief, Francisco Solano, a tract of land called Suisun, covering four square leagues, within exterior limits, embracing about eight leagues. On the 4th of March, 1840, the same government granted to Armijo a tract of land called Tolenas, covering three leagues, within exterior limits embracing from twelve to twenty leagues. The maps referred to in both grants cover the land in controversy. Upon final confirmation and survey a patent was issued, January 18th, 1857, by the United States to Ritchie, successor in interest to Solano, for four leagues of land, with the specific description of the official survey by the United States. This patent covers the land in dispute. The grant to Armijo, from whom defendant traced title, was confirmed by the United States District Court, and stands on appeal to the Supreme Court. Assuming that Armijo occupied and claimed, from the entire quantity comprehended within the map referred to in his grant, three specific leagues covering the land in controversy. *Held:* that the patent is conclusive against the defendant, unless he shows title superior to the patent, under a confirmed Spanish or Mexican grant located under those governments, or under the government of the United States.

Held: that the grants to Solano and Armijo passed a present and immediate interest in the quantity of land specifically designated in their respective grants, to be afterwards surveyed and laid off within the exterior limits of the general tracts by the government; that such survey could only be made under the former government by its officers and could not be made by the grantees themselves; that the right of survey passed, with other public rights, to the government of the United States, and is to be exercised in pursuance of its policy, and in conformity with its laws; that by its legislation the subject of surveys is intrusted to the Executive Department; that the location of confirmed grants when the quantity granted is without specific boundaries, lying within a larger tract, rests exclusively with such department, and cannot be reviewed or corrected by the judiciary, but is binding and conclusive upon it in actions of ejectment, except only when the patent issued thereon conflicts with prior rights of third parties, and then in its inconclusiveness is maintained, only so far as may be necessary for the protection of such prior rights.

Occupation and cultivation can have no greater effect than a private survey. They were without binding effect upon the Mexican Government, and are equally inoperative under the new.

The location of the specific quantity may be made by a survey of such quantity, or by grants with specific boundaries of such parts of the general tract as will reduce it to such specific quantity. Either course will give precision to the claim of the grantee. So long as there remains within the general tract sufficient land to satisfy the quantity specified in his grant, the grantee is without remedy.

Where the dividing line between the two grants was fixed by an award between the parties, the award was conclusive until the action of the government. But the government having issued a patent to Ritchie of a portion of the land included in the general tract designated in the grant to Armijo, it does not lie in the mouth of the latter to complain, there still remaining of such general tract more than sufficient to satisfy the specific quantity granted to him. If the patentee accepted the land described in his patent as answering his claim, other persons cannot complain, even if a portion of the land thus taken was without the boundaries of his original claim.

The limitation of quantity was a controlling condition of the grants in question, and the delivery of juridical possession was an essential ceremony under the government of Mexico, to perfect the title of the grantees to the specific quantity designated.

The essential and substantive acts under the law of 1851, are the confirmation and survey. The patent is only evidence of the pre-existing title made perfect by these acts. Upon the original grant, final confirmation and approved survey, the plaintiffs might have relied, without reference to the patent.

The title of the parties claiming under Solano became perfect from the time of the approved survey of the United States. On the other hand, the title under the grant to Armijo did not attach to any three specific leagues; it constituted only an interest in such quantity, to be afterwards laid off by

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- competent authority. Such general interest cannot be set up as a defense to the claim of plaintiffs. The patent is conclusive evidence of the right of the patentee to the land described therein — not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship.
- The survey having been made in July, 1855, Ritchie having died in July, 1856, the patent, dated January, 1857, is to be regarded as if it had received the signature of the president at the completion of the segregation of the land.
- The Act of Congress (May 20th, 1836) vesting the title of public lands, patented to a person, dead at the date of the patent, in "the heirs, devisees, or assigns of the deceased patentee," was intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands.
- The third persons against whose interests by the 15th Section of the Act of 1851, the final confirmation and patent are not conclusive, are those whose title is at the time such as to enable them to resist successfully, any action of the government in respect to it. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute such third persons, nor do parties who hold claims only upon the bounty of the government, nor do intruders, nor even settlers, having certificates of sale, unless the same ante-date the presentation of the claim of the patentee to the Board of Land Commissioners for California, to which period the patent takes effect by relation. The interests of the third persons, intended by the act, would have been as effectually protected without its provisions, as they are now by them. The section in question is only a legislative recognition of a principle of law and justice, applicable to all grants.
- The fact that a grant was not approved by the Departmental Assembly does not impair the title.
- Such approval simply discharges the grant from liability to defeasance by the Mexican Government, except for breach of its conditions subsequent.
- No law authorizes a forfeiture of any rights of property, under a Mexican grant, for any act or omission on the part of the grantee since the treaty of Guadalupe Hidalgo.
- The grant of Armijo, being of three leagues within a much larger area, and no survey having been made, gave him no title to any specific three leagues of land, which would enable him to defend against ejectment on a patent.

APPEAL from the Seventh District.

The Appellants, plaintiffs below, brought an action of ejectment against Respondent, as defendant, for a parcel of land lying in the county of Solano. The title relied on by the plaintiffs and with which they connected themselves, may be found in the case of *The United States v. Ritchie*, 17 How. S. C. 534-537, fully set forth. The chain of title commences with a petition of Francisco Solano to the Commandant-General, M. G. Vallejo, who was the Director of Colonization, for a grant "of the land of the Suisun, together with its known appurtenances."

The following is a copy of the petition:

"To the Commandant-General:

Francisco Solano, principal chief of the unconverted Indians, and born Captain of the 'Suisun,' in due form before your Honor, represents: That, being a free man, and owning a sufficient number of cattle and horses to establish a rancho, he solicits from the

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strict justice and goodness of your Honor, that you be pleased to grant him the land of the 'Suisun,' with its known appurtenances, which are a little more or less than four square leagues from the 'Portzuela to the Salina de Sacha.' Said land belongs to him by hereditary right from his ancestors, and he is actually in possession of it; but he wishes to revalidate his rights in accordance with the existing laws of our Republic and of the Colonization recently decreed by the Supreme Government.

He therefore prays that your Honor be pleased to grant him the land which he asks for, and procure for him from the proper sources the titles which may be necessary for his security, and that you will also admit this on common paper, there being none of the corresponding stamp in this place.

(Signed)

FRANCISCO SOLANO.

SONOMA, January 16, 1837."

Upon this petition the following order is made:

"SONOMA, January 18, 1837.

The undersigned grants, temporarily and provisionally, to Francisco Solano, Chief of the tribes of this frontier and Captain of the 'Suisun,' the lands of that name, as belonging to him by natural right and actual possession. Said land is comprehended between the 'Portzuela and the Salina de Sacha.' The party interested will ask from the government of the State the usual titles, in order to make valid his rights in conformity with the new order of Colonization.

(Signed)

M. G. VALLEJO."

On the 15th of January, 1842, Solano presented a petition to Governor Alvarado for a full grant of the same land, accompanying it with the petition above referred to, to the Director of Colonization, and the marginal decree made by that officer, stating in his petition to the Governor that he is in actual possession of the land known by the name of "Suisun," together with its dependencies, and asking for a perpetual grant of the same. That petition is as follows:

"[SEAL.]

To His Excellency, the Governor:

The undersigned a resident of Sonoma, respectfully appears

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before your Excellency, and representation makes, that in virtue of the rights which belong to him, as shown in the annexed petition and marginal decree, he is in actual possession of the land known by the name of 'Suisun,' together with its dependencies; and, in order to secure and legalize said ownership, he humbly petitions that your Excellency, in consideration of the document referred to, may be pleased to grant him the corresponding title of concession, perpetual and hereditary, of the aforesaid land in order that in no time may the petitioner or his heirs be molested in the pacific enjoyment of his property.

Wherefore, your petitioner prays that your Excellency will deign to grant him the favor which he asks for, he swearing that he is actuated by no malice, and such other oath as is required, etc. etc.

As Attorney of the petitioner,

(Signed)

JUAN ANTONIO VALLEJO.

MONTEREY, January 15, 1842."

On this petition the Governor makes the following order:

"MONTEREY, January 20, 1842.

In consideration of the petition at the beginning of this *expediente*, the report of the Commandant-General, and the merits and services of the Indian called Francisco Solano, rendered on the frontier of Sonoma, I declare him to be owner in fee of the place called 'Suisun,' in extent four square leagues, and with the boundaries shown in the corresponding map. The corresponding patent will be made out, and this *expediente* directed to the most excellent Departmental Junta for its approbation.

Juan B. Alvarado, Constitutional Governor of the Department of the Californias, thus ordered, decreed, and signed, of which I certify."

On the 21st of January, 1842, the title in form was granted him, and on the 3d of October, 1845, the grant was approved by the Departmental Assembly, upon the report of a committee made on the *expediente*, "formed at the instance of the Indian, Francisco Solano," as follows:

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" [SEAL.]

Juan B. Alvarado, Const'l Governor of the Dept. of the Californias:

Whereas, the aboriginal, Francisco Solano, for his own personal benefit and that of his family, has asked for the land known by the name of 'Suisun,' of which place he is a native, and chief of the tribes of the frontier of Sonoma, and being worthy of reward for the quietness which he caused to be maintained by that unchristianized people; the proper proceedings and examinations having previously been made, as required by the laws and regulations; using the powers conferred on me in the name of the Mexican nation, I have granted to him the above-mentioned land, adjudicating to him the ownership of it. By these presents, being subject to the approbation of the most excellent Departmental Junta, and to the following conditions, to-wit:

1. That he may inclose it, without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use and cultivation of it as he may see fit; but within one year he shall build a house, and it shall be inhabited.

2. He shall ask the magistrate of the place to give him juridical possession of it, in virtue of this order, by whom the boundaries shall be marked out; and he shall place in them, besides the landmarks, some fruit or forest trees of some utility.

3. The land herein mentioned is to the extent of four 'sitios de ganado mayor' (four square leagues) with the limits as shown on the map accompanying the respective expediente. The magistrate who gives the possession will have it measured according to ordinance, leaving the excess that may result to the nation, for its convenient uses.

4. If he shall contravene these conditions, he shall lose his right to the land, and it may be denounced by another.

In consequence, I order that these presents be held firm and valid, that a register be taken of it in the proper book, and that it be given to the party interested, for his voucher and other purposes.

Given this twenty-fifth day of January, one thousand eight hundred and forty-two, at Monterey.

(Signed)

JUAN B. ALVARADO.

(Signed)

Manuel Jimeno, Secretary."

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“MOST EXCELLENT SIR:—

The Committee on Vacant Lands has ordered the expediente, formed at the instance of the Indian, (Indigena,) Francisco Solano, for the place known by the name of ‘Suisun,’ and being satisfied that the proceedings had in the said expediente were sufficient for the purpose that the Superior Government should have granted the said place, offers to the deliberation of your Excellency the following proposition:—

The grant made by the Supreme Government of the Department by a title legally issued, with the date 28th January, 1842, in favor of the Indian, (Indigena,) Francisco Solano, of the place known by the name of ‘Suisun,’ and situated in the jurisdiction of Sonoma, in accordance with the law of August 18, 1824, and Article five of the Regulations of November, 1828, is approved.

Hall of the Committee, in the City of Los Angeles, September 29, 1845.

(Signed)

FRANCISCO DE LA GUERRA.

(Signed)

MARCESO BARTOLA.”

“ANGELES, Oct. 3, 1845.

In session of this day, the proposition of the foregoing report was approved by the most excellent Departmental Assembly ordering the original expediente to be returned to his Excellency the Governor, for suitable purposes.

(Signed)

Proo Proo,
President.

(Signed)

Augustin Olona, Secretary.”

On the same day the proper copy was issued to the party interested.

The Appellants established by several mesne conveyances and other proof, their connection with the above mentioned grant to Solano, through Archibald A. Ritchie, deceased, and likewise offered in evidence a patent of the United States, bearing date the 17th day of January, 1857, issued to said Ritchie, covering the land in controversy. It was likewise in proof that the land sued for was in the county of Solano, and it was admitted that defendant was in possession of the same.

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The Respondent pretended to hold under a grant to one José Francisco Armijo, and to connect himself with it by proper mesne conveyances. From these documents, it appears that on the 22d of November, 1839, José Francisco Armijo presented to M. G. Vallejo, the Commandant-General and Director of Colonization, a petition asking for a grant of the place known by the name of Tolenas, which extends from the place so-called to the Ololatos Creek, containing about three leagues of land, more or less, "and joins with the rancho of Suisun." This is the language of the petitioner in the description of the land selected by himself, as appears from the petition which follows:

Senor Commandant-Generals

José Francisco Armijo, by birth a Mexican, before your Honor, in the manner which may be best for me in the law, say:

"That having four sons, natives of the same country, without owning any lands to cultivate, finding myself owner of about one hundred head of cattle, the product of which I annually lose, supplicate that your Honor will be pleased to concede to me the place known to me by the name of Tolenas, that in company with my son, Antonio Maria, I dedicate myself to the cultivation of my own land and the breeding of cattle, with the understanding that the land which I solicit is from the place already mentioned to Ololatos Creek, containing about three leagues of land, more or less, and it joins with the Suisun Rancho.

For this I pray that you will be pleased to decree as I have petitioned, for which I respectfully forward herewith the map.

This favor I shall perpetuate on my memory.

Does not know how to sign.

SONOMA, Nov. 22d, 1839."

On the same day Vallejo makes an order on the margin of this petition allowing Armijo to occupy the place of Tolenas, "which joins with" (lindra is the word used in response to the language of the petition) "the rancho of Suisun;" enjoining it upon him to take pains not to molest in any manner whatever the Indians who live there or the neighbors; to endeavor to win their confidence, and to give notice of any act of rebellion which

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may occur, or any sign of rebellion he may observe, and to communicate in every instance with the Chief of Suisun, with whom, by reason of his being in the immediate neighborhood, it will be convenient to advise whatever may conduce to the lives and tranquillity of the settlers.

Here follows the marginal order or decree:

“SONOMA, November 22d, 1839.

The place of Los Tolenas, which joins with the Rancho of Suisun, can be occupied by the interested party, José Francisco Armijo, on account of its being vacant, and not being private property.

The interested party shall also take pains not to molest, in any manner whatever, the Indians who live there nor the neighbors. He shall try to attract the former without violence, inspiring them with confidence. He shall give immediate notice to the military commander of the frontier if any act of rebellion should occur, or should he observe any sign of rebellion among the wild Indians, and he shall communicate in every instance with the Chief of Suisun, to whom, by his being in the immediate neighborhood, it will be convenient to advise whatever may conduce to the lives and tranquillity of the settlers.

Apply with this decree to the political authority, that it may serve him as a legal step, and that the grant be made to him, unless there should be some other obstacle to his obtaining the necessary title.

M. G. VALLEJO.”

Subsequently, Armijo presented a petition to the Prefect of the First District, asking for a grant of the same land in accordance with the law of colonization. This document is without date. It is as follows:

“ [SEAL.]

Señor Prefect of the First District:

José Frasco Armijo, by birth a Mexican, before your Honor, in the manner which may be best for me in the law, say: that having permission from the Commander-General to occupy the land which I indicate in the accompanying petition, solicit the ownership of said land in accordance with the laws of coloniza-

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tion, by which, and under its auspices, I believe myself entitled to.

I supplicate that your honor will give the necessary directions to this, my petition, for which I shall always be grateful, swearing it is not through malice and whatever is unnecessary, etc. etc. I do not know how to sign."

On the 29th February, 1840, the Prefect, Castro, made the following order on this petition:

"MONTERREY, 29th February, 1840.

The party interested in this petition having resorted to the prefecture under my charge, let it be carried up to his Excellency, the Governor of the Department, with the corresponding report.

CASTRO."

The prefect accompanies this order with the following report:

"*Most Excellent Señor Governor:*

The prefecture being informed of the petition which José Francisco Armijo makes in claiming the land which he indicates, and of the order of the Señor Commander-General, no obstacle is found to the concession which the government ought to decree, provided the party interested obtains the necessary requisites to be attended to, and that the place which he solicits is found to be entirely vacant.

JOSE CASTRO."

The Governor made a grant to Armijo on the foregoing documents, which grant was offered in evidence by the Respondent in the Court below. It bears date the 4th of March, 1841. The land granted is stated to be three leagues, (see 4th condition,) as shown by the map which accompanies the expediente. The map here referred to, was presented with the petition to the Commandant-General. This grant contains the conditions usually found in the grants, (see *Fremont's Case*, 17 How. 545; *Fossat's Case*, 20 How. 426; and *Ritchie's Case*, 17 How.) and the unusual one that "through no motive whatever shall he molest the Indians, who are there located, nor the immediate neighbors with whom he adjoins."

The following is the grant:

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" [SEAL.]

Juan B. Alvarado, Constitutional Governor of the Department of the Californias:

As the citizen, José Francisco Armijo, has claimed for his personal benefit and that of his family the land known as Tolenas, adjoining the Suisun Creek, to the estuary of Julpines, to the Ololatos Creek, and to the mountains. The necessary forms and investigations having been previously attended to, according to what is determined by the laws and regulations by virtue of the authority in me vested, I have, in the name of the Mexican nation, ceded to him the mentioned land, by these presents, declaring it his property, subject to the approval of the most excellent Junta Departmental, and on the following conditions:

1st. Through no motive whatever shall he molest the Indians who are there located, nor the immediate neighbors with whom he adjoins.

2d. He can fence it in without damage to the trails, roads, and by-ways; he shall enjoy it freely and exclusively, appropriating it to the use or cultivation which may best suit him, but he shall within one year build a house which shall be inhabited.

3d. He shall request the proper Judge to give him juridical possession by virtue of this dispatch, by whom the boundaries shall be marked out; within which limits, in addition to the landmarks, he shall plant some fruit trees or some useful wild ones.

4th. The land referred to consists of three leagues as shown by the map accompanying the expediente. The Judge who may give possession shall cause it to be measured according to law. the overplus to remain in possession of the nation for such uses as may be convenient.

5th. Should he not comply with these conditions he will lose his right to the land and it may be denounced by another. Therefore, this title being as firm and valid, I order that it be registered in the proper book, and that it be delivered to the party interested for his security and other ends.

Given in Monterey on the fourth of March, eighteen hundred and forty.

JUAN B. ALVARADO.

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Notice taken of this dispatch in the Book of Records for the adjudication of vacant lands on the first page succeeding.

His Excellency, the Governor, has ordered that notice of this title be taken in the prefecture of the first district."

The Respondent connected himself with this title through conveyances from José F. Armijo to one D. K. Berry and from Berry to himself.

The grant to Armijo was not authenticated by the signature of the Secretary, nor was it approved by the Departmental Assembly.

It was proven that Solano lived within the bounds of the Suisun Rancho up to the time of his death. He had a rancheria of Indians there of the Suisun tribe. Solano died in 184-. Armijo lived within the map of the rancho of Tolenas until his death, in 1849. Antonio Armijo, his son, resided within the same bounds until his death, in 1850 or 1851. The Armijos did not reside on the same spot within the bounds of the map of Tolenas; he resided first at a spot some two miles south of the Rancheria Tolenas, then removed to a spot one and a half miles east of the first settlement, where he died, which latter spot is in the neighborhood of the *locus in quo*. The Rancheria de Tolenas is near the forks of the creeks coming down from the mountains and forming the Suisun Creek, or about three miles above the dry gulch.

It was established by the evidence of a practical surveyor, Swan, that the *deseño* of Suisun contains some eight or nine leagues of land, (only four leagues were granted to Solano,) and it was likewise shown by a practical surveyor who had made an estimate of the superficial area, that the *deseño* of Tolenas contained twenty leagues, of which three were conceded to J. Francisco Armijo. Swan also states that there are in the *deseño* of Tolenas twelve leagues.

It appears from some documentary testimony offered in the court below by the Respondent, that some time in 1847, or previously, a controversy had arisen between M. G. Vallejo, (who was at that time owner of the rancho of Suisun,) and Armijo the grantee of Tolenas, which resulted in the institution of an action of trespass by Vallejo against Armijo before Alcalde L.

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W. Boggs. The Respondent's counsel formally offered this evidence by calling Boggs, to prove that such a transaction took place before him in 1847, and that Prudon, a Frenchman, wrote the award which concludes the controversy. Witnesses were subpoenaed, and a summons issued to Armijo, the defendant, returnable on the third Monday in August, 1847. On that day the parties, Vallejo and Armijo, appeared in court, and the court was informed that the parties had agreed to refer the matter to arbitration. The parties selected the arbitrators, who were duly sworn, and an award was presented as their decision of the controversy. It (the award,) was entered on the record as part of the case, and the whole was offered in the court below as one record. It was signed by the arbitrators and the parties, plaintiff and defendant. It was in proof that the award and translation were written by the same person, one Prudon. Here follows the award:

“ We, the undersigned, appointed arbitrators by and for Mariano G. Vallejo and Francisco Armijo, to decide on the question existing between them, for having the last trespassed his limits, and usurping part of the land belonging to farm of first; as it is expressed in the complaint presented before the Alcalde of the jurisdiction, L. W. Boggs, and after hearing the declaration of both parties and examination made of the proofs and documents presented to us: we find that the limits of each farm are clearly determined in their respective titles, being those of the Tolenas farm according to the said the Suisun Creek which runs to the N. N. E. of Suisun, and beginning from thence at the first limits mentioned, there are to be measured three leagues running at E. N. E. as the ridge (sierra) runs, leaving the said ridge the natural limits which laying between the two farms, separate them, leaving one at the north and the other at the south. Thus neither of the both parties is prejudicated, and the tital meaning of the respective titles to both farms are fulfilled with, and in order to so not burden one part more than another, the costs of the judgment and those of the tribunal ought to be paid equally by both parties.

And for the fulfillment of the contents of this present writing

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we sign it by our hands and seals before the Alcalde of this jurisdiction, on the sixteenth day of August, A. D. 1847.

(Signed)

CAJETANO JUAREZ,

Arbitrator for M. G. Vallejo.

(Signed)

M. G. VALLEJO.

(Signed)

SALVADOR VALLEJO,

Arbitrator for Fco. Armijo.

(Signed)

FRANCISCO ARMIJO."

The counsel for Respondent contended that this award was conclusive of the action in his favor; although he afterwards moved to strike it out, near the conclusion of the case, which motion was denied. The subject matter of this controversy will be understood from the award, which discloses the fact that the action was brought on account of an alleged trespass committed by Armijo on the land of Vallejo. This award was made, as it states, on the proofs and documents presented by the parties—the documents were doubtless the expedients of the titles of Solano and Armijo. One of the arbitrators testifies that the *deseños* of both were presented to the arbitrators.

Testimony was likewise offered by Respondent to show that M. G. Vallejo and Ritchie had stated that the *arroyo seco*, or dry gulch, was the line on the north of the Suisun grant, and upon this it was contended by counsel for Respondent, that such admissions fixed the boundary at the dry gulch. The Judge charged the jury in relation to it, but the view taken of the case by the court renders any further statement on this point unnecessary.

There were many minor points as to striking out, admitting and rejecting evidence, which are not presented, because not passed on by the Court. The plaintiffs, however, asked for certain instructions to the jury, which were refused. They may be found in the latter part of the opinion of the Court as the first, third, sixth, seventh, eighth, and ninth, instructions.

The cause was tried before a jury, who, under the charge of the Court, rendered a verdict for defendant, whereupon judgment was entered.

An application being made for a new trial, was denied. Plaintiffs appeal.

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Thornton, Williams & Thornton, for Appellants.

I. The Courts of the State should conform their decisions to those of the Supreme Court of the United States, on questions involving the alienation of the public domain, the effect of titles derived from the United States, the interpretation of treaties, and acts of Congress.

This has been the uniform doctrine of the Supreme Court of the United States, and the Courts of the States have followed it.

The ground upon which this doctrine rests is derived from the Constitution of the United States, (see Art. 4, Sec. 3,) which invests Congress with the power "to dispose of and make all needful rules and regulations respecting the territory and other property of the United States." Such has been the uniform ruling of the Supreme Court of the United States in a series of cases. (*Wilcox v. Jackson*, 13 Pet. 516, 517; *Bagnell v. Broderick*, Id. 450, 451; *Irvine v. Marshall*, 2 How. 566, 567; *Pontalba v. Copland*, 3 Ann. La. 86-88; *Boyd v. Montgomery*, 6 Mo. 514; *Mackay v. Dillon*, 7 Id. 10; *United States v. Wiggins*, 14 Peters, 350; *Gugnon's Lessee v. Astor*, 2 How. 344; *Strother v. Lucas*, 12 Peters, 454; *Loddell v. Clark*, 4 Ann. La. 99, 100; *Purvis v. Harmanson*, 4 Ann. La. 422; *Foley v. Harrison*, 5 Ann. La. 87; *Lott v. Prudhomme*, 3 Rob. La. 295, 296; *Hallett v. Hunt*, 7 Ala. 882, 900-902; *Ganache v. Piquignot*, 16 How. 468; *Gunn v. Bates*, 6 Cal. 271.)

II. The grant to Armijo is in its nature and essence, executed and not executed. It gives to the grantee *jus ad rem*, not *jus in re*. It confers on him the right to three leagues of land, to be afterwards surveyed and laid off to him, within the territory described in the *deseño* or map by official authority, but the grant did not, nor does it now, attach the title to any particular land. To this extent, there vests in him a present and immediate interest.

This we conceive to be the legal effect and proper construction of such a grant, as clearly defined by the Supreme Court of the United States, in *Fremont's Case*, (17 How. 542, 558, 559.) The grant to Armijo, offered in evidence, is substantially the same as the grant to Alvarado, of which Fremont was the assignee. (17 How. 545, 546.) The third and fourth conditions

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are identical. These conditions are common to nearly all the grants made under the colonization laws. (*Ritchie's Case*, 17 How. 536; *Reading's Case*, 18 How. 2; *Cambuston's Case*, 20 How. 61; *Fossat's Case*, Id. 426; *Fossat's Case*, 20 Id. 426; *Paschal v. Perez*, 7 Texas, 367; *Edwards v. James*, Id. 379; *Hancock v. McKinney*, Id. 449; *Menard v. Massey*, 8 How. 305-308, etc.; *United States v. King*, 3 Id. 773-786; *Lessieur v. Price*, 12 Id. 59; *Stoddard v. Chambers*, 2 How. 317; *Barry v. Gamble*, 3 Id. 51; *Rutherford v. Graves' Heirs*, 2 Wheat. 196; *Neal v. E. T. College*, 6 Yerger, 190; *West v. Cochran*, 17 How. 403, 414-416; *Kissell v. St. Louis Public Schools*, 18 Id. 19-25; *Elliott v. Piersol*, 1 Pet. 341; *Cooper v. Roberts*, 18 Id. 173; *Gaines v. Nicholson*, 9 Id. 304, 305, 356; *Stanford v. Taylor*, 18 Id. 409; *Bissell v. Penrose*, 8 Id. 317; *Ledoux v. Black*, 18 Id. 475; *Willot v. Sandford*, 19 Id. 81; *Bryan v. Forsyth*, 19 Id. 334; *Ballance v. Papin*, Id. 343; *Gilmer v. Poindexter*, 10 Id. 257; *Baird v. Wolfe*, 4 McLean's C. C. R. 549; *Waddingham v. Gamble*, 4 Mo. 465; *Jackson v. Van Buren*, 13 Johns. 527, 528; *Vandenburgh v. Van Burgeen*, Id. 202; *Corbin v. Jackson*, 14 Wend. 625; *Jackson v. Livingston*, 7 Wend. 136-141.)

III. The conditions expressed in the grant to Armijo and Solano are subsequent. Negligence in respect to the performance of these conditions did not of itself forfeit the right of the grantee. It subjected the land to be denounced by another; but the conditions do not declare the land forfeited to the State, upon the failure of the grantee to perform them. (*Ferris v. Cooper*, 10 Cal. 615; *U. S. v. Fremont*, 17 How. 560-562; *Same v. Reading*, 18 Id. 1, 6; *U. S. v. Cruz Cervantes*, Id. 555; *U. S. v. Vaca and Pena*, Id. 557; *U. S. v. Larkin*, 558, 563.)

IV. There was vested in the grantee, under such a grant as Armijo's, a right of possession to the whole land embraced within the limits of the *deseño* or map, against all the world except the government, or some one claiming under the government. This right existed until the quantity granted was surveyed off to the grantee by the government, or until the government had made a grant of a specific tract of land to a second grantee within the territory embraced in the map or *deseño*. (See *Fremont's Case*, 17 How. 558.) Unless this were so, unless the grantee had a

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lawful possession, the conditions subsequent in the grant could not be performed, and the grantee would lose his land by denouncement. The grantee must enter to perform the conditions, or the grant is *felo de se*, carries on its face its own destruction. It gives no right of value to the grantee, unless he can make a lawful entry, take possession, and defend it. This is sufficient to enable the grantee to maintain the possessory action of ejectment, an action founded on the legal right or title to the possession, and may be maintained though the grantee has not a full and perfect title to the lands.

A case illustrating the point before us in a clear and striking manner is that of *White v. St. Guirons*, (1 Minor's Ala. 332-351.) Indeed, the title considered in this case is more clearly similar to the grant to Fremont, as far as this possessory right is concerned, than any other we have been able to find in the progress of our investigations. (1 Wash. C. C. 204-206, and note 2; Id. 160, 425-433; *Payne v. Treadwell*, 5 Cal. 311; 3 Chit. Blac. 205, 201, 199; Adams Eject. 12, 9-11, 17, Waterman's Ed. See Argument of Chancellor Bibb, in *Henderson v. Tennessee*, 10 How. 317; see, also, Opinion of Lord Mansfield in *Taylor v. Hords*, 1 Burrow, 119; Rumington on Eject. 21, 42; *Troublesome v. Estill*, 1 Bibb, 128; *Jackson v. Buel*, 9 Johns, 299; *Doe v. West*, 1 Blackford, 133; *Christy v. Scott*, 14 How. 295; *Bullock v. Wilson*, 2 Porter, Ala. 437; *Masters v. Eastis*, 3 Id. 371; *Goodleth v. Smithson*, 5 Id. 245.)

The last three cases cited were imperfect grants under the United States land system. (*Jones v. Inge*, 5 Porter, 327; *Fippo v. McGehee*, Id. 432; *City of Cincinnati v. White*, 6 Peters, 441, 442; *Ferris v. Coover*, 10 Cal. 589.)

V. The Mexican Government reserved the right to survey off the land granted in the case of the grant to Armijo, and of all such grants. This is reserved in the condition in which it is required that the Magistrate who may give possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper uses. The delivery of judicial possession and survey were executive acts to be performed by the authorities. The obligation to perform these acts now devolves on the United States.

This is the plain meaning of the third condition of the grant

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to Solano, 17 How. 536; of the fourth condition in the grant to Alvarado, Id. 546; of the fourth in the grant to Reading, 18 How. 2; of the third in the grant to Larios, 20 Id. 426; and of the fourth in the grant to Armijo. (See case of Fremont and Fossat above cited.)

VI. The Government of the United States could alienate the land embraced in the *deseño* of Armijo, where there had been no specific location of the quantity granted to Armijo, as it was held in Fremont's case Mexico could have done. This could be done with the most perfect good faith where a sufficient quantity was left to give Armijo the three leagues granted to him. (*Fremont's Case*; *Ledoux v. Black*, 18 How. 475; *Menard's Heirs v. Massey*, 8 How. 301; *Lefebvre v. Cameau*, 11 Lou. 203; *Stack v. Orillon*, 11 Id. 587; *Lott v. Prudhomme*, 3 Rob. 293; *Metoyer v. Larenaudiere*, 6 Id. 139; *Cousin v. Blanc's Executors*, 19 How. 209; *McCabe v. Worthington*, 16 Id. 96.)

VII. The granting and location of lands by surveys pertains to the executive or political department of the government. Until location is given to a grant by survey, where the boundaries are vague and uncertain, the title is imperfect; the title as a title in fee does not become the subject of judicial cognizance until it is perfected by location. (*Vattel's Law of Nations*, 175; 1 *White's Land Law*, 601; Act Congress 3d March, 1851; 13 *Peters*, 450, 516; 20 How. 566; 4 *Bacon's Ab. Bouvier's Ed.* 1856, Tit. Grant, Sec. 3; *Haven v. Cram*, 1 N. Hamp. 93; 2 *Bl. Com.* 347; *Foster v. Neilson*, 2 Pet. 253; *Garcia v. Lee*, 12 Id. 511; *United States v. Rogers*, 4 How. 127.)

A title or grant is imperfect as a title to any specific piece of land, and as such does not become the subject of judicial cognizance until it is perfected by location. (See *Lessieur v. Price*, 12 How. 76; *West v. Cochran*, 17 Id. 413; *Kissel v. St. Louis Public Schools*, 18 Id. 25; *Stanford v. Taylor*, Id. 412; *Willett v. Sandford*, 19 Id. 81, 82; *Les Bois v. Bramell*, 4 Id. 449; *Bryan v. Forsyth*, 19 Id. 335, and authorities cited under point immediately preceding; 18 How. 19, and cases cited under Point VI.)

VIII. In the case of a grant by the Legislature, if the boundaries are not fixed by statute, it must be fixed by survey. Where there is a legislative grant, when a survey is duly made

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by the proper authority, no patent is required. Ejectment can be maintained on it without a patent in the Courts of the United States. (*Bryan v. Forsyth*, 19 How. 334; 2 Id. 313; 4 Id. 456; 3 Id. 317; *Chouteau v. Eckhart*, 2 Id. 372, 373; Remark of McLean, J. 19 Id. 340, 341.)

IX. The survey must be made by the political department. A private survey is of no authority to segregate the land, or to attach the grant of Armijo to any particular land.

This is and was the rule under the Mexican system, as well as under that of the United States. (*Ordenanzas de Tierras and Aguas*, by Galvan, Edition of 1855, 226, 227; *Story's Eq. Jurisp.* 677, etc.; *Smith v. United States*, 10 Pet. 327; *U. S. v. Hanson*, 16 Id. 199-201; *Acosta's Case*, 17 Id. 19; *U. S. v. King*, 3 How. 785; *Jourdan v. Barrett*, 4 Id. 169; *Les Bois v. Bramell*, Id. 449; Id. 421; *Bissel v. Penrose*, 8 Id. 335; *Glenn v. U. S.* 13 Id. 256; *Fremont's Case*, 17 Id. 563-565; *American Ins. Co. v. Carter*, 1 Peters, 511; *The Fama*, 5 Rob. Adm. Rep. 105; *U. S. v. Percheman*, 7 Peters, 86, 87; *Mitchel v. The U. S.* 9 Id. 711; *Strother v. Lucas*, 12 Id. 410; *Leitersdorfer v. Webb*, 20 How. 177.) This last case was in relation to territory acquired under the treaty of Guadalupe Hidalgo. (*Vattel*, Book 3, Chap. 13, Sec. 200; 1 *Kent's Com.* 177.)

This being the correct rule, the laws of the United States must regulate the entire system of surveys.

It may be remarked here that there was never in California under the former government such an officer as a Surveyor. Mexico had no such officer here. Though the land system demanded such an official, no one had such powers. The land in fact in the absence of an energetic population capable of developing the immense resources of the country, was of too little value to support a system of surveys.

X. The United States have made provision for such surveys in the Act of Congress of 3d March, 1851, and the 6th Section of the Act of March, 1831, so far as it is made a part of said Act of 1851. (*Dunlop's Laws of the United States*, 1226 and 806.)

XI. The survey and patent of the United States to Ritchie, are conclusive against Armijo and those claiming under him, as the three leagues granted to Armijo have not been located. (*U.*

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S. v. Fossat, 20 How. 414; *Fremont's Case*, 17 Id. 558, 565; *Feris v. Coover*, 10 Cal. 620; cases before cited in 12 How. 76; 19 Id. 335, 336, 343; 2 Id. 344; *Mezes v. Greer*, McAll. 401; *Tobin v. Walkinshaw*, Id.; *Pollard's Heirs v. Greit*, 8 Ala. 940-942; *Hallett v. Hunt*, 7 Ala. 882-900; 4 McLean, 549; *Hickey's Lessee v. Stewart*, 3 How. 750; *West v. Cochran*, 17 Id. 415; 18 Id. 88; 13 Peters, 451; 4 How. 462.)

XII. Armijo and those claiming under him are not of the class of third persons mentioned in the 15th Section of the Act of Congress of the 3d of March, 1851, against whom the survey and patent are not conclusive. The third person mentioned in that section of the Act are those who have titles paramount to the government, and not subordinate to the right of government to enter by its officers and segregate and designate the land which was granted. If this be not true, then Armijo is better off without a survey and patent than with one. (*City of New Orleans v. De Armas & Cuculler*, 9 Peters, 224; 10 Peters, 662-731; 5 Wheaton, 290; 9 Cranch, 87; 11 Wheaton, 380; 2 How. 280; *U. S. v. Arredondo*, 6 Peters, 738.)

As to perfect and imperfect titles, counsel cited: Blac. Com. Book 2, Chap. 13, p. 195, 199; Ordenanzas above; Escriche's Dictionario de Legislacion, etc. Tit. Propriedad; 8 How. 293, etc.; *Arredondo's Case*, 6 Pet. 691; 13 How. 257; 15 Id. 14, *D'Auterieve's Case*; *U. S. v. Roselius*, 15 How. 31, 33; Id. 38; 10 Id. 442; *Paschal v. Perez*, 7 Texas, 367; *Edwards v. James*, Id. 379; *Hancock v. McKinney*, Id. 449; *U. S. v. Davenport*, 15 How. 1, and *U. S. v. Patterson*, Id. 10, where the concessions were made by the Commandant at Nacogdoches, who could only make concessions of inchoate grants; to make which perfect the ratification of the civil and military Governor was required. They did not possess this last requisite, and though they had all the rest, wanting this, they were held imperfect. (15 How. 8, 12.) In *Bal-lance v. Papin*, title of plaintiff held imperfect for want of survey, (19 How. 343.) Same title in *Bryan v. Forsyth*, where there was a survey held perfect, (19 How. 335, 337); and that it was perfected by a survey, (337.)

XIII. The first perfect legal title must prevail. Nothing but a patent will pass a perfect and consummate title, unless in case

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of grant of fee by Act of Congress. The fee is in the government until the patent issues, and this was the view of Congress in enacting the thirteenth section of the Act of the third of March, 1851.

That the first perfect legal title must prevail, see *Stoddard v. Chambers*, 2 How. 317, 318; *Ledoux v. Black*, 18 Id. 475; *Bagnell v. Broderick*, 13 Pet. 450, 451; *Chouteau v. Eckhart*, 2 How. 375, 376; *Les Bois v. Bramell*, Id. 449; *Mackay v. Dillon*, Id. 421; *Barry v. Gamble*, 3 Id. 32; *Landes v. Brant*, 10 Id. 348; *Menard's Heirs v. Massey*, 8 Id. 293; *Bissell v. Penrose*, Id. 317; *Mills v. Stoddard*, Id. 345.

That nothing but a patent will pass a perfect and consummate title, unless in case of grant of fee by Act of Congress, or grant of a *specific* parcel of land, see *Wilcox v. Jackson*, 13 Pet. 576; *Bagnell v. Broderick*, Id. 450; *Fossat's Case*, 20 How. 425; 3 Ann. La. 88.

XIV. A government is never presumed to grant land twice. (*U. S. v. Arredondo*, 6 Pet. 788, and authorities there cited; 7 Johns. 8.) Nor is it to be presumed that any government would by its officers survey the same land to two grantees, especially when she can give the quantity granted to each one of them out of the territory designated in which the land ceded is to be procured.

But it is contended that the treaty of Guadalupe Hidalgo protects the title of Armijo, and to allow the Appellants to succeed upon their patent would be in violation of the rights secured to Armijo and those claiming under him by the said treaty. This would be true were the title of Armijo perfect, and that title embraced the *locus in quo*. The treaty did not make the title of Armijo perfect, for like the treaty of 1803, it did not change the character of the claims to land in the territory acquired by it. (See *Chouteau v. Eckhart*, 2 How. 375, and cases there cited.) The treaty only protects property; (see Article 8); it does not enlarge or diminish the rights of property. It guarantees the rights of property as they existed at the date of the treaty, and as they came to the United States. It does not make the rights attaching to an imperfect title identical with those pertaining to one that is perfect. Its guaranty goes no further than the law of nations — that law could have afforded the same protection, as

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it is recognized among civilized nations. (12 Pet. 436, 438; 7 Id. 88; 6 Id. 741, 742; 9 Id. 133.) While the possessory rights attaching to an imperfect title are protected by the eighth and ninth articles of the treaty of Guadalupe Hidalgo, the same treaty likewise imposes upon the government of the United States a further obligation, *political in its character*, to perfect such imperfect titles; but "this obligation, sacred as it may be in any instance, cannot be enforced by any action of the judicial tribunals." (2 How. 375; 13 Id. 48.) And it would seem that all the legislation of Congress upon this subject has proceeded upon this construction of the treaty, as is manifested by the mode adopted to investigate the claims through a Board of Commissioners, under the Act of 1851. (*Chouteau v. Eckhart*, 2 How. 375; *U. S. v. Wiggin*, 14 Pet. 350.) The judicial tribunals are competent to protect *rights of property*, but not to discharge duties political in their character. Such functions, by our Constitution and laws, devolve upon a co-ordinate department of the government. (*Foster v. Neilson*, 2 Pet. 314; *U. S. v. Ferreira*, 13 How. 48, 49, etc. etc. cases cited, and note at end. *Sullivan v. Davis*, 4 Cal. 291; *Arguello v. Edinger*, 10 Id. 150; *Les Bois v. Bramell*, 4 How. 462; *Hickey's Lessee v. Stewart*, 3 Id. 762; *U. S. v. King*, 3 Id. 787; *Ross v. Borland*, 1 Pet. 655; *Bagnell v. Broderick*, 13 Id. 450, 451; *Wilcox v. Jackson*, Id. 517; *Marsh v. Brooks*, 8 How. 233; 14 Id. 513; *Barry v. Gamble*, 8 Mo. 87; 3 How. 32; 10 Pet. 340; 4 How. 55; *De La Houssaye v. Saunders*, 4 Lou. 445; *Broussard v. Gonsoulin*, 12 Rob. Lou. 1; *Jewell v. Porche*, 2 Lou. Ann. 148; *La Vergnes' Heirs*, 17 La. 230; 2 How. 318; *Burgess v. Gray*, 16 Id. 48; *Sterling v. Drew*, 5 N. S. Martin's La. 203, 204; *Palmer v. Boling*, 8 Cal. 384; *Rutherford v. Greene's Heirs*, 2 Wheat. 196; *Gunn v. Bates*, 6 Cal. 273; *Landes v. Brant*, 10 How. 348; *Strother v. Lucas*, 12 Pet. 436; *Stanford v. Taylor*, 18 How. 421; *Gonsoulin's Heirs v. Brashear*, 5 N. S. La. 33; *New Orleans v. De Armas et al.* 9 Pet. 236; *Polk's Lessee v. Wendell*, 9 Cr. 99; 5 Wheat. 291; *U. S. v. Peralta*, 19 How. 347; *Same v. Clark*, 8 Pet. 436; *Viner's Abr. Tit. Relation*, 290; 2 Cruise on Real Property, 510, 511; 3 Cow. 75; 12 Mo. 145.)

XV. The award or judgment of the Alcalde's Court of So-

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noma, dated August 16, 1847, fixes the line running in an easterly and westerly direction, dividing the two ranchos of Tolenas and Suisun by the Sierra Madre, and is conclusive between the parties. The construction of this award was a question of law, and the Court erred in submitting its consideration to the jury. (*Neilson v. Hanford*, 8 Mees. & W. 806, 823; *Hutchinson v. Bawker*, 5 Id. 535; *Perth Amboy Man. Co. v. Condit*, 1 New Jersey, 659; *Rogers v. Colt*, Id. 704; *Brown v. Hutton*, 9 Iredell, 319; *Wason v. Rowe*, 16 Verm. 525; *Eaton v. Smith*, 20 Pick. 150; *Hitchins v. Groom*, 5 C. B. 515; *Monell v. Frith*, 3 M. & W. 402; *Brown v. Osland*, 36 Me. 376; *Bogg v. Forbes*, 30 Eng. L. & E. 508; *Rupp v. Rupp*, 6 Penn. 45; *Brown v. Brown*, 8 Metcalf, 576, 577; *Armstrong v. Burrows*, 6 Watts, 266; 1 Green. Ev. 378; *Robertson v. French*, 4 East, 135; 2 Parsons on Cont. 13; *Schuylkill Nav. Co. v. Moore*, 2 Wheat. 491; *Maillard v. Lawrence*, 16 How. 261; 1 Green. Ev. 301; *Roman v. Hayward*, 2 Ad. & El. 666; *Crofts v. Marshall*, 7 C. & P. 597.)

The Court below erred in refusing the instructions asked. (See latter part of opinion.)

John Currey, also, for Appellants.

1. The Suisun title for the lands embraced by the survey recited in the patent granted by the United States to Archibald A. Ritchie was, at the commencement of this action, and now is, absolute and paramount; and in virtue thereof a verdict and judgment ought to have been rendered in the case for the plaintiffs against the defendant, for the recovery of the land described in the complaint.

[The Counsel here makes an elaborate argument upon the doctrine of "relation" to show, that the title of Solano is really prior in time to that of Armijo. But it is omitted, because the Court waive any consideration of that question.]

2. Where there was a grant by the Mexican nation to one person, of a given number of leagues of land, embraced within a much larger area described, with a reservation of the excess to the nation for its convenient uses; and subsequently there was a grant made by the same authority to another person of a given number of leagues of land within a larger area described, with a like reservation, embracing in part land within the entire

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area indicated by the first grant, could the junior grantee, or his assigns, either under the laws of Mexico, or of the United States, as successor of Mexico, acquire a title to any of the land within the general descriptions of both grants, paramount to that of the senior grantee?

By the 12th Section of the decree of August 18, 1829, respecting colonization, (Rockwell's Spanish and Mexican Law, 452,) no one person could obtain under that law more than eleven leagues of land; and hence where concessions were made of a definite number of leagues within an area embracing, for convenience of description, a larger territory or district described by prominent or well-defined land marks and water-courses, it became the custom, which was general, if not indispensable, to provide in the concession itself for the segregation, by the officer of the government, of the quantity granted, and that the excess contained within the extended description should remain to the nation, for its convenient uses. And in cases where a specified number of leagues, within a described area of much greater extent, was granted, a segregation of the quantity granted by the officer of the government was of essential necessity, before the grantee could become invested with absolute title to any specific portion of the whole area described. This position follows as an inevitable deduction from the law and the circumstances of the given case, and is equally supported by the opinion of the Court in the case of *Fremont v. U. S.* 17 How. 542, 558-560, 565; see, also, *U. S. v. Fossat*, 20 Id. 426; *Smith v. U. S.* 10 Pet. 334, 335; *Strother v. Lucas*, 12 Id. 435, 436, and cases cited; *Lessieur v. Price*, 12 Id. 60; Id. 75-77; *Kissell v. St. Louis Public Schools*, 18 Id. 21; 17 Id. 413; *Gunn v. Bates*, 6 Cal. 272; 13 Peters, 450; Id. 516; 20 How. 566.

All the right acquired by Armijo by the concession of three leagues made to him, was: "The right to so much land, to be afterwards laid off by official authority, in the territory described." Such is the doctrine of the case of *Fremont v. The United States*, and such is the principle of law maintained in *Rutherford v. Green's Heirs*, and in *Lessieur v. Price*.

There was no evidence that any juridical measurement of any portion of the territory comprehended within the descriptive *deseño* of the Tolenas, was made or approved under Mexican

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authority. As already appears, "under the Mexican Government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form, as would be inconvenient to the adjoining public domain, and impair its value. The right, which the Mexican Government reserved to control this survey, passed with all other public rights to the United States." (17 How. 565; 12 Pet. 435, 436.)

Until such survey and segregation, or laying off, might be made, it cannot be maintained that the government could not make a grant to any other person, of any number of leagues not exceeding the legal maximum quantity, and not exceeding the surplus reserved by the granting authority for the nation's convenient uses. For by the general grant to Armijo, the government did not bind itself to make no other grant within the territory described, until after he had made his survey. (17 How. 558.) If the rule were declared otherwise, Armijo could hold the whole domain contained within the exterior limits of his general grant. He could maintain his action, or defend against the grantees of the former government, or against the patentees of the United States Government, for that portion of his domain in "La parte de Ololate," or at the "Esteros de Julpines," or at the sink of the Ololatos, with the same assurance of success, as at a point nearly at a league's distance below "La Punta de Partida." And that such was the right of Armijo, and those holding under him, the Court below in effect ruled.

The patent granted by the Government of the United States to Ritchie, contains therein the survey and map or plat of the Suisun Rancho, made and approved by the Surveyor-General of the United States, for California, in July, 1855, under, and in pursuance of the Act of Congress, of March 3d, 1851, entitled "An Act to ascertain and settle Private Land Claims in California." (4 Stat. at Large, 632.) By this survey and allotment of four specific square leagues of land of the Suisun, as the segregated land, to which the title granted to Solano attached, the right which the Mexican Government reserved to itself to control the survey and selection, and which with other public rights, passed to the United States, has been exercised; and by

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such survey and allotment the United States Government has performed the obligation which was concomitant of the right acquired to control such survey and segregation, (12 Pet. 435, 436); and thereby the Suisun grant has become completed and perfected by specific boundaries, (17 How. 558); and cannot be impaired by any subsequent survey that may be made of the three leagues granted to Armijo. This view, it is believed, is fully supported by the decision in *Frémont's Case*, (17 How. 558,) and forever puts at rest the question of title, as to the lands comprehended by the survey and segregation made under government authority, of the Rancho of Suisun. (See, also, *West v. Cochran*, 17 How. 408.)

III. The right of the plaintiffs to the possession of the land described in the patent to Ritchie cannot be lawfully resisted in this action.

1. The delivery of juridical possession by an officer of the government was an essential ceremony to perfect the title, as to a definite portion of land under the land system of Mexico, (17 How. 558, and 20 Id. 426); and where such office has not been performed by Mexican authority, the government of the United States, in virtue of its right and duty, will fulfill this obligation to the grantee, who, under the Act of Congress of 1851, may become entitled to its performance. (17 How. 565; 20 Id. 427.)

This duty, as to the Suisun grant, has been performed by competent authority, under our own government. The essential ceremony of perfecting the grant made to Solano, by attaching the title to four particular leagues of land, described by specific boundaries has been completed; and not only are the government and the grantee of the Suisun bound by such selection and segregation, but the grantee of the Tolenas is also concluded thereby. (9 Stat. at Large, 632, Sec. 13; 4 Id. 49, Sec. 6; 17 How. 558, 565; 20 Id. 426; *Reading's Case*, 18 Id. 13; *U. S. v. Larkin*, Id. 561; 17 Id. 413; 19 Id. 80; 18 Id. 412; Id. 25; 4 Id. 456, 460, 461.)

2. The patent itself, with the evidence of the conveyance by Ritchie to Waterman, and the conveyance by Waterman to Bissell, is conclusive of the plaintiff's right to the possession of the land in controversy. The patent in the hands of the patentee,

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is competent evidence of his right to the land therein described, not only as between himself and the United States, but as between himself and any third person or stranger, who fails to establish a superior title in himself from a source of paramount proprietorship. And this is so because the political sovereign authority of the government has ordained the means which, exercised by the judicial and executive power of the government, works out a solemn official instrument, as a muniment of title, importing absolute verity, and which is primary evidence of what it contains. (9 Statutes at Large, 632, Sec. 13; 4 Id. 494, Sec. 6.)

In *Doe v. Eslava*, (9 How. 447,) it was held that a confirmation by Act of Congress was equivalent to a patent — that after such a confirmation, no patent was necessary to confer a perfect legal title. (*Sims v. Irvine*, 3 Dallas, 456, 457.)

Thus, it appears, the confirmation and survey under the Act of March 3, 1851, make perfect titles before then imperfect, and vest in the confirmer an absolute legal estate in the land selected and set apart by government authority; and though a patent may issue, it is merely evidence of title made perfect under the Act of Congress. The title vests without the aid of a patent. The government is concluded by the confirmation and segregation, because Congress has so ordained. (9 Stat. at Large, 632, Secs. 13, 15; see, also, *West v. Cochran*, 17 How. 412-416; *Kissell v. St. Louis Public Schools*, 18 Id. 24-26; *Bryan v. Forsyth*, 19 Id. 337; *Les Bois v. Bramell*, 4 Id. 460-464; *Landes v. Brant*, 10 Id. 371-373; *Lessieur v. Price*, 12 Id. 75-77.)

That the patent, when issued, is competent and conclusive evidence of title to the particular land confirmed and surveyed by authority of the government; and from the time of confirmation and official designation, operates by relation, as from the time of official confirmation and survey, seems fully sustained by many of the authorities already cited, and particularly so by the cases of *Fremont*, and *Fossat*, and *Stark v. Barnes*, 4 Cal. 412; *Jackson v. Bull*, 1 John. Ca. 81; *Heath v. Ross*, 12 John. 140; *Jackson v. Ramsey*, 3 Cow. 79; and *Landes v. Brant*, 10 How. 372, 373 — which last case contains a clear and cogent exposition of the law of the subject matter under immediate consideration;

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the circumstances of which are strikingly analogous to the principal features of the case at bar.

If the grounds here taken are tenable, how stands the objection interposed on behalf of defendant, to the effect —

That the patent issued to Archibald A. Ritchie, after his death, is void, and therefore incompetent as evidence?

It appears, by the record, that Archibald A. Ritchie died July 9, 1856. The survey following final confirmation of the validity of his claim to the extent of four square leagues of land of the "Suisun," was made and finally authenticated by the proper Surveyor-General, in July, 1855. The patent bears date January 17, 1857.

The Appellants insist, that, by a just application of the doctrine of relation, the patent is to be regarded in law, as if it had passed the great seal at the moment the official selection and measurement of the designated four square leagues of land were completed; which was in the lifetime of the confirmer.

At that point of time, every substantive act to be performed on the part of the government, to invest the confirmer with a perfect title to the specifically described four leagues of land mentioned in the grant to Solano, became fully complete; and all that remained to be done thereafter, were duties of a mere ministerial nature. (*Doe v. Eslava*, 9 How. 447, and cases therein cited; *Landes v. Brant*, 10 Id. 371-373; *Landas v. Perkins*, 12 Mo. 254; 14 Johns. 406.)

The *last substantial act* in the case at bar, and that which was necessary to give precision to the title, and attach it to a particular tract of land, and thus render that which before was imperfect, a perfect title, was the segregation and measurement by the proper Surveyor-General, of the quantity specified: The *first substantial act* towards the completion of the Suisun title was the filing of a petition before the Board of Land Commissioners, setting forth the claim of the petitioner, and praying its confirmation. By the authority of *Landes v. Brant*, the patent relates to the first substantial act in the series necessary to be taken in order to perfect the title, which, before then, was imperfect. So in the case at bar, the same reasonable rule would give the patent legal effect and validity by relation, from the filing of the claimant's petition with the Board of Commis-

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sioners. (See also Act Congress, 1836, 5 Stat. at L. 31; Act entitled Estates of Deceased Persons, Secs. 194, 195; Wood's Dig. 410, 411; *Becket v. Selover*, 7 Cal. 238, 239.)

3d. The defendant is not in a position to object to the plaintiff's right to the possession of the land in controversy, because of any title in himself as successor to Armijo; for Armijo never had absolute title to the land, and the defense made is concluded by the patent to Ritchie. (17 How. 558; Id. 413; 20 Id. 426; 18 Id. 25, 179; 9 Id. 356; 10 Johns. 23; 12 Id. 81; 3 Cow. 281.) His interest was only equitable. (12 Pet. 435, 436; 10 Id. 330, 335, 736; 4 Id. 512; 9 Id. 734.)

4th. The imperfect title of Armijo cannot be rendered perfect by any other means than those provided by, and enumerated in, the Act of Congress of 1851. (17 How. 403, 413; 18 Id. 409, 413; Id. 25; 19 Id. 80-82; 12 Id. 76-77; 17 Id. 565; 20 Id. 426; 18 Id. 412.)

Again: To the making of the confirmation, survey, and patent, conclusive against the defendant in this action, it is objected, on his part, that the 15th Section of the Act of March 3, 1851, provides that these shall be conclusive between the United States and the claimant only, and shall not affect the interests of third persons.

We believe, that, notwithstanding the general language of the 15th Section of the Act of 1851, its application should be limited to the interests of those third persons, whose rights of property and title in the particular land, were perfect and absolute at the time of the acquisition of California by the United States: Which interests would, by the law of nations, have been as effectually protected without the provision of said 15th Section, as by it; and that by the law of nations, the rights of property of private persons in California, held under the laws of Mexico, at the time of the treaty of Guadalupe Hidalgo, would have been protected as amply as by the treaty stipulation for that purpose; and also that the 15th Section of the Act of 1851, and the stipulation for the protection of rights of property contained in the treaty, were provisions incorporated, each in its appropriate place, *ex abundanti cautela*, in order that those whose rights of property were beyond the reach of confiscation, might enjoy exemption from the vexatious and harassing litiga-

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tion which would have resulted from the teachings of carping advocates of the omnipotence of government. (*U. S. v. Percheman*, 7 Pet. 87, 88; *U. S. v. Arredondo*, 6 Id. 741; *Strother v. Lucas*, 12 Id. 438, 439, and the cases therein cited; *Ferris v. Coover*, 10 Cal. 619; *Doe v. Eslava*, 9 How. 445, and cases cited; *Strother v. Lucas*, 12 Pet. 438, 439, and cases cited; Act of Congress, May 3d, 1831, 6th Section, as to *Surveyor of Public Land in La.*)

Thompson, Irving & Pate, for Respondent.

Upon the facts, the principal question involved in the case is, whether a patent from the United States, founded upon a confirmed Mexican grant, is paramount to, and can override, a prior Mexican grant for lands held, occupied, and claimed, by the first grantee, by specific boundaries, to the extent specified in the grant in conformity with its terms, and within the exterior limits therein described. The affirmative of this proposition is maintained by the Appellants; while, on the other hand, it is contended by the Respondent, that the prior grant accompanied by possession, with specific boundaries of the quantity of land granted, within the exterior limits described in the grant, conferred upon the grantee an absolute and indefeasible estate in the land so granted and occupied, which could not be divested by any subsequent grant by the Mexican Government, or the United States, who succeeded to the rights of that government, unless the title of the first grantee had been forfeited by due course of law, and such forfeiture duly declared by a tribunal of competent jurisdiction.

We do not pretend to controvert, as a general proposition, the doctrine set out in the first point of the argument contained in the brief of the Appellants, filed by Messrs. Thornton, Williams & Thornton, that the decisions of the Supreme Court of the United States are a rule of decision to the State Courts, on questions involving the interpretation of treaties and the construction of Acts of Congress. But we do deny that the authorities cited, from those decisions growing out of questions arising under the inchoate titles or concessions issued by the Spanish authorities in Louisiana, have any application to the case at bar.

It has been argued that the first patent appropriates the land

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and extinguishes all claims of inferior dignity. But this view is not sustainable. The issuing of a patent is a ministerial act which must be performed according to law. A patent is utterly void and inoperative which is used for land that had been previously patented to another individual. (*Choteau v. Eckhart*, 2 How. 344; *Les Bois v. Bramell*, 4 Id. 449; *Bissell v. Penrose*, 8 Id. 7; *Menard's Heirs v. Massey*, Id. 293; *Mills v. Stoddard*, Id. 345.) The cases of the *U. S. v. Boisdore*, (11 How. 69,) *Glenn v. U. S.* (13 Id. 250,) and *Villemont v. U. S.* (Id. 266,) cited in the case of *Fremont*, and others of a similar character, were all decided upon the same general principle, that there had been no severance of the land claimed from the public domain, and that the right of property still remained in the government.

The radical error on which the whole argument for the Appellants rests consists in the application of principles and rules of decisions, founded upon the laws of Spain and the United States in relation to the granting of the public domain, to grants of land made by the Mexican authorities in California, where the mode of granting and the rules for the segregation of the land granted from the public domain, were entirely different.

The difference between the two classes of cases is so clearly stated in the case of *Fremont v. The U. S.* that we need only refer the Court to the lucid exposition upon that point contained in the opinion of Chief Justice Taney, (17 How. 553-559.)

In support, therefore, of the general proposition laid down in the first part of the argument, as the basis of the Respondent's defense to the action, we shall endeavor to maintain the following points:

1st. That the grant to Armijo, of the 4th of March, 1840, vested in the grantee a present and immediate property in fee to the three leagues of land specified in the grant, within the exterior limits delineated on the map; and that his subsequent occupation and possession of the three leagues, in conformity with the terms of the grant and the provisions of the Mexican law, by metes and bounds, was a segregation of the land from the public domain, by reason of which the general gift became a particular gift, and the grant attached to the specific three leagues so held and occupied.

The first branch of this proposition can scarcely be considered

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an open question. See the decision of the Supreme Court of the United States, in the Fremont case, on this point, and the affirmation of the principle there laid down by this Court in the cases of *Gunn's Adm'r v. Bates*, (6 Cal. 263,) and in *Palmer v. Boling*, (8 Cal. 389); *Ferris v. Coover*, (10 Cal. 589.)

It is contended, however, on the part of the Appellants, that although the grant to Armijo might give him an immediate vested right to the three leagues of land within the exterior limits delineated on the map, yet that right could attach to no particular three leagues until there had been an official survey made by authority of the government, establishing the precise limits of the tract granted. We have already had occasion to call the attention of the Court to the broad distinction laid down by Chief Justice Taney, between cases arising under Spanish grants and the land laws of the United States, in relation to the disposition of the public domain, and those growing out of Mexican grants in California.

But it is contended for the Appellants that because, under the provisions of those Acts, a survey was necessary to complete the title, that being the mode of segregation prescribed by the law, therefore the same mode of segregation was requisite, under the laws of Mexico, in order to perfect the title of a grantee from that government.

The authorities cited have no application. Where the law requires a particular mode of segregation, that mode must be pursued before a severance can take place. But we cannot perceive the application of this, or the numerous other cases to the same effect cited in the briefs of the Appellants, to the case presented by the record. For that purpose it would be necessary first to show that the laws of Mexico in force in California, required a survey before the title could vest, and this they have utterly failed to do.

We hold the rule to be that where there is no locative description in the grant, and no possession or occupation under it, then, and then only, a survey or some equivalent act by authority of the government, was necessary to segregate the land and give precision to the grant. On the other hand, where the grant contains sufficient words of description, to fix the *locus in quo*, and the grantee takes possession and occupies consistently with

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the calls of the grant, such description and occupation operate, *per se*, as a severance of the land from the public domain, and vest in the grantee an absolute and definite title to the land so granted and occupied. (*Smith v. U. S.* 10 Pet. 326; *Lecompte v. U. S.* 11 How. 127, 128; *U. S. v. Clark*, 8 Pet. 466, 467; *U. S. v. Percheman*, 7 Id. 89-93; *U. S. v. Peralta*, 19 How. 345.)

As to the effect of actual occupation and possession under the grant, we say, that an actual entry by the grantee under his grant, prior to the change of government, and continued occupation in accordance with its terms and the requirements of the law, operated as a severance of the land granted from the public domain, and gave full effect to the title. This proposition is fully sustained by the decisions of the Supreme Court of the United States and the Courts of Louisiana, in relation to Spanish concessions, and is likewise in strict conformity with the laws, usages, and customs, of the Mexican Government in force in California, when the grants to Armijo and Solano were made. (*U. S. v. Boisdore et al.* 11 How. 63, 69; Id. 115; *Lafayette v. Blanc*, 3 Ann. La. 60; *Hooter v. Tippet*, 17 La. 109.)

The doctrine here laid down, evidently contemplates three modes by which the land granted could be severed from the public domain.

1st. Where the descriptions in the grant were sufficient to identify the particular tract granted.

2d. Where the party entered under the grant occupied the land, in conformity with its terms; and,

3d. By an official survey, when the description in the grant was vague and indefinite, and there had been no possession under it. As to the first and last mentioned modes of segregation, there would, we presume, be no conflict of opinion between the opposing counsel and ourselves, the second results necessarily from the doctrine laid down in the above cases.

Upon this branch of the subject, therefore, we contend in the second place —

That, under the laws, usages, and customs, in force in California, in reference to the granting of the public domain, and by the terms of the instrument itself, a grant of lands, such as we are considering, gave to the grantee the right to locate and occupy the quantity of land granted within the exterior limits de-

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scribed in the grant, and that such location and occupation, when made in accordance with the calls of the grant, and in conformity to law, was conclusive both on the grantee and the government.

The error of the argument of the Appellant's counsel, on this point, consists in giving to the act of juridical possession the force and effect of a survey, as understood under the laws of Spain and the United States; than this, nothing can be more fallacious.

The approval of a grant by the Departmental Assembly, was a prerequisite to obtaining juridical possession. (See *Espediente in cases of Vaca and Peña*, and the Archives in Surveyor-General's office; *U. S. v. Reading*, 18 How. 7; 10 Cal. 618.)

If, then, the juridical possession could not be given until after the approval, and the failure to obtain the latter did not affect the grantee's right and title to the land, as decided in the *Reading* case, neither would it be at all impaired by his failure to obtain the former. It had resulted from no default of his; he had done all that was incumbent upon him to perfect his title. He had entered upon the land, built a house, which was inhabited by his family, in compliance with the imperative condition of his grant; he had stocked it with cattle, and inclosed and cultivated portions of it. Here his duty ended; and until the Governor obtained from the Assembly the approval of the grant, no juridical possession could be had. The failure, therefore, to obtain the juridical possession, where the grant had not been approved, could no more affect the title than the want of the latter formality. It results, then, from this view of the subject, that unless the possession and occupation of the grantee, in conformity with the terms of his grant, operated a segregation and perfected his title, there could be no severance of the land from the public domain in such cases, which embrace the majority of Mexican grants in California, and the title still remained in the government, a position which is well characterized by the learned Judge above cited, as startling.

As to the effect, under Mexican law, of prior occupation and possession, see cases as to the grant of Richard Berry; *The Heirs of Wm. Fisher v. U. S.* (No. 244, Docket late Land Commission); *Espediente* and Decree in case of Vaca above, to be found in the Archives.

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2d. That the patent from the United States to Archibald A. Ritchie, of the 17th January, 1857, operated only as a quitclaim or relinquishment of title on the part of the government, and did not affect the rights of third parties; and that, so far as it conflicts with the vested rights of Armijo, and those claiming under him, by virtue of his grant of the 4th of March, 1840, the same is void and of no effect. (See Act of Congress, 3d March, 1851, for settlement of Land Claims in California, Sec. 15, 9 U. S. Statute, 631; Debate in U. S. Senate on the same, Cong. Globe, Second Session, 31st Congress, Vol. 18, pp. 428, 429; Act of 3d March, 1831, to create office of Surveyor-General for State of Louisiana, Sec. 6, 4th Stat. 494; *Marsh v. Brooks et als.* 8 How. 223; *Barry v. Gamble*, 8 Miss. 87; *De la Housaye v. Saunders*, 4 Lou. 445; *Broussard v. Gonsoulin*, 12 Rob. Lou. 1-8; *Jewell v. Porche*, 2 Lou. 146; *Polk's Lessee v. Wendell*, 9 Cranch, 99; 5 Wheat. 293; *Stoddard v. Chambers*, 2 How. 284; *Choteau v. Eckhart*, Id. 375; *Les Bois v. Bramell*, 4 Id. 449; *Bryant v. Forsyth*, 19 Id. 334; *Bissell v. Penrose*, Id. 317.)

There seems to be an idea pervading the argument of the opposite counsel, though not distinctly avowed, that a peculiar efficacy attaches to a patent from the United States which does not belong to other conveyances. They say: "That nothing but a patent will pass a consummate title, unless in case of a grant in fee by Act of Congress, or a grant of a specific parcel of land." Now, this might all be true under the rules prescribed by law for the granting and conveying of lands in the United States, but a very different system may have obtained in Mexico; and if a party could show that, according to the Mexican law, he had obtained a perfect title to lands, although it was by neither of the modes enumerated above, yet we apprehend that under the provisions of the treaty of cession, the United States and the tribunals of the country would be bound to respect it to the same extent as if he had obtained a patent from the United States. In our view, a patent from the United States is entitled to no more dignity or consideration, in a legal point of view, than any other instrument for the conveyance of real estate; and its effect must be tested, and its language construed by the same rules which apply to other deeds. This is clearly illustrated in many of the cases cited above. (*Stoddard v. Chambers*, *Bissell v. Pen-*

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rose, Marsh v. Brooks, Choteau v. Eckhart; 6 Cal. 263; 8 Id. 384; 10 Id. 589.)

4th. Where adjoining landholders agree upon a dividing line between their respective tracts, such an agreement is conclusive between the parties and their privies; and the admissions of the party making such agreements, made while owner of the premises, long continued occupation up to the agreed line, and long acquiescence by the parties in such line, are evidence from which such an agreement may be presumed. (*Thacker v. Gardner*, 7 Met. 484; *Wray v. Berry*, 9 N. Hamp. 473; *Houston v. Matthews*, 1 Yerg. 116; *Wilson v. Hudson*, 8 Id. 398; *Dibble v. Rogers*, 13 Wend. 467; *Adams v. Rockwell*, 16 Id. 285; *McCormick v. Barnum*, 10 Id. 105.)

[In this connection counsel discussed the effect of the award.]

Again: The patent to Ritchie is void, because issued after his death. (Act Cong. 5 U. S. Stat. 31.)

FIELD, J. delivered the opinion of the Court — TERRY, C. J. and BALDWIN, J. concurring.

This is an action of ejectment, for the recovery of a tract of land situated in the valley of Suisun, in the county of Solano. Both parties claim title under grants of the Mexican Governor of California, Juan B. Alvarado—the plaintiff under a grant issued to the Indian Chief, Francisco Solano, on the twenty-first of January, 1842, and the defendant under a grant issued to José Francisco Armijo, on the fourth of March, 1840. The grant to Solano is of land known by the name of Suisun, and covers four square leagues, within exterior limits embracing about eight leagues. The grant to Armijo is of land known as Tolenas, and covers three leagues, within limits embracing from twelve to twenty leagues. The maps referred to in both grants cover the land in controversy. The grant to Solano was presented to the Board of Land Commissioners for confirmation by Archibald A. Ritchie, who had become, by purchase, interested in the land granted; and the same was confirmed to him by the Board in January, 1853, and subsequently by the United States District Court, in November, 1853, and the decree of confirmation was affirmed on appeal by the Supreme Court of the United States, at its December Term, 1854. In July of the following

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year (1855) the four leagues specified in the grant were laid off and surveyed, under the directions of the Surveyor-General of the United States for California, and the survey was approved and authenticated by that officer. In conformity with this survey, a patent on behalf of the United States was issued to Ritchie, bearing date on the seventeenth of January, 1857, for four leagues of land, with the specific description of the official survey. This patent covers the land in suit. The grant to Armijo was likewise presented to the Board of Land Commissioners, and was rejected. On appeal to the District Court of the United States, the decision of the Board was reversed, and the claim under the grant confirmed. From the decision of the District Court the case is now pending, on appeal, in the Supreme Court of the United States.

Both grantees resided within the limits of their respective grants, and it is insisted by the counsel of the defendant that the evidence establishes the fact that Armijo occupied and claimed three leagues of his tract, marked by metes and bounds, and that such occupation and claim operated as a segregation of that specific quantity, and the grantee's right thereto could not be impaired by the subsequent grant to Solano, and the patent thereon to Ritchie.

We shall pass over any consideration of the question as to the application of the doctrine of relation, in virtue of which the plaintiffs contend that the grant to Solano, though subsequent in date to that to Armijo, relates back to the provisional decree of Vallejo, made in January, 1837, as immaterial to the determination of the case. We shall assume, also, for the purposes of the appeal, that Armijo occupied and claimed from the entire quantity comprehended within the map referred to in his grant, three specific leagues, and that these covered the land for the recovery of which the present suit is brought. We propose to place our decision upon grounds which will settle the controversy in the present case, and serve as a rule in controversies of a similar character; and for that purpose we shall disregard the minor points presented by the record, and confine ourselves principally to the questions which properly and necessarily arise from the claim asserted by the defendant, that the occupation and possession by Armijo, under his grant of three leagues, by designated

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metes and bounds, was a location of that specific quantity within the exterior limits described in the grant, effectuating its segregation from the public domain, and attaching thereto the grant, and making the title of the grantee perfect against even a subsequent patent of the United States. These questions relate to the nature of the titles conferred by the grants; to the authority by which location can be given to the specific quantity granted where that is less than the quantity contained within the exterior limits of the grants; to the effect of a patent of the United States in such cases, and who constitute the third persons mentioned in the 15th Section of the Act of Congress of March 3d, 1851, against whom the confirmation and patent are not conclusive.

The grants to Solano and Armijo both purport to convey the land designated therein—limiting its extent in the first case to four, in the other to three, leagues. Both are subject to similar conditions, with the exception of one peculiar to the grant to Armijo, against the molestation of the Indians there located and his immediate neighbors. Both provide for the free and exclusive enjoyment of the land by the grantees, and for such use and cultivation of it as they may think proper. Both require juridical possession to be given by a public officer of the vicinity, by whom the boundaries are to be designated. Both reserve any surplus over the quantity specified to the uses of the nation. Both are made liable to denouncement for failure to comply with their conditions, and both are subject to the approval of the Departmental Assembly. The grant to Solano received such approval—the one to Armijo did not; but this fact does not impair the title which passed to the latter. The effect of the approval was only to discharge the grant to Solano from liability to defeasance by the Mexican Government, except for breach of its conditions subsequent. Both of the grantees acquired rights of property, which were not impaired at the date of the treaty of Guadalupe Hidalgo, and were protected by the guaranties of that instrument, and there is no law which authorized a forfeiture for any act or omission since. (Opinion of U. S. Supreme Court in the Sutter Case.)

The grants in question are similar in the title they convey to the one issued to Sutter, which was the subject of consideration in

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the case of *Ferris v. Coover*, (10 Cal. 589,) and, like that, passed an estate in the land embraced within their exterior boundaries, to the extent of the specified quantity, to be subsequently laid off by the government. They were issued in pursuance of the laws and regulations of Mexico for the colonization of the territories, the object of which was the settlement of the vacant lands of the Republic; and for that purpose were made subject to the usual condition in such cases, of cultivation and occupancy. The first condition in the grant to Solano provides for his inclosure of the land with a reservation of the crossings, roads, and servitudes, and for his free and exclusive enjoyment of the same, with such use and cultivation as he may think proper, and requires the construction of a house and its inhabitation within one year. Its language is:

“That he may inclose it without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively; making such use and cultivation of it as he may see fit, but within one year he shall build a house, and it shall be inhabited.” The second condition in the grant to Armijo is substantially the same; so were the second condition in the grant to Alvarado, (*Fremont v. United States*, 17 How. 545); the third condition in the grant to Reading, (*United States v. Reading*, 18 How. 2); and the first condition in the grant to Jimeno, (*United States v. Larkin*, 18 How. 559). Indeed, the same condition, substantially, was contained in all the colonization grants issued to individuals by the Mexican Government of California. Whilst it required the construction of a house, it conferred a right of entry upon the land, without which the requirement would have been incapable of fulfillment. Whilst it enforced the inhabitation of the house when constructed, it gave a right to the possession, use, and enjoyment, of the land, without which the inhabitation would have been of little benefit to the grantee, and the policy of the government in the settlement of the country would have been entirely frustrated.

But though the grants passed a right of possession to the land, they conferred only a vested interest in the specific quantity designated, to be afterwards measured and laid off by the officers of the government. The conditions required a juridical possession to be given by the magistrate of the vicinage, who was to

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cause a survey of the specific quantity granted, to be made in accordance with the provisions of the law, the surplus being reserved for the use of the nation. The juridical possession was to accompany the official survey, and in this way alone could a segregation of the given quantity take place under the Mexican authorities, from the public domain. The officers by whom, and the manner in which, the measurement was to be made, were distinctly designated by the law. The grantee could not, for himself, make the segregation. "No person," said the Mexican law, "though his grant be older than others, can take possession for himself, or measure, or set limits, to his landed property, (*propriedades territoriales*.) unless it be done by judicial authority, with the citation of all those who bound upon him, (*colindantes*.) for whatever is done contrary to this will be null, of no validity or effect." (*Ordinanzas de Tierras and Aguas by Galvan*, edition of 1855.) As the grantee could not locate his land by his own survey, it would seem a necessary conclusion that he could not do so by mere occupation, and the assertion of a claim to any particular place.

The right to make the measurement and to give the juridical possession remained with the government, and could only be exercised by its officers. That right, like all other public rights, passed, with the transfer of the territory, to the government of the United States, and is now to be exercised in accordance with its laws. The estate, which vested in the grantees upon the execution of the grants, remains unaffected by the change of government; but the survey and measurement are to be made — not in accordance with the laws of the old government, which were abrogated with its authority, but in accordance with the policy and laws of the new government. The right to survey and segregate the specific number of leagues granted to Solano and Armijo, respectively, under the legislation of Congress, belongs to the Executive Department, and cannot be exercised by the Courts of Justice. The Courts can ascertain and fix the position of boundaries which are designated, but they cannot give boundaries to a specific quantity which has none and lies in a larger tract. To give precision and location to such specific quantity a survey by the department is essential. The authorities to this effect are numerous and decisive. In *Stanford v. Taylor*, (18

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How. 409,) the plaintiff claimed title to the land in dispute under a Spanish concession of 1785, which was confirmed in 1811, and a survey ordered conformably to the possession. The concession described the land as lying along the River Des Peres, from the north to the south, and as bounded on one side by the lands of Louis Robert, and on the other by the domain of the King. The survey was not executed until 1834, when the Surveyor ordered the land to be located *west* of Robert's tract. The plaintiff insisted that the land granted and confirmed adjoined Robert's tract on the east, and that the location was so plainly apparent on the face of the concession as not to require a survey, and offered evidence to show that the possession of the confirmee was part of a tract of land east of Robert's tract and adjoining it, and, if located there, would include the premises in controversy. The Court rejected the evidence, and allowed the defendant to introduce the official survey, and excluded evidence offered by the plaintiff to show that this was improperly made west of Robert's tract instead of east of it, and instructed the jury that, as the parties agreed that the official survey of the confirmation under which the plaintiff claimed did not include the premises in suit, they ought to find for the defendant. In considering the exceptions taken to the ruling and instructions, Catron, J. in delivering the opinion of the Court, said: "The law is settled, that where there is a specific tract of land confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment. The case of *Bissell v. Penrose*, (8 How. 317,) lays down the true rule.

"But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land; nor has a Court of Justice any authority in law to ascertain and establish its boundaries, this being reserved to the Executive Department. The case of *West v. Cochran*, (17 How. 403,) need only be referred to as settling this point. And the question here is, whether the concession to Perry (the confirmee) is indefinite and vague, and subject to be located at different places." And, after considering the description, the Court concluded that the uncertainty of the outboundary was

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In *Ledoux v. Black*, (18 How. 475,) the Court, in speaking of too manifest to require discussion to show that a public survey was necessary to attach the concession to any land.

the Act of Congress of 1820, confirming the plaintiff's claim, held that the Act did not tend to locate the claim and sever the land from the public domain, and that that could only be done by a public survey.

In *Willot v. Sanford*, (19 How. 81,) the defendants derived title under one Disonet, whose claim was confirmed by Act of Congress, in 1816. The land was surveyed in 1817, by authority of the United States, and a patent was issued in 1850. There was a conflict between this survey and the survey of the claim upon which the plaintiff relied. The Circuit Court instructed the jury that the survey and patent under which the defendant claimed were not conclusive evidence that the land they embraced was correctly located and surveyed according to the confirmation; and if they believed that the land sued for was not within the confirmation of the legal representatives of Disonet, although it might be within the survey and patent, then the survey and patent would not protect the defendants; but the Supreme Court held that Courts of Justice had no authority to disregard surveys and patents when dealing with them in actions of ejectment, and reversed the judgment of the Court below. (See, also, *Bissell v. Penrose*, 8 How. 317; *West v. Cochran*, 17 Id. 413; *Cooper v. Roberts*, 18 Id. 178; *Bryan v. Forsyth*, 19 Id. 334; *Bal-ance v. Papin*, 19 Id. 343.)

The matter of surveys of floating grants belongs, then, to the Executive Department of government, under the legislation of Congress on the subject of public lands. With such surveys the Courts of Justice have nothing to do. Whether in justice to the claimants the location should have been different from the official survey is none of their concern. That belongs to a department of government whose action is not subject to review by the Judiciary. The Courts, it is true, must determine whether prior rights of third parties have been interfered with by such survey and the patent following thereon, but they cannot correct the survey or patent and locate the land where, in their opinion, it ought originally to have been made.

The case of *Fremont v. The United States*, (17 How. 542,) is in

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point, as to the estate which passed under the grants of Solano and Armijo, and the authority by which precision and location are to be given to the specific quantity granted. In that case, the grant to Alvarado was for ten leagues, within a tract of much greater extent, and the Court held that as between the government and the grantee, the latter had a vested interest in the quantity of land mentioned in the grant. "The right to so much land," said the Chief Justice, in delivering the opinion, "to be afterwards laid off, by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it." And in illustration of the principle asserted, the Court cited the case of *Rutherford v. Greene's Heirs*, reported in 2 Wheat. 196, which arose upon an Act of the State of North Carolina, of 1782, providing that twenty-five thousand acres of land should be allotted to General Greene and his heirs, within a tract reserved for the use of the army, to be laid off by Commissioners appointed therefor. The Commissioners, in pursuance of the Act, allotted the twenty-five thousand acres, and caused the tract to be surveyed and returned to the proper office, and the question upon which the case turned, related to the validity of the title of General Greene and the date at which it was commenced. The Court held the general gift of twenty-five thousand acres, lying in the territory reserved, became, by the survey, a particular gift of that quantity within the survey, and concluded a full examination of the title by saying that it was the clear and unanimous opinion of the Court, "that the Act of 1782 vested a title in General Greene to twenty-five thousand acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that Act, and returned March 3, 1783, gave precision to that title, and attached it to the land surveyed."

The Court, in the Fremont case, observes, in reference to this case of *Rutherford v. Greene's Heirs*, that "it recognizes as a general principle of justice and municipal law, that such a grant, for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee a present and immediate interest. In the language of the Court, the general gift becomes a particular gift, when the

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survey is made; and when this doctrine has been asserted in this Court, upon the general principles which Courts of Justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican Government, where a controversy arises between the United States and the Mexican grantee." And, as to the authority by which the survey was to be made, the Court holds this language: "Under the Mexican Government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form as would be inconvenient to the adjoining public domain, and impair its value. *The right which the Mexican Government reserved to control this survey passed, with all other public rights, to the United States*, and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract."

The authorities cited are conclusive of the questions we have been considering. Following them, we must hold that the grants to Solano and Armijo, passed a present and immediate interest in the quantity of land specifically designated in their respective grants, to be afterwards surveyed and laid off within the exterior limits of the general tracts by the government; that such survey could only be made under the former government, by its officers, and could not be made by the grantees themselves; that the right of survey passed, with other public rights, to the government of the United States, and is to be exercised in pursuance of its policy, and in conformity with its laws; that by its legislation, the subject of surveys is intrusted to the Executive Department; that the location of confirmed grants, when the quantity granted is without specific boundaries, lying within a larger tract, rests exclusively with such department, and cannot be reviewed or corrected by the Judiciary, but is binding and conclusive upon it in actions of ejectment, except only, when the patent issued thereon conflicts with prior rights of third parties, and then its inconclusiveness is maintained only so far as may be necessary for the protection of such prior rights.

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The learned counsel for the defendant has presented with great force the injustice which may follow from holding that the government can compel a grantee to abandon that part of the tract embraced in the exterior limits of his grant, upon which he has settled and made his improvements, and to take some other part; but his observations should be addressed to the officers of government, under whose supervision and control the survey and location are placed. To their sense of justice the appeal is to be made, and with them the observation would be entitled to the highest consideration. The Courts of the country possess no authority to act upon them. The right to measure and set apart the specific quantity was not left to the grantee, as we have observed, under the Mexican Government, nor is it permitted under our own. Occupation and cultivation could have no greater effect than a private survey. They were without binding effect upon the former government, and are equally inoperative under the new. In *Smith v. The United States*, (10 Peters, 335,) the Court said: "The laws of the United States give no authority to an individual to survey his grant or claim to lands; he may mark lines to designate the extent and bounds of his claim, but he can acquire no rights thereby. The only effect which we can give to this private survey is to consider it as a selection by the petitioner of that piece of land, as a part of what he was entitled to locate, in virtue of his general grant."

In *United States v. Hanson*, (16 Peters, 199,) a private survey was considered and rejected, as being of no force or validity. In *United States v. King*, (3 How. 785,) the Court rejected a survey made by the officer of the government after his authority had ceased. In *Les Bois v. Bramell*, (4 How. 457,) in speaking of a survey of one Mackay, the Court said it "was a private one, made at the instance of the inhabitants of St. Louis, and was not binding on the rights of any one;" and in *Mackay v. Dillon*, (4 How. 447,) of the same survey: "It was in its nature a private survey, not binding on the United States." In *Glenn v. The United States*, (13 How. 256,) in referring to surveys offered in evidence, the Court said: "The surveys produced to us are private ones, and of no value in support of the claim."

The location of the specific quantity may be made by a survey of such quantity, or by grants with specific boundaries of such

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parts of the general tract as will reduce it to such specific quantity. Either course will operate to give precision to the claim of the grantee. So long as there remains within the general tract sufficient land to satisfy the quantity specified in his grant, the grantee is without remedy. To this effect the language of Mr. Chief Justice Taney, in the Fremont case. "It is true," he says, "that if any other person within the limits where the quantity granted to Alvarado was to be located, had afterwards obtained a grant from the government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee would not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the government, the title of the party who had obtained a grant for the specific land, would be the superior and better one; for by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described, until after he had made his survey." (17 How. 558.)

To the same effect is the language of the Supreme Court of Louisiana, in *Lott v. Prudhomme*, (3 Rob. 293,) cited in the opinion rendered in *Ledoux v. Black*, by the Supreme Court of the United States. "We then held," referring to the previous adjudication, "that when the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or such confirmation is only the recognition of a pre-existing right or claim, and before the survey and location the government sells a part of the land *not necessarily embraced within the tract confirmed*, the title of the purchaser will prevail."

This view disposes of the questions raised upon the award between Vallejo, the vendor of Ritchie, and Armijo, made in August, 1847. We are of opinion that the correct construction of the award makes the ridge and not the stream the dividing line between the two claims; but if we admit, for the purposes of the argument, that Suisun Creek was intended by the parties, it is difficult to perceive how this fact can avail the defense. Until the action of the government, whilst the claimants rested only on their grants, the award would have been conclusive in any controversies between them. But the government having wisely, or otherwise, issued a patent to Ritchie of a portion of the land

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included in the general tract designated in the grant to Armijo, (assuming this to be the fact—and we do so only for the argument,) it does not lie in the mouth of the latter to complain, there still remaining of such general tract more than sufficient to satisfy the specific quantity granted to him. The award could not bind the government, or control the effect of its patent. It was at most only effective as to the lines of the exterior limits of the general tracts claimed by the grantees. If the patentee accepted the land described in his patent as answering his claim, it is not perceived how any other persons can complain, even if a portion of the land thus taken was without the boundaries of his original claim.

The limitation of quantity was a controlling condition of the grants in question, and the delivery of juridical possession was an essential ceremony, under the government of Mexico, to perfect the title of the grantees to the specific quantity designated. This was expressly held in the case of *The United States v. Foshat*, (20 How. 426.) Until such possession, which was accompanied by a survey, the title of the parties attached to no definite portion of the tract. There is no evidence in the record that such juridical possession was given under the former government to either Solano or Armijo, although in the opinion of the Supreme Court of the United States, in the *United States v. Ritchie*, (17 How. 537,) it is said that the grantee, Solano, was put in juridical possession in conformity with the conditions of his grant. If this were the fact, it does not appear in the transcript before us, and the rights of the parties are treated as though no such fact existed. The right, then, which the Mexican Government reserved to itself to control the location, having passed to the government of the United States, the duty to exercise such right devolved upon the latter. This duty was discharged by the survey following the final confirmation, and from that time the title of the parties claiming under Solano became perfect. On the other hand, the title under the grant to Armijo, did not attach to any three specific leagues; it constituted only an interest in such quantity, to be afterwards laid off by competent authority. Such general interest—not attached to the land in controversy, but, by the action of the officers of government, excluded from it—cannot be set up as a defense to the claim of

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the plaintiffs. The patent is conclusive evidence of the right of the patentee to the land described therein — not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship. The patent was not necessary to invest Ritchie with the title, as his title existed at the cession of the territory, and the only act to render it perfect to a defined and particular tract, was an official segregation. The title was recognized by the decree of final confirmation, and the approved survey attached it to the specific land. The essential and substantive acts under the law of 1851, were the confirmation and survey. The patent in such cases is only evidence of the pre-existing title made perfect by these acts. Upon the original grant, final confirmation, and approved survey, the plaintiffs might have relied, without reference to the patent. The survey following the final confirmation was made and approved in July, 1855. Ritchie died in July, 1856, and the patent bears date in January, 1857. At the date of the survey every substantive act required for the vesting of a perfect title had been performed. The subsequent issuance of the patent only involved duties of a mere ministerial character, and by a just application of the doctrine of relation, the patent must be regarded as if it had received the signature of the President at the completion of the segregation of the four leagues. In *Landes v. Brant*, (10 How. 370,) the Supreme Court of the United States held that a confirmation made in 1811, and a patent issued in 1845, related to the first act necessary to complete the title, that of filing the claim in 1805, and that intermediate conveyances made by the confirmee, or by the Sheriff in his behalf, of a day after the first substantial act, were covered by the legal title, and passed that title to the alienee. In that case Clamorgan, the patentee, had died in 1814, and the Court held that according to the common law the patent was void for want of a grantee, but that this defect was obviated by the Act of Congress of May 20, 1836, declaring: "That in all cases where patents for public lands have been, or may hereafter be issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall inure to, and become vested in, the

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heirs, devisees, or assigns, of such deceased patentee, as if the patent had issued to the deceased person during life." This law, the defendants contend, does not aid the patent to Ritchie, as the patent is not for public lands. It may be true that the land embraced in the patent is not in the strict meaning of the term public, but we think it was the intention of the Act to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though an interest in the same was also held by the patentee himself. The United States possessed the right to make the location of the four leagues in any part of the general tract they thought proper. By their act the identical land patented might have been reserved as a part of the public domain—and there was, therefore, such a public interest possessed in the land as to include the latter within the spirit of the Act of Congress in question. We think the objection untenable, and that whatever rights could have passed to Ritchie by the patent, had he been living at the date of its issuance, inured to, and became vested in, his heirs or assigns, represented by the plaintiffs in this action.

The third persons against whose interests by the 15th Section of the Act of 1851, the final confirmation and patent are not conclusive, are those whose title is at the time such as to enable them to resist successfully, any action of the government in respect to it. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute such third persons, nor do parties who hold claims only upon the bounty of the government, nor do intruders, nor even settlers, having certificates of sale, unless the same ante-date the presentation of the claim of the patentee to the Board of Land Commissioners for California, to which period the patent takes effect by relation. The interests of the third persons, intended by the Act, would have been as effectually protected without its provisions, as they are now by them. The section in question is only a legislative recognition of a principle of law and justice, applicable to all grants.

From the conclusions to which we have arrived, after the most mature consideration, it is clear that the plaintiffs were entitled to recover upon the facts conceded by the record, and

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that the first, third, sixth, seventh, eighth and ninth, instructions, requested by the plaintiffs, were proper, and should have been given, and the Court below erred in refusing them. The instructions requested and refused, are as follows: 1. That, if the jury believe, from the evidence, that the Suisun and Tolenas grants embrace, within their exterior boundaries, a much larger quantity of land than called for by both said grants, and that neither of said grants was located or segregated under the Mexican Government, and that the Suisun grant has, under the United States Government, been finally surveyed, and located, and patented; but that the Tolenas grant has not been finally confirmed and located by an officer, or under the authority of the United States; that, in such case, the location and patent of the Suisun Rancho, made and granted by the United States, must prevail in this action, and a verdict should be rendered in accordance with this instruction.

3. "The location of land granted by the Mexican nation, in pursuance of the colonization law of Mexico of 1824, and the regulations of 1828, belonged to, and was to be made by, such government; and whenever such location was not made under the Mexican Government, the right to make it passed to the United States, under the treaty of Guadalupe Hidalgo."

6. "That in an action of ejectment by the person or persons entitled under a patent of the United States, against one in possession of any portion of such land, adverse to such patent, and the title whereon the same is predicated, and claiming to hold under a Mexican grant *which was not surveyed or located by metes and bounds, or juridical possession under the Mexican Government*, the defendant so claiming to hold adversely, as above mentioned, cannot interpose such unlocated grant, as a title paramount for the land described in said patent."

7. "That the patent in evidence by plaintiffs is conclusive as against the defendant, unless there is evidence that the defendant has a title superior to the title by said patent to the land in controversy, under a confirmed Spanish or Mexican grant, located under the Mexican Government, or under the United States Government."

8. "That if the jury believe, from the evidence, that the Suisun grant and Tolenas grant lie contiguous to and adjoining

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each other, and that there is embraced within the *deseño* of the Tolenas grant and the land therein described, a quantity of land outside of the land described in the patent of the United States to Archibald A. Ritchie, *greatly exceeding three leagues of land*; that, in such case, the said Tolenas grant cannot be interposed and set up as a defense by defendant, without evidence of a specific location of three leagues granted to Armijo, by authority of the government of Mexico or of the United States; and showing that such last mentioned location embraces the land in controversy."

9. "The grant to Armijo does not invest him, or those claiming under him, with a title to any specific three leagues of land. If it is a grant of three leagues within a much larger area, then it is, in legal effect, a grant of land uncertain in its location, to be afterwards surveyed off to him by the government; and *until* such a survey on the part of the government, designating the three leagues of land granted to Armijo, he, or those claiming under him, have no right or interest *which can be alleged in resistance to the right vested in Ritchie, or those claiming under him, by the patent to Ritchie*, and this is true, although the land in controversy in this action is embraced within the exterior limits of the larger area, within which the three leagues granted to Armijo are to be located."

It is unnecessary to consider any other of the instructions given or refused, or points made by the Appellants. The judgment must be reversed, and the cause remanded for a new trial.

Ordered accordingly.

PARKS v. ALTA CALIFORNIA TELEGRAPH COMPANY.

TELEGRAPH companies in contemplation of law, are common carriers, and are subject to the rules of law governing the same.

Where A contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due him from a third party, by attachment, and this service is so negligently performed that other creditors of the common debtor obtain the first attachment, and exhaust the assets of the debtor—which would not have been the case had the Telegraph Company performed its contract within a reasonable time, the company is liable not only for the cost of the dispatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract.

APPEAL from the Sixth Judicial District.

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The Court below held that a telegraph company was not a common carrier; was not in any sense an insurer; that a message had not any market value; and that the measure of damages was limited to the cost of the dispatch, which being two dollars and fifty cents, judgment therefore was rendered. Plaintiff moved for a new trial, which being denied, this appeal was taken in his behalf.

George Cadwalader, for Appellant.

1. The telegraph is a public vehicle; a common carrier; whose value consists in its accuracy and dispatch, which, to be preserved, must be guarded by the strict rules defining the liability of common carriers.

2. No exemption from such liability can be claimed upon the ground that the motive power is a subtle, and often uncontrollable, agent.

3. Debts have all the characteristics of property; and the negligence of the defendant destroyed the value of the debt, owing to the plaintiff.

4. The measure of damages is the cost of the dispatch and the amount of the debt. (5 N. H. 357; 14 Peters, 99; 1 Starkie, 410; 19 Johnson, 381; 9 Bing. 68; 6 Id. 212; 17 Ala. 689; 7 Hill, 61; 13 How. U. S. 307; 18 Vt. 620; 10 Cal. 239; 7 Cush. 522; 8 Pick. 356; 9 Wend. 325; 8 Exchequer, 401; 10 Id. 401; 4 Id. 388; 20 Wend. 327; 24 Penn. 114.)

H. H. Hartley, for Respondent.

1. The rules of law governing common carriers, do not apply to telegraph companies. They are not insurers because a message is without value.

2. The legal measure of damages is the price paid for the dispatch. The loss of the debt is too remote, and the maxim is *causa proxima non remota spectatur*. (*Coggs v. Bernard*, 2 Lord Raym. 909; 2 Kent, 558; 1 Pick. 50; Sedg. on Damages, 112; 5 Hill, 472; 15 Pick. 297; 1 Iowa, 406; 1 Lord Raym. 546; 3 Denio, 406; 17 Mass. 168; 21 Wend. 342.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

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On the 7th day of October, 1856, about 7 o'clock, P. M. the defendant contracted with the plaintiff, at Mokelumne Hill, for the immediate dispatch of a message to the city of Stockton. The dispatch was directed to the agent of the plaintiff, in these words: "Due, 1,800; attach if you can find property; will send note by to-morrow's stage." This was in answer to a dispatch by the same line received that morning from plaintiff's agent, informing the plaintiff of the failure of a firm of Gillingham & Co. and inquiring the amount due from them to him. An accident prevented the sending of the message, of which the plaintiff was not informed until 9 o'clock, A. M. of the next day. The dispatch was forwarded the next day, which reached the agent at about 12 P. M. but the writ was not delivered to the Sheriff until 6 P. M. At that time, other attachments had been issued at the suit of other creditors, and the property of the defendants all seized under these subsequent attachments, so that nothing was made by the plaintiff's writ. The firm are now insolvent, and the plaintiff claims that he has lost his debt by failure of defendant to transmit this message.

It is found that this failure to send the message was by the gross neglect of the defendant's agent.

Some evidence was offered tending to show that the debt of plaintiff would have been made if the transmission had been made in time, or if the defendant's agent had informed the plaintiff that the defendant could not send the dispatch, that the plaintiff would have gone that night to Stockton, and been in the city early the next morning, in time to have taken proceedings before the other creditors sued and levied.

The rules of law which govern the liability of Telegraph Companies are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract in one case or the other, is, or may be, attended with

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the same consequences; and the obligation to perform the stipulated duty, is the same in both cases. The importance of the discharge of it in both respects, is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules. Nor do we perceive the difficulty experienced by the learned Judge, below, either in estimating the damages or ascertaining the cause of them. The process of ascertainment is the same in this as in other cases of carriers. The breach of the contract entitled the plaintiff to nominal damages, if no real damages were shown. The question of real or special damages, was a question of fact, and this question is dependent upon certain considerations, which, probably, in this case could have been better left to a jury under appropriate instructions, then decided by the Court. For example, the plaintiff had a right to have his message sent according to contract. To ascertain the damages sustained by the breach of this contract these inquiries are pertinent: if the message had been sent, was the plaintiff's agent in Stockton, at the time? and would he have received it? next, would he have then taken out an attachment on the debt? at what time could he have done this? could he have given security? could he have procured Attorneys to issue the writ? at what hour could, and would, it have been put in the hands of the Sheriff? was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at eight o'clock on the seventh, the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had, the Sheriff is to be presumed willing to do his duty; if he did not, he would be liable to the plaintiff; and thereby the plaintiff's debt would be secured.

We see no greater difficulty in this case than in a large class of cases upon which Courts have frequently adjudicated. Take the case of an Attorney: A note is placed in his hands for collection; he fails to sue; other creditors sue on claims placed later in the hands of other Attorneys; these last get judgments, and exhaust the property of the common debtor. Upon showing that the claim was just; that the Attorney failed to sue; that other creditors sued and obtained judgment on suits commenced

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later than the time the Attorney might and ought to have sued, the Attorney is held liable. It is true that it might be argued that all the intermediate persons might or might not have neglected their duties; but it is not to be presumed. On the contrary, the presumption of law is, that persons intrusted with specific duties will perform them; or if there is no presumption on the subject, the question whether they would, if the defendant had done its duty, becomes a question of proof for a jury or for the Court.

Suppose a man, on the eve of the expiration of a policy of insurance on his house, telegraphs to his agent to renew the policy immediately, the agent having the funds and the authority of the principal, and the telegraph company neglects to forward the message, and the house is burned a few days afterwards, could the company defend upon the ground that it could not be known whether the agent would have insured or not? Or, suppose that A bargains for a telegraphic dispatch to his agent to protest a bill of exchange, could the company, if it neglected to send it, set up that the damages were too remote, for it could not be known whether the agent would have taken the bill to the Notary, or the Notary have protested, or given the notice; or whether, if the notice were given, the indorser could have been compelled to pay? Would not the contract, the fact of the bill being due, the agent in the place, the Notary at hand, the apparent solvency of the indorser, be enough to charge the company? At all events, would not the plaintiff be allowed to prove that these things would have been done by the testimony of those who know or have opportunities of knowing the facts, in order to make out his case against the company? It seems to us that the loss of the debt would be the natural and proximate damages resulting from this breach of contract; and so in this case, the plaintiff had a debt on Gillingham & Co.; he wished to get out an attachment; he contracted with the defendant for the conveyance of a telegraphic message to his agent to take out an attachment; in the usual course of things, if the message had been delivered, the agent would have received it on the evening of the seventh; the papers could, with the most ordinary diligence, have been made out, and the writ issued early on the morning of the eighth; placed in the

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Sheriff's hands shortly afterwards, the plaintiff's writ would have been entitled to precedence over most of these attachments; there was enough property, as seems to be admitted, to secure the debt. If the facts warrant these conclusions, the plaintiff, we think, was entitled to judgment.

As, however, the Court below has not found these facts directly and distinctly, we think it better to remand this cause, that a full investigation may be had. We are not to be understood as assuming these statements as facts fully proven. We only take them to be such for the purpose of the legal propositions announced. Upon another trial, the facts can be fully elicited, and the conclusions reached from the proofs, without any prejudice arising from this opinion.

The opinion of the Court below is not in accordance with these views, and the judgment is reversed and cause remanded for another trial.

TERRY v. SICKLES.

WHEREIN, in suit on an account stated, the only evidence was that of a witness who said defendant, on presentation of the account, admitted it to be correct and promised to pay it, and the Court charged the jury that, if they believed the testimony of the witness, they must find for plaintiff the amount claimed; and they so found. *Held*: That the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence.

To sustain an action on an account stated, it must be shown there was a demand in favor of plaintiff acceded to by defendant. And if defendant does not object to the account as presented, within a reasonable time, his silence will be an admission of its correctness.

In such action evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting.

Query: Whether such evidence would be admissible under a general denial if the pleadings were not verified?

Where the pleadings are verified, every matter of defense, not directly responsive to the allegations of the complaint, must be set up in the answer.

APPEAL from the Twelfth District.

Action on an account stated. Complaint and answer verified. The answer admits the purchase of the goods, as stated in the complaint, and avers that defendant agreed to pay fair market price. Denies that there ever was an account stated in which the balance alleged, or any balance, was found due plaintiff;

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denies that he ever promised to pay, or that, on a just accounting, defendant is indebted to plaintiff in the sum claimed.

On the trial, plaintiff introduced a witness who testified in substance, that, as agent of plaintiff, he presented the account sued on to defendant, who examined it for some time, and said it was correct; but that there were arrangements for settling it in New York, and that if witness did not soon get advices that it was so settled, he, defendant, would settle it with witness. Witness identified the account, and it was given in evidence.

Plaintiff closed. Defendant offered in evidence the original accounts furnished by plaintiff, of which the account in evidence is a summary, showing what the articles were, and the prices charged, and then offered to prove that the articles were charged at more than fair market value. The evidence was ruled out, on objection, defendant excepting. Case closed.

The Court instructed the jury, that if they believed the testimony of the witness, Belknap, in relation to the stating of the account, they must find for the plaintiff the amount claimed.

Verdict for plaintiff; judgment accordingly. Defendant appeals.

Crockett & Crittenden, for Appellant.

I. The instruction was wrong: 1st. The witness did not prove any such admission by the defendant, of a balance due, as would entitle the plaintiff to recover on an account stated. (Chitty on Cont. 562, and cases cited; 2 Greenl. Ev. Sec. 926, and cases cited.) 2d. And whether he did prove such an admission was a question of fact for the jury. (2 Bouv. Law Dic. 519; *Porter v. Cooper*, 4 Tyrwhitt, 463-465; Const. Art. Sec. 17.)

II. The Court erred in refusing to allow the defendant to give in evidence the original accounts and to prove that the goods were overcharged. (Chitty on Cont. 567, and cases cited; 2 Greenl. Ev. Sec. 128; 5 Phil. Ev. 124; *Chappelains v. Dechenaux*, 4 Cranch, 306; *Waland v. Heson*, 7 Id. 237; *Perkins v. Hart*, 11 Wheat. 237; *Barger v. Collins*, 7 Harr. and Johns. 313.)

To show fraud or mistake, it was not necessary to allege it in the answer. A general denial under our system is equivalent to the general issue at common law, and it is now settled that any errors in an account stated, may be shown and corrected under

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the general issue. (2 Greenl. Ev. Sec. 128, and cases cited; *Thomas v. Hawkes*, 8 Mees. & W. 140.)

, *George F. & William H. Sharp*, for Respondent.

1. There being no *conflict of testimony*, the instruction was right. (*Nichols v. Rich*, 16 Wend. 663; *Allen v. Hofman*, 2 Dana, 221.)

2. Appellant was not prejudiced. (*Dean v. Hewitt*, 5 Wend. 257; *Evans v. Spillman*, 6 B. Mon. 384.)

3. The evidence offered for defense was inadmissible under the answer. (3 Greenl. Ev. Sec. 126; *Truman v. Hurst*, 1 Tenn. 126; *Dawson v. Remnant*, 6 Esp. 24.)

There were two opinions rendered in this case. The judgment is the same, but the opinions being different in some particulars, and both covering all the points in the case, the last only, delivered at the July Term, 1860, is inserted here. It was delivered by COPE, J.—FIELD, C. J. concurring.

We have examined the questions in this case, and are satisfied of the correctness of the former decision of this Court. The objection to the instruction given by the Court below is purely technical. The instruction could not have prejudiced the defendant. There was but one witness examined, and his testimony established every fact necessary to entitle the plaintiff to recover. Upon the evidence before them but one verdict could have been rendered by the jury, and we do not see how the instruction can be regarded as such an error as would justify a reversal.

In support of an action upon an *account stated*, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be express and in terms. If the account be sent to the debtor, and he do not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. "So," says Greenleaf, "if one item only is objected to, it is an admission of the rest. So, if a person is employed by both parties to examine the accounts in their presence, and he strikes a balance against one, which, though done without authority is not objected to, it is

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sufficient proof of an account stated." (2 Green. Ev. Sec. 126.) In this case the account was presented to defendant, and he not only admitted its correctness, but promised to pay it.

The evidence in relation to the amount of the account was properly excluded. It is not alleged in the answer that there was any fraud or mistake in the original accounting. If the pleadings were not verified, the introduction of this evidence might have been proper under a general denial; but this point does not arise in the case, and we express no opinion in regard to it. In all cases where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer.

Judgment affirmed.

GOULD v. SCANNELL, SHERIFF, *et al.*

Is an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation, or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value, is in the nature of a cross judgment, and must be based upon proper averments.

APPEAL from the Fourth District.

The answer simply denies that the defendant wrongfully detains the property, etc. and avers that it was the property of Lavalle, against whom the Sheriff had a writ of attachment, issued in the suit of *Mills & Vantine v. Lavalle*, and that the property was seized and held by the defendant, Scannell, as Sheriff, in that suit.

The Court below found, among other things, that said property was taken from the possession of defendant, Scannell, by the Coroner, by virtue of the proceedings in this action, and returned to the said Lavalle; and "that the property cannot be returned to the defendant."

Fabens & Tracy, for Appellant, cited *Nickerson v. Chatterton et al.* 7 Cal.; Pr. Act. Secs. 177, 200.

John Reynolds, for Respondent, cited Pr. Act, Secs. 177, 200, 46, 147, 71.

Herrick v. Hodges.

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

This action was brought to recover certain personal property. On the trial in the Superior Court, the plaintiff failed to appear, and his complaint was dismissed, and the Court proceeded to render judgment for the defendant for the value of the property, upon a special finding that the same could not be returned. Afterwards, a motion was made in the Superior Court to set aside the judgment, upon the ground of some alleged irregularity in the manner of ascertaining the facts. But when this motion came up for hearing, the plaintiff again failed to appear, and the Court dismissed the motion.

There seems to be no allegation or prayer in the answer in respect to the change of possession of the property from the defendant to the plaintiff; and, therefore, the judgment for the value was erroneous. The judgment of return is in the nature of a cross judgment, and there must be some appropriate averments in the pleadings to put in issue the facts upon which the relief is given. The judgment was erroneous in this respect.

So much of the judgment of the Court below as dismisses the plaintiff's complaint is affirmed, but the judgment in favor of the defendant against the plaintiff for the value of the property is reversed. As the plaintiff below failed to prosecute his suit or motion, and has thereby been guilty of *laches*, we think the costs of this appeal should be paid by him.

Ordered accordingly.

HERRICK v. HODGES.

WHERE one, having a claim to collect, agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared *pro rata*, and, afterwards, prosecuted both claims to judgment in his own name, and in his own name bought the property of the defendant on execution sale and left it with an agent for sale, he is not liable to an action for money had and received, or in *indebitatus assumpsit*. For gross negligence or bad faith he would be responsible in a different form of action.

APPEAL from the Fourth District.

The Court gave two instructions: The first as stated in the opinion, and the second as follows:

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That, if Hodges bid in the property for himself, he would be liable, as just stated; but, if he bid for himself and Herrick, then he would be liable to Herrick to account to him for Herrick's proportion of any amount realized, after deducting Herrick's proportion of necessary expenses; and that Hodges, as Herrick's agent, had no right to dispose of the property so bid in without first having authority from Herrick.

Defendant excepted.

The jury found for plaintiff, nine hundred and twenty dollars. Judgment accordingly, and defendant appeals.

Waller & Moore, for Appellant.

Hollady & Cary, for Respondent.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Suit brought to recover a sum of money alleged to have been collected by defendant of a firm of Towers & Pierce, in Humboldt County, the defendant acting as agent for the plaintiff, and which money the defendant refused to pay.

It seems defendant had a large claim on this firm, and was about going to Humboldt, from San Francisco, to collect it. Plaintiff had a smaller claim, and the plaintiff and defendant agreed together that defendant should take plaintiff's claim and treat it as his own in any suit to be brought for the collection of the debt, the plaintiff and defendant to share costs and expenses *pro rata*, but the defendant to make no charge for his personal services. The defendant sued on his claim and plaintiff's together, and got judgment for the aggregate amount in his own name. Execution issued, and defendant bought in the entire property of defendants sold at execution sale under this joint judgment for less than the amount of the entire judgment. One Quick was appointed agent to take care of the property. It seems that the plaintiff knew and approved of these proceedings. It turned out that this property was involved in legal controversies in Humboldt County, so that it was lost to defendant and plaintiff, and that nothing was realized from these proceedings. Quick, the agent, was authorized to dispose of this property at private sale. While this property was in the hands of Quick,

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defendant gave the plaintiff an order on R. H. Waller, Esq. of San Francisco, for nine hundred and twenty-five dollars, which would have been his proportion of the sum for which the property was bid in, if that property had been considered as cash to that amount. This order on Waller was in these words:

“Mr. R. H. WALLER:— You will please pay to A. P. Herrick, or order, nine hundred and twenty-five dollars, or any part thereof, as soon as it may be remitted to you by John Quick, to my credit, but with instructions from him that it is to apply on a claim that the said Herrick assigned over to me against Towers & Pierce. This is the only paper by which to show that he has a claim to the above moneys.

(Signed)

WILLARD HODGES.”

The Court charged the jury that, under the evidence adduced, Hodges' purchase would raise a *prima facie* case that the five thousand four hundred and ninety dollars bid by Hodges for the property was its value, and that he would be liable to Herrick for his proportion of that amount.

1. We think the Court erred in giving this charge. According to our understanding of the matter, Hodges was the agent of Herrick, with full power from Herrick to do with this matter as if it were his own. It was a sort of gratuitous agency he undertook; but it created an obligation to act in good faith, and without gross negligence. But the agency extended as well to the purchase of the property at public sale as it did to the prosecuting of the case to judgment. The bidding in of the property was a mere means of securing the debt, it created no obligations of paying to Herrick his proportion. Hodges did not hold as owner, but as Trustee so far as Herrick's claim is concerned. Even if Hodges had no original authority to bid, the subsequent acquiescence of Herrick was equivalent to that authority.

2. The second instruction is wrong, too. We think that the tendency of the facts was, to show that Hodges had power to dispose of the property without consulting Herrick: 1st. The large measure of powers first given. 2d. The recognition shown of Quick's agency. 3d. The order set out, which evidently contemplates that Quick should sell, and that it was expected he should remit the proceeds to Waller.

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3. It seems to us that the plaintiff has not taken his proper remedy, if he has any, if we rightly apprehend the true tendency of the proofs.

If defendant had undertaken this agency, he would be bound, though it were gratuitously undertaken, to good faith and ordinary diligence in executing what he pretended to do; but he could not be sued for money received if he never received any, though he failed to get it because of his gross negligence or even bad faith. If, in other words, he neither directly or indirectly received money on account of this agency, though he might be responsible, in a different form of action, for his negligence, he would not be held responsible for money had and received, or in the form of *indebitatus assumpsit*.

But the errors indicated are sufficient for the reversal of the judgment, which is ordered, and the cause remanded for a new trial.

PATRICK *et al.* v. MONTADER *et als.*

An attachment issued before the maturity of the debt, is *prima facie* void as against a subsequent attachment.

Taffe v. Josephson, (7 Cal.) overruled.

Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought.

The debt in such case, is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself.

Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground, that by his superior diligence the fraud has been discovered.

Such a fund is not strictly an equitable asset. The prior attachments became liens, in the nature of a legal estate vested in the Sheriff for the benefit of the creditors. Plaintiffs' costs, disbursements, and counsel fees, however, should first be deducted from the fund before distribution.

APPEAL from the Twelfth District.

Sandrie & Lange, Grocers in San Francisco, failed December 1, 1857, having been in business about two years. On that day Alfred de Montader brought suit against them in the Twelfth District Court, on their note to him for fifteen thousand and eighty dollars, and attached their stock in trade. On several

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subsequent days various other creditors also levied attachments on the same stock. In due time judgments by default were entered in favor of the creditors, and the stock was sold for about seven thousand dollars, under execution upon the judgment of De Montader. Before sale, however, this suit was instituted by plaintiffs, as judgment creditors of Sandrie & Lange, against nearly all of the other judgment creditors who were prior in time to plaintiffs. The object of the suit is to set aside, as fraudulent in fact, the judgment of De Montader, and as fraudulent in law, because suit was prematurely brought, the judgments of the other defendants—excepting only Howes & Co. and Goodwin & Co. The stock was sold, and by stipulation of the parties, the proceeds left in the Sheriff's hands to abide the final decree.

Among the creditors, made defendants, Moller & Co., Mark Sheldon & Co., Bragg, Rollinson & Co., and J. Paxson, attached on the 2d and 3d of December, while their debts were not due until the 4th of December.

De Montader having assigned his judgment to Moller & Co. and Goodwin & Co. left the State, and was not served with process.

Upon the case being called for trial it was agreed that the main issue of fraud in the De Montader judgment, be tried by the Court, and in the event of that judgment being set aside, that the other issues as to whether the suits of Moller & Co., Bragg, Rollinson & Co., Mark Sheldon & Co., and Paxson, were not prematurely brought, and therefore fraudulent as to the other creditors, be referred. Accordingly, after trial by the Court, the De Montader judgment was found void as to creditors, and after trial before a referee, the judgments of the defendants above named, were also found void, and then, a motion for new trial being overruled, a final decree was entered directing the Sheriff to pay the creditors in the following order, to wit: Howes & Co., plaintiffs, Goodwin & Co., and the rest in the order of their attachments. The fund, however, did not reach them, except a small sum to Moller & Co.

Goodwin & Co. as assignees of the judgment of De Montader, appeal from so much of the decree as sets it aside; and Bragg, Rollinson & Co. and Mark Sheldon & Co. appeal from

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so much of the decree as postpones them to Howes & Co., Goodwin & Co. and plaintiffs.

J. P. Treadwell, for Bragg, Rollinson & Co. and Mark Sheldon & Co. Appellants.

I. The facts found by the referee, and on which the Court below proceeded, do not warrant the decree postponing the attachments of the defendants, Sheldon & Co. and Bragg, Rollinson & Co. to the subsequent attachments of the plaintiffs, and of the defendants, Goodwin & Co. and of Howes & Co.

Where goods are purchased on a credit, with the fraudulent intent never to pay for them, the seller, on discovering the fraud, may treat the credit, or whole special contract, as void, and maintain an action immediately, on an implied assumpsit, for the value of goods sold and delivered. (*De Symans v. Minchwich*, 1 Esp. 430; *Hogan v. Shes*, 2 Id. 522; *Camp v. Pulver*, 5 Barb. Sup. Ct. R. 92, 93; *Wilson v. Force*, 6 Johns. 109; 110; *Bromagim v. Throop*, 15 Id. 476; *Linningdale v. Livingston*, 10 Id. 36, 37; *Rickard v. Stanton*, 16 Wend. 26; *Whipple v. Dow*, 2 Mass. 418. As favoring this principle, see *Ruiz v. Norton*, 4 Cal. 358; *Johnson v. Totten*, 3 Cal. 343.)

The authority of these cases has not been uniformly followed to their full extent, and there are conflicting decisions. It is held by all the cases, however, that if the goods, so fraudulently purchased, have been sold by the vendee, which is the case here, an action for money had and received may be immediately brought and maintained.

The present suit seems to be grounded on this, that Sheldon & Co. and Bragg, Rollinson & Co. did not count right against Sandrie & Lange; that they should have counted in assumpsit for money had and received, not in assumpsit for the value of goods sold and delivered.

"It is well settled that a stranger cannot interfere upon the grounds of irregularity. When the contest is between creditors, all the equities are in favor of the most diligent. The subsequent execution or attachment creditors can claim no equitable relief. If the proceedings of the prior creditor are not void, but voidable, the defendant can alone object." (*Disey v. Pollock*, 8 Cal. 573.)

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This case is not within the rule laid down in *Taaffe v. Josephson*, (7 Cal. 355,) because there the defendant knew the debt he sued on was not due; and here the debt was fraudulently contracted, a fact not existing in that case.

But that case is not law. The principle of *Dana v. Stanford*, (10 Cal. 277,) is against it. So with the Practice Act authorizing confession of judgment on a debt not due.

II. The plaintiffs now contend that they are entitled to be preferred to Sheldon & Co. and Bragg, Rollinson & Co. though the attachments of the latter were not fraudulent!

The priority of payment out of equitable assets sometimes, in some States, allowed the creditor first discovering them and filing a creditor's bill, is never extended to legal assets that may be reached by execution at law.

Such priority is never extended to oust, or have priority over, an existing prior lien at law — such as that of the prior attachments of Sheldon & Co. and Bragg, Rollinson & Co. on the same property, in this case.

Montader's judgment was "utterly void," at law, by the statute against fraudulent conveyances. The Sheriff might have so treated it, and have appropriated the proceeds of the property of the junior attachments of the Appellants, and then returned it *nulla bona*. And then, to an action for a false return, the Sheriff might have pleaded the fraud and facts, as a defense. (4 Wend. 111, and 5 T. R. there cited.) Equitable assets are only such as cannot be reached without the interposition of a Court of Equity.

But the principle of a priority of payment contended for by plaintiffs, is not recognized at all, as a doctrine of general equity jurisprudence; nor a limitation on the rule that equality is equity. (1 Story Eq. Jur. Secs. 553, 554; 8 Cal. 157; 2 Paige, 568.)

Harmon & Labatt, for Appellant, Goodwin & Co. argued, that the finding of the Court below, that the De Montader judgment was fraudulent in fact, was against evidence.

Hoge & Wilson, for Plaintiffs.

1. Can a creditor bring an action for goods sold and delivered

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before the term of credit, expressly agreed to, has expired, on the ground that the purchase from him was a fraudulent one?

I. We maintain the negative of the first question on the following points and authorities:

The actions of the Appellants against Sandrie & Lange, could not be maintained on the special contract made between the parties, for the term of credit had not expired. They could not be maintained upon implied agreements, because no agreement is implied when there is an express one. An action, therefore, for goods sold and delivered, could not be maintained at all.

The fraud did not render the contract void, but only voidable, and that at the election of the vendor; but if he elected to avoid, it must be in toto. He cannot affirm the sale in part and disaffirm it in part. If disaffirmed in toto, then the goods became re-invested in the vendors, and they could bring trover or replevin. But they cannot set up the fraud to avoid the express contract of sale, and then waive the fraud and set up an implied contract of sale. (*Ferguson v. Carrington*, 9 Barn. & Cress. 59; 17 Eng. C. L. R. 36, S. C. 14 E. C. L. 661; *Strutt v. Smith*, 1 Crompt., M. & R. Exch'r, 312; *Bradbury v. Anderton*, 1 Id. 490; Chit. on Con. 408; *Reed v. Hutchinson*, 3 Camp. 352; *Selway v. Fogg*, 5 Mee. & Wels. 86; *Saratoga & Schenectady R. R. Co. v. Row*, 24 Wend. 75; *Hogan v. Shroob*, 24 Id. 460-461; same doctrine, *Thompson v. Bond*, 1 Camp. 4.)

Galloway v. Holmes, (1 Doug. Mich. 330,) is a late case, and contains a lengthy review of the whole subject and the authorities. (*Mason v. Bovet*, 1 Denio, 74; Chit. on Con. 680; *Allaire v. Whitney*, 1 Hill, 484; S. C. 4 Denio, 558; S. C. 1 Com. 311, 312. See, also, *Linn v. O'Hara*, 2 E. D. Smith, 569; *Minturn v. Main*, 3 Seld. 227; *Lamerson v. Marvin*, 8 Barb. 18; *Gibson v. Moore*, 7 B. Monroe, 95; *Hardwick v. Forbes*, 1 Bibb, 213; *Hunt v. Suk*, 5 East, 449; *Devendorf v. Beardsley*, 23 Barb. 661; *Mattewan v. Bentley*, 13 Id. 645; *Butler v. Hildreth*, 5 Met. 51; *Jennings v. Gage et al.* 13 Ill. 612; *Buchanan v. Harney*, 12 Id. 338; *Wheaton v. Baker*, 14 Barb. 594; Chitty on Con. 681, and cases cited; *Lloyd v. Brewster*, 4 Paige, 537; *Butler v. Hildreth*, 5 Met. 51. See *Fisher v. Tredenhall*, 21 Barb. 84; *Campbell v. Fleming*, 1 Adol. & El. 40.) Where goods are obtained by tort, to

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entitle the plaintiff to sue, *ex contractu*, the goods must be sold and turned into money and the action for money had and received must be brought. (*Jones v. Hoar*, 5 Pick. 285-290. See, also, *Rowley v. Bigelow*, 12 Id. 312; *Ayres v. Hewitt*, 19 Me. 283; *Minturn v. Main*, 3 Seld. 227.) "The party who claims rights resting upon a rescission (of a contract), must show facts establishing the rescission of the contract." (*Wheaton v. Baker*, 14 Barb. 597-601; *Green v. Russell*, 5 Hill, 183.)

Here, not a fact going to the election to rescind was proven by defendants. If the injured party "have a knowledge of the fraud, he will be presumed to acquiesce if he takes no steps, but sleeps on his rights." (*Edmunds v. Hildreth*, 16 Ill. 216; *Canal v. Potter*, 1 Walk. Mich. 13, 373; *Boyce Exrs. v. Grundy*, 3 Pet. 215; *Whitney v. Allaire*, 4 Denio, 559.)

The only cases to the contrary of the positions above taken seem to be *De Symons v. Minchwinch*, (1 Esp. N. P. 430); *Hogan v. Shee*, (2 Id. 522); *Wilson v. Force*, (6 Johns. 110,) and *Arnold v. Crane*, (8 Id. 81.) The earliest case is the one first quoted, and is the authority on which the two New York cases rest. *De Symons v. Minchwinch* is discussed in *Bradbury v. Anderton*, (1 Crom., Mee. & Rosc. 490,) and it is there said by Park, B. that "that case has been overruled, and the principle is well established, that where there is an express contract between two parties, the law will not imply another." In Chitty on Contracts, 408, Note (i), it is said: *De Symons v. Minchwinch*, (1 Esp. 430,) is no longer law." It was decided in 1795, and *Hogan v. Shee* in 1797; but the whole current of English authorities, ever since, is the other way, and *Ferguson & Carrington*, (9 Barn. & Cres. 59,) is followed as settled law. *Arnold v. Crane*, (8 Johns. 81, 82,) is decided on the authority of *Wilson v. Force*, (6 Id. 110,) and the latter cases in *Espinasse*.

II. A subsequent attaching creditor can, by bill in chancery, have the attachments thus improperly brought set aside. (*Drake on Attach. Ch.* 39, p. 771 and cases cited; *McClung v. Jackson*, 6 Grattan, 96; *Smith v. Gottinger*, 3 Geo. 140; *Brown v. Chancy*, 1 Id. 410, and cases cited; *Drake*, 775 to end; *Briggs v. French*, 2 Sum. 254; *White v. Williams*, 1 Paige. 502; *Chappel v. Chappel*, 2 Kern. 215; *Gates v. Johnson*, 3 Barr, 55; *Burns v. Morse*, 6

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Paige, 109; *Griswold v. Stewart*, 4 Cow. 459; *Proctor v. Johnson*, 2 Salk. 600; *Ryan v. Daley*, 6. Cal. 238; *Burns v. Morse et al.* 6 Paige, 108; *Chappel v. Chappel*, 2 Kern. 215; *Taaffe v. Josephson*, 7 Cal. 355; *Alvarez v. Brannan*, Id. 503; *Swartz v. Haslett*, 8 Id. 128, 129; and *Seligman v. Kalkman*, Id. 215.)

III. Respondents are entitled to priority, because by their diligence the property has been saved from the judgment of De Montader.

The Appellants say that they had a lien at law, and that the removal of the fraudulent judgment was not necessary to their protection; that De Montader's judgment "was utterly void at law," and that it might have been treated as such at law; that "equitable assets are only such as cannot be reached without the interposition of a Court of Equity." The counsel forgets, that other parties than De Montader and Sandrie & Lange had an interest in that judgment; that it had been assigned to Moller & Co. and to Goodwin & Co. who set it up as good and valid. Their rights could not be disposed of at law. (*Smith v. Wright*, 6 Black. 551; *Lawrence v. Lane*, 4 Gilman, 361.) Here then is a necessary resort to chancery to settle the whole question. The plaintiffs here first filed their bill, and having by their superior diligence saved the whole assets in dispute, they are, upon all principles of equity, entitled to priority of payment. (*Pierson et al. v. Robb et al.* 3 Scam. Ill. 143; *Baker v. Bartol*, 6 Cal. 486; *Page v. O'Neil*, 12 Id.)

BALDWIN, J. delivered the opinion of the Court—FIELD, J. and TERRY, C. J. concurring.

Bill filed to subject the proceeds of certain goods to the plaintiff's claim, he being an attaching and judgment creditor of defendants, Sandrie & Lange. One Montader had procured attachment on a large debt claimed to be due from these last defendants. The bill charges that this debt was simulated; the referee and the Court below find that it was. There was a good deal of conflicting proof on the trial. The counsel for the representatives of this claim have made a very plausible and forcible argument, impeaching the propriety of the finding that the claim of Montader was fraudulent. But it is not our habit to

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review the evidence on questions of fact, and especially in cases of fraud, where the result depends upon various considerations, of greater or less force, to be found in the conduct, dealings, and relations, of the parties, and various circumstances, tending, with more or less directness, to prove or repel the ascription of fraud.

It is claimed by the plaintiff that the attachments of Sheldon & Co. and Bragg, Rollinson & Co. are fraudulent as against the plaintiff's attachment. The main ground of this charge is that these attachments issued upon accounts for goods which were due on the 4th of December, when the attachments issued two days before. The examination which we have given the authorities convinces us that an attachment is, at least, *prima facie*, void as against another attachment, when the first is issued before the maturity of the debt. The authorities collected in Drake on Attachment, 775, *et seq.* sustain the doctrine laid down by the author. The cases of *Pierce v. Jackson*, (6 Mass. 244); *Smith v. Gettinger*, (3 Kelly, 145); and *Walker v. Roberts*, (4 Richardson, 591.) especially, are in point; though the force of the last case is somewhat impaired by the fact that, in South Carolina, a judgment in attachment has only the effect of liquidating the debt and establishing the demand. The ground upon which the decision is placed is the fraud; or, as Chief Justice Parsons says, in the Massachusetts case: "The attempt is against law, and a fraud on the other creditors, for whom some remedy ought to be provided. If, therefore, the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a creditor having a good cause of action." *Felton v. Wadsworth* (7 Cushing, 587), is still more emphatic. In that case the previous decisions of the Supreme Court of Massachusetts are reviewed. The Court say: "The actual fraud is the essential element in the case," and proceeding further, hold this language: "The case of *Pierce v. Partridge*, is expressly put upon the same principle as that upon which *Fairfield v. Baldwin* was decided. It appears, therefore, that it was not the intention of the Court to adopt any principle in *Pierce v. Partridge*, different from that involved in *Fairfield v. Baldwin*. Nor does it appear that in *Pierce v. Partridge* the Court intended to extend the principle of the

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case of *Fairfield v. Baldwin*; but, on the contrary, the case of *Pierce v. Partridge* is expressly declared to be within the principle of the case of *Fairfield v. Baldwin*. Both these cases, therefore, were decided on the ground of fraud, and it is difficult to see on what other ground a party could be deprived of a just debt. The judgments in favor of the plaintiffs were declared invalid because they were fraudulent, and were made the means of defrauding others."

In the case of *Cushing*, the party took judgment on his attachment for too much. The Attorney did this by mistake. Within thirty days after the issuing of the execution he went to the defendant and offered to correct the error. It was held that this mistake did not avoid the debt or writ.

2 Kernan, 215, recognizes the same doctrine.

The case of *Taaffe v. Josephson*, (7 Cal. 355,) is directly opposed to the case in 7 *Cushing*, and, we think, to reason and the great weight of authority. The arbitrary presumptions which the Court draw from the facts in the case seem to us unauthorized, when applied to the question of fraud in fact. According to that case, if a man should happen to take a judgment for ten dollars too much on a claim for ten thousand dollars, it would be a conclusive proof of fraud and avoid the judgment.

If these claims, therefore, stood on this fact alone, unexplained, there would be no doubt that the plaintiffs could hold these attachments to be mere fraudulent obstructions to his right. But the referee finds, and so the proof seems to be, that there was fraud on the part of these debtor defendants in contracting these debts; that the defendants were insolvent, and bought the goods without any intention of paying for them; and many facts are offered to show this. It may be true, as argued by Respondent's counsel, that this fact gave the plaintiffs in those suits no legal cause of action until the maturity of the debt as fixed by the contract; that is, that no suit could be brought for the goods as on a contract of sale, except according to the terms of the contract. Many respectable authorities hold the contrary, though, probably, the weight of authority, and, certainly, a very strong technical reason, favors the proposition as the learned counsel states it. But there can be no doubt that, in morals and conscience, this money was due from the defendants to these plain-

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tiffs in attachment; there is neither showing nor presumption that the goods were not of the value for which they sold. There is some proof in the record, too, that these goods had been sold by the defendants, and the money received, though this is not so found by the referee. But that *this debt*, represented by the attachments and judgments, was equitably due at the time of the suing out of the attachment, we think clear. It may be true that if the defendants had chosen to plead a technical rule of law, the action in its present form might have been defeated. But we do not see what obligation rested on the defendants to make this plea, or how, if they did not choose to do so, third persons can complain. There was no fraud in the plaintiffs trying to recover the money for goods of which they have been defrauded. Nor was there fraud in defendants suffering judgment to go when they justly owed the money. If they had confessed judgment for this money, we suppose no man could have imputed fraud to them in the confession, unless it be held that it is fraudulent to pay a creditor whom the debtor has deceived and defrauded, the value of the property of which he has cheated him.

The objection of the plaintiffs here, then, would seem to be directed to the form of the action of these plaintiffs against the common debtors, rather than against the substance of their act. But, as we said before, the only valid cause of complaint of *these* plaintiffs against the attachment assailed is for the fraud, which may, to be sure, be shown *prima facie* to exist, when the note is prematurely sued on, but which, we apprehend, would be rebutted when it was shown that the debt was really presently due, in justice and equity. We think it would be holding the rule with great rigor to decide that in such a case as this, where many of the most respectable authorities hold the suit properly brought, even according to the strictest rules, and when, in fact, *this sum* was due, at the time of the attachments, in conscience, and even, perhaps, at law—though recoverable in a different way, the plaintiffs below should lose their debts, because they have mistaken the particular form of remedy which they should have adopted. Having obtained a lien for a just debt, a Court of Equity, when they have been summoned before it, when there is no proof of actual fraud, would, according to its known liberal course of procedure, permit them to hold it. The plaintiffs here

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asking equity must do it, and it is only upon the ground of actual fraud that chancery usually holds void the contracts or liens of creditors in favor of junior creditors or purchasers.

It is contended that the plaintiffs here, by virtue of their superior diligence, have gained priority over the claims of these Appellants. But, we think, the rule cannot be invoked in this case. There are not, strictly, equitable assets, discovered by these plaintiffs, and only to be reached in equity. The Appellants had a lien, by virtue of their levies, subordinate only to other prior liens. It was in the nature of a legal estate vested in the Sheriff for their benefit. But a short time elapsed after their levy before the filing of this bill. They were not asked to go in with the plaintiffs to set aside this fraudulent attachment of Montader. They had shown nothing like abandonment of their right to subject these goods in priority to the plaintiffs. The plaintiffs have brought them into Court as parties to this proceeding. The effect of the bill is to marshal these assets and distribute them according to the rights of the several parties before the Court. The necessary parties and the necessary pleadings were made. We do not see why a final decree could not be rendered in equity, which delights in closing litigation, and abhors multiplicity of actions—settling all the rights and equities of the parties. The plaintiffs' reasonable costs, disbursements, and counsel fees, should be first deducted from the fund recovered, and the balance distributed as we have indicated.

The judgment will be reversed and remanded for a decree according to the principles of this opinion.

Ordered accordingly.

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ROYAL grants, made at the solicitation of the grantees, are to be construed liberally for the King. But, when made *ex mero motu regis*, the construction is in favor of the grantees.

Legislative grants are to be construed liberally in favor of the grantees.

The Act of March, 1851, commonly called the San Francisco Water Lot Act, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the Act.

Nothing in the Act of May, 1851, indicates any intention on the part of the Legislature to exclude the public slips from the Act of March.

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APPEAL from the Twelfth District.

Ejectment for a lot, being part of what was formerly known as the City Slip, bounded by Clay, Davis, and Sacramento streets and the waters of the bay, in the city of San Francisco.

It is deemed unnecessary to state the facts. The whole controversy was as to the construction of the Act of March, 1851, known as the Water Lot Act, relative to San Francisco, and the Act of May, 1851, referred to in the opinion. And the question was, whether the title to what are called "slips," that is, water lots surrounded on three sides by wharfs, etc. and opening out into the bay, and not divided into "lots," technically speaking, at the time of the passage of the Act of March, 1851, vested under that Act in the city of San Francisco, or whether those "slips" remained the property of the State, subject to sale under the Act of May 18th, 1853, appointing Commissioners to sell the State's interest in the water lot property in San Francisco, and the Act of May 1st, 1855, supplementary thereto.

Plaintiff claimed under the Act of 1855; defendant under the city through the Act of March, 1851.

Defendant had judgment, and plaintiff appeals.

Heydenfeldt, for Appellant.

The first section of the Act of 1851, is devoted exclusively to a description of the property, and I direct particular attention to the salient points of description. The points are —

- 1st. All the *lots* of land.
- 2d. According to the survey of the city.
- 3d. According to the map of the same.
- 4th. Are known and designated as the San Francisco Beach and Water Lots. By the second section of the Act, "the use and occupation of all the land described in the first section," is granted to the city for ninety-nine years.

What is "the land" described, and made the subject matter exclusively in the first section?

It is beyond dispute, "the beach and water lots, according to the survey and the map." Then the question arises, can the strip which has been described pass under the denomination of "lot of land?" Upon examining the map it will be seen, that all the property within the lines described in the Act

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of 1851 is divided and subdivided into lots of different sizes, with the exception of the space occupied by this slip. Now, it is clear, upon authority and principle, that the map must be taken not only as explanatory of the grant, but as a part of it. (*Lincoln v. Wilder*, 29 Maine, 169; *Davis v. Rainsford*, 17 Mass. 207; *Sutherland v. Jackson*, 32 Maine, 80; *Blake v. Doherty*, 5 Wheat. 359.) The city took "lots" according to the map. What is a lot? The rule is to give to words the meaning which is commonly accepted. This word, as applied to land, is purely an American application. Webster is the only orthoepist who mentions the sense in which it is used in this connection. He says: "In the United States a piece or division of land;" and he illustrates it thus: "So we say, a man has a lot of land in Broadway, or in the meadow; he has a lot on the plain, or on the mountain; he has a home-lot, a house-lot, a wood-lot."

Now, in the Act of 1851, the Legislature speaks of pieces and subdivisions, as shown upon the map, as commonly and universally recognized as lots, according to American usage, and only of such as were so recognized. If, therefore, any portion of it would not in common parlance be called a "lot of land," it cannot be deemed within the description. Besides, if they intended to grant all the land independent of its apparent subdivisions on the map, how easy, indeed how much easier, it would have been to have done so. For the Act describes two lines, an interior or land line, and an exterior or water line. How simple it would have been to grant all the land lying within these two lines, instead of "the San Francisco Beach and Water Lots, according to the survey and the map of said city on file in the Recorder's office."

Again: Something is due to contemporaneous legislative exposition. About one month after the passage of the above named Act, the same Legislature passed another Act entitled "An Act in relation to the City of San Francisco." (See Acts of 1851, 311.) This has been commonly called "the Second Water Lot Bill." Its first section gives the city the right to construct wharfs at the ends of streets, etc. The second section relinquishes the right of the State to the beach and water lot property, upon the express conditions that the city shall confirm the titles to lots granted by Justices of the Peace, and

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it confirms them on behalf of the State, and closes with this provision: "that this Act shall not be construed as confirming grants to the property known as the Public Slip, bounded by Davis, Clay, and Sacramento streets."

I insist, therefore, that the Legislature disclose by this proviso, that they knew of the existence of this property and its uses as a slip, and did not know it as a lot of land; and the inference is irresistible, that as they excluded it from passing for the purposes of the second Act, they never intended it should pass by the first Act.

I invoke another rule of instruction, to wit: that grants by the sovereign must be construed most beneficially for the sovereign. (2 Black. 347; *Canal Co. v. Wheely*, 2 Barn. & Adol. 792; *Hall Dock Co. v. La March*, 8 B. & C. 51; *Canal Co. v. Hastler*, 1 B. C. 424; *U. S. v. Arredondo*, 6 Pet. 738, and authorities cited; *Charles R. Bridge v. W. Bridge*, 11 Pet. 545; *Mayor v. The O. & P. R. R. Co.* 26 Penn. 355; *McLeod v. Burroughs*, 9 Geo. 213; *Townsend v. Brown*, 4 Zab. 80; *Plank Road v. Elmer*, 1 Stock. 754; 8 Porter 9.)

Again: Land does not pass as appurtenant to other land; it must pass only by its own description in the deed. (*Cole v. Haynes*, 22 Vt. 588; *Chinaweth v. Haskell*, 3 Pet. 96; *State v. Clements*, 32 Maine, 297.)

Hoge & Wilson, for Respondent.

The phrase "Beach and Water Lots," was the common designation of all the lands on the east part of San Francisco, between Point Rincon and Fort Montgomery, from 1847, down to the passage of the Act of March, 1851. (See the Kearny Grant; Captain Halleck's report as Secretary of State to Governor Mason, made before the land was divided into what are strictly city "lots;" also, the survey made by the City Surveyor in 1847, when Bryant was Alcalde.)

These surveys left undivided into town lots, within the boundaries of the Water Lot Act of 1851, and lying in larger lots or blocks, the following lands, viz: All east of Front Street, between Vallejo and Pacific; all east of Davis, between Pacific and Jackson; all east of Front, between Jackson and Washington; all east of Drumm, between Washington and Clay; all east

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of Davis, between Clay and Sacramento; two fractional blocks, and one small block, off Rincon Point; and also, *all the land covered with water, nearly two miles in length, from the site of Fort Montgomery toward the Golden Gate, and a like tract about a mile in length from Rincon Point south to Mission Creek. None of these tracts were divided into those small subdivisions called town lots.*

Prior to the first Water Lot Act, and in the early settlement of San Francisco, great doubt existed as to the rights of the town and the powers of the officers of the government. General Kearny, conceiving himself to have the power as Governor, clearly intended to cede to the town the entire bulk of the overflowed land between Rincon Point and Fort Montgomery, which would make a line about like or near the present city front. He meant by the phrase, "The Beach and Water Lots," the land—"the ground"—in that boundary, and did not use the word "lots" as "subdivisions as shown upon the map." It was then supposed that the town, by surveying "the ground" into those small "subdivisions," after that grant, and selling them could convey to the purchasers perfect titles, and had this been true, "blocks" never laid out would just as much have belonged to the town as those that were subdivided, and could at any time afterward have been laid out, subdivided, and sold. Subsequently it was discovered that the "Kearny grant" had no validity, and the doctrine of the case of *Pollard's Lessee v. Hagan*, 3 How. S. C. U. S. R. 212, followed afterward by *Good Title v. Kibbe*, 9 Id. 477; *Doe v. Kibbe*, 13 Id. 25, became the prevailing doctrine, and the title was by all avowed to be in the State of California. It was upon this basis that the Water Lot Act was passed. This Act was passed in the main to carry out and confirm all that had been done under the Kearny grant, but not merely that. Had it been intended only to convey to the city and her grantees the *lots*—that is, those small subdivisions called city lots—and in the limited sense that counsel uses the word. the boundary of the Water Lot Act of March 26th, 1851, would have been identical with that of Kearny's grant, *for all the surveys and subdivisions into such lots were before then inside of and in pursuance of the Kearny grant, and on the assumption of its validity.* But that Act does not stop with the Kearny grant, but extends about two miles north and west, and about one mile south and

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west into a great mass of water property, never surveyed or even platted into town lots before that Act, which was passed by the Legislature, with a knowledge of all the facts, and refers on its face to the Kearny grant; the sales made by the city under that grant; the Government Reservation, and the leases by the government officers.

All the land in the boundaries of the Kearny grant, was called "the beach and water lots," or in other words, all the water property claimed by the town, was called "the beach and water lots." The Legislature, besides granting, enlarged the boundary of the water property of the city, and applied to it the same appellation of "the beach and water lots," which it borrowed from the Kearny grant. As the Kearny grant laid down a distinct boundary, and called the land within it, "the beach and water lots," so Section 1 of the Act of 26th March, 1851, lays down a certain boundary, and designates the land within it as the "beach and water lots." That phrase had assumed a peculiar and somewhat technical signification, and was used by the Legislature in that sense, being in fact, synonymous with "water property." The State claimed and owned the whole of the property within the boundaries, as well as the tracts and blocks, not divided, as the smaller subdivisions, called town lots; she was making a donation to her great commercial city, and establishing a permanent boundary line or water front, and no good reason would seem to exist for such distinction by the State, between different parts of the property within the boundaries, nor for such an implied reservation, when she does make other express reservations. Where there are express reservations, there cannot be implied ones. *Expressio unius, exclusio alterius*. Why was not "the permanent water front" of San Francisco made on the line of the small subdivided city lots? Why were large blocks, squares, and irregular tracts, left between those small lots and that permanent front? What was the policy of the State in ceding any of this property to the city? Did not that policy dictate a cession of the blocks as well as the lots?

Counsel further argued, that legislation exposition was with Respondent; citing Act May 1st, 1851, showing that the line of the "permanent water front" of the city, under the Act of March, 1851, is the outside line of the beach and water lots.

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The reference to "the survey of the city of San Francisco and the map or plat of the same," was not made in the Act of March 26th, for the purpose of showing what lots had been laid out, subdivided, and numbered, but for the purpose of fixing the boundaries only. The language of the Act is not, "all the lots" laid out on "the map or plats of the same," etc. but, "all the lots of land situate with the following boundaries, according to the survey of the city of San Francisco, and the map or plat," etc. that is, "the boundaries according to the survey," etc.

The fact is, that the Act of March 26th, assumed that many streets were extended beyond what they were in fact, and made a boundary to correspond thereto, without any map being plated and in existence, that precisely agreed with the Act. (*Wood v. San Francisco*, 4 Cal. 193, 194.) In the case of *Holland v. The City of San Francisco*, (7 Cal. 361,) the city slip is expressly decided to be a part of the beach and water lot property, and to have actually passed by the Act of 26th March, 1851, to the city, for ninety-nine years.

McDougall & Sharp, and *F. M. Haight*, also for Respondent, filed separate briefs, maintaining similar views to those contained in the foregoing brief; and the former, against the point of Appellant, that the grant in question must be construed in favor of the grantor, cited: 2 Blac. 347; *United States v. Arredondo*, (6 Peters, 738;) and argued that the general doctrine as to royal grants has no existence in this country; that we have no such things as grants by the grace of the crown, at the suit of the subject; nor any such thing as grants "*ex speciali gratia, certa scientia, et mero motu*;" that all grants, with us, are supposed to be made for some sufficient consideration, moving the government as well as individuals, and, therefore, according to the note cited from Blackstone, stand upon the same ground with private grants; and, further, that grants to private corporations, *ex gratia*, stand upon very different grounds, from grants to private persons; that this grant to the city of San Francisco, is not within any of the rules cited, nor within their reason; it was to the city of San Francisco, itself a department of the government, for the purposes of better administration; and the act, according to settled rules of construction, is to be construed liberally, for the maintenance of the administration.

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TERRY, C. J. delivered the opinion of the Court — FIELD, J. concurring.

This is an action of ejectment, for a lot in that portion of San Francisco known as the City Slip. Plaintiffs claim under a purchase from the State Land Commissioner, and the defendant sets up title in the city, under the Act of March, 1851, commonly called the Water Lot Act.

The decision involves a construction of the Water Lot Act — the main question being, whether the lot in question forms a part of the property granted to the city by the terms of that Act. It was, at the time of the passage of the Act in question, part of an open slip, inclosed on three sides by wharfs, and open toward the bay, so that vessels could sail in and out.

The language of the first section is: "All lots of land situated within the following boundaries, according to the survey of the city of San Francisco, and the map or plat of the same now on record in the office of the county of San Francisco, and known and designated in this Act as beach and water lots." The section then proceeds to give the boundaries within which all the lots mentioned are situated. The second section provides that "the use and occupation of all the land described in the first section of this Act is hereby granted to the city of San Francisco," etc.

If this were a grant from an individual, there can be no doubt that the words used would be sufficient to pass all the land included in the general boundaries, whether laid off in lots or not. It is, however, contended by Appellant that grants from the sovereign are subject to a rule of construction different from that of grants of private persons; that the language of the Act does not clearly indicate the intention of the Legislature to grant any land, except such as was designated as "water lots" on the map referred to; that the Act must be construed most favorably to the grantor, and, therefore, the premises in question did not pass by it.

We are by no means satisfied that the statute is justly amenable to the charge of ambiguity, tested by ordinary rules. It appears sufficiently to indicate the intention to grant all the land included in the boundary designated. The grant is not of lots of land according to the survey, but of all lots of land within bound-

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aries fixed by reference to the survey. The survey is not referred to as determining the boundaries respectively of the lots granted, but of the territory which included all the lots. We can see nothing in the language of the Act of May, 1851, which discloses an intention on the part of the Legislature to exclude the public slip from the operation of the Act of March. The Act of May, which confirmed certain grants known as Colton grants, made by an Alcalde to individuals, provided, "that this Act shall not be construed as *confirming grants* to the property known as the public slip, bounded by Davis, Clay, and Sacramento streets."

The land, at the time, was an open slip, used for the purposes of commerce, and, in order that the city might continue to use it in this manner, the Legislature refused to confirm grants to portions of it which had been made to individuals, the effect of such confirmation being to deprive the city of control over it.

But admitting for the purposes of the argument, that the language of the Act is uncertain and ambiguous, we think the Appellant has failed to establish his legal proposition, that the grant should receive a strict construction in favor of the grantor.

The rule for construing grants from the King is thus laid down by Blackstone, (2 Com. 347): "A grant made by the King, at the suit of the grantee, shall be taken most beneficially for the King, and against the party; *whereas*, the grant of a subject is construed most strongly against the grantor. Wherefore, it is usual to insert in the King's grants that they are made, not at the suit of the grantee, but '*ex speciali gratia, certa scientia, et mero motu regis*;' and, then, they have a more liberal construction." In Note 4 to this text, it is said, "Royal grants, for a valuable consideration, are also liberally construed in favor of the grantee."

The construction and leaning shall be in favor of the subjects, if the grant show that it was not made at the solicitation of the grantee, but *ex speciali gratia, certa scientia, et mero motu regis*. "The grants of the King, when valid in general, bind him, though without consideration, as subjects are bound by their grants." (Chitty on Prerogative, Chap. 16, Sec. 5.)

A very thorough examination of this question was made by Judge Story, in the case of *Charles River Bridge v. Warren Bridge et al.* (11 Peters, commencing page 589.) The opinion of Judge Story on this question, which was not necessary to the

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decision of the case, has not the force of a judicial decision, but being the deliberate and careful elaborated conclusion of a very learned and able jurist, upon a point presented and solemnly argued in the case before him, it is entitled to the utmost respect, especially as it is sustained by cogent reasoning, and by reference to authorities. He says: "It is a well known rule in the construction of private grants, if the meaning of the words be doubtful, to construe them most strongly against the grantor. But it is said that an opposite rule prevails in cases of grants by the King; for, where there is any doubt, the construction is made most favorably for the King and against the grantee. The rule is not disputed. But it is a rule of very limited application. To what cases does it apply? To such cases, only, where there is a real doubt, where the grant admits of two interpretations, one of which is more extensive, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant. If the King's grant admits of two interpretations, one of which will make it utterly void and worthless, and the other will give it a reasonable effect, then the latter is to prevail; for the reason (says the common law) "that it will be more for the *benefit* of the subject and the *honor* of the King, which is to be more regarded than his profit." (Com. Dig. Grant, G. 12; 9 Co. R. 131, a; 10 Id. 67, b; 3 Id. 6.) And in every case the rule is made to bend to the real justice and integrity of the case. No strained or extravagant construction is to be made in favor of the King. And if the intention of the grant is obvious, a fair and liberal interpretation of its terms is enforced. The rule itself is also expressly dispensed with in all cases where the grant appears upon its face, to flow, not from the solicitation of the subject, but from the special grace, certain knowledge, and mere motion of the crown, or, as it stands in the old royal patents, '*ex speciali gratia, certa scientia, et ex mero motu regis.*' (See Arthur Legate's Case, 10 Co. R. 109, 112, b; Sir John Moulin's Case, 3 Id. 6; 2 Black. Com. 347; Com. Dig. Grant, G. 12,) and these words are accordingly inserted in most of the modern grants of the crown, in order to exclude any narrow construction of them. So the Court admitted the doctrine to be in *Attorney-General v. Lord Eardly*, (8 Price, 69). But what is a most important qualification of the rule, it never did

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apply to grants made for a valuable consideration by the crown, for in such grants the same rule has always prevailed, as in cases between subjects. The mere grant of a bounty of the King may properly be restricted to its obvious intent. But the contracts of the King for value are liberally expounded that the dignity and justice of the government may never be jeopardized by petty evasions and technical subtilities."

Again, on page 590, he says, "So in respect to implications in cases of royal grants, there is not the slightest difficulty, either upon authority or principle, in giving them a large effect so as to include things which are capable of being the subject of a distinct grant. A very remarkable instance of this sort arose under the statute of prerogative, (17 Edw. II, Stat. 2, Ch. 15,) which declared that when the King granteth to any a manor or land, with the appurtenances, unless he makes express mention in the deed, in writing, of advowsons, etc. belonging to such manor, then the King reserveth to himself such advowsons. Here, the statute itself prescribed a strict rule of interpretation. Yet, in *Whistler's Case*, (10 Co. R. 63,) it was held that a royal grant of a manor, with the appurtenances, in as ample a manner as it came to the King's hands, conveyed an advowson which was appendant to the manor by implication from the words actually used, and the apparent intent. This was certainly a very strong case of raising an implication from words susceptible of different interpretations, where the statute had furnished a positive rule for a narrow construction, excluding the advowson. So it has been decided that if the King grants a messuage and all land *spectantes, aut cum eo dismissas*, lands which have been enjoyed with it for a convenient time, pass. (2 Rolle Abridg. 186, C. 25, 30; Cro. Car. 169; Chitty on the Prerogatives, Ch. 16, S. 3, 393; Com. Dig. Grant, G. 5.) In short, wherever the intent from the words is clear, or possesses a reasonable certainty, the same construction prevails in crown grants as in private grants; especially where the grant is presumed to be from the voluntary bounty of the crown, and not from the representation of the subject."

Again, on page 596, he says: "But what, I repeat, is most material to be stated, is, that all this doctrine in relation to the King's prerogative of having a construction in his own favor, is

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exclusively confined to cases of mere *donation*, flowing from the bounty of the crown. Whenever the grant is upon a valuable consideration, the rule of construction ceases, and the grant is expounded exactly as it would be in the case of a private grant, favorably to the grantee. Why is this rule adopted? Plainly, because the grant is a contract, and is to be interpreted according to its fair meaning. It would be to the dishonor of the government, that it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract. Such was the doctrine of my Lord Coke, and of the venerable sages of the law in other times, when a resistance to prerogative was equivalent to removal from office. Even in the worst ages of arbitrary power, and irresistible prerogative, they did not hesitate to declare that contracts founded on a valuable consideration ought to be construed liberally for the subject, for the honor of the crown. (2 Co. Inst. 496. See, also, Com. Dig. Franchise C. F. 6.) If we are to have the grants of the Legislature construed by the rules applicable to royal grants, it is but common justice to follow them throughout for the honor of this Republic. The justice of the commonwealth, will not (I trust) be deemed less extensive than that of the crown."

The case of *Arredondo*, (6 Peters,) does not, as we conceive, conflict with this view, inasmuch as the grant then under consideration, was a grant from the sovereign, made *at the suit of the grantees*.

But, if we are mistaken as to the rule of construction applicable to grants from the crown, there is no doubt that both on principle and authority, a legislative grant should be construed liberally in favor of the grantee. We again quote from 11 Peters, 597: "The present, however, is not the case of a royal grant, but of a legislative grant, by a public statute. The rules of the common law in relation to royal grants have, therefore, in reality, nothing to do with the case." We are to give this act of incorporation a rational and fair construction, according to the general rules which govern in all cases of the exposition of public statutes. We are to ascertain the legislative intent; and that once ascertained, it is our duty to give it a full and liberal operation. The books are full of cases to this effect, (see Com. Dig. Parliament, 10-28; Bac. Abridg. Statute,) if, indeed,

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so plain a principle of common sense and common justice stood in any need of authority to support it. Lord Chief Justice Eyre, in the case of *Boulton v. Bull*, (2 H. 136, 463, 500,) took notice of the distinction between the construction of a crown grant, and a grant by an Act of Parliament; and held the rules of the common law, introduced for the protection of the crown in respect to its own grants, to be inapplicable to a grant by an Act of Parliament. "It is observed," said his Lordship, "that there is nothing technical in the composition of an Act of Parliament. In the exposition of statutes, the intent of Parliament is the guide. It is expressly laid down in our books, (I do not here speak of penal statutes,) that every statute ought to be expounded, not according to the letter, but the intent." Again, he said: "This case was compared to the case of the King being deceived in his grants. But I am not satisfied that the King, proceeding by and with the advice of Parliament, is in that situation, in respect to which he is under the special protection of the law; and that he could on that ground be considered as deceived in his grant. No case was cited to prove that position.

Now, it is to be remembered, that his Lordship was speaking upon the construction of an Act of Parliament of a private nature; an Act of Parliament in the nature of a monopoly; an Act of Parliament granting an exclusive patent for an invention to the celebrated Mr. Watt. And let it be added, that his opinion as to the validity of that grant, notwithstanding all the obscurities of the Act, was ultimately sustained in the King's Bench by a definitive judgment in its favor. (See *Hornblower v. Boulton*, 8 T. R. 95.) A doctrine equally just and liberal has been repeatedly recognized by the Supreme Court of Massachusetts. In the case of *Richards v. Daggett*, (4 Mass. 534-537,) Mr. Chief Justice Parsons, in delivering the opinion of the Court, said: "It is always to be presumed that the Legislature intend the most beneficial construction of their Acts, when the design of them is not apparent." (See, also, *Inhabitants of Somerset v. Inhabitants of Dighton*, 12 Mass. 383; *Whitney v. Whitney*, 14 Id. 88; 8 Id. 523; *Holbrook v. Holbrook*, 1 Pick. 248; *Stanwood v. Pearce*, 7 Mass. 458.) Even in relation to mere private statutes, made for the accommodation of particular citizens, and which may affect the rights and privileges of others, Courts of Law

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will give them a large construction, if it arise from necessary implication. (*Coolidge v. Williams*, 4 Mass. 145.)

Again, on p. 601, "An attempt has however been made to put the case of legislative grants upon the same footing as royal grants, as to their construction, upon some supposed analogy between royal grants and legislative grants under our republican forms of government. Such a claim in favor of republican prerogative is new, and no authority has been cited which supports it. Our Legislatures neither have, nor affect to have, any royal prerogatives. There is no provision in the Constitution authorizing their grants to be construed differently from the grants of private persons, in regard to the like subject matter. The policy of the common law, which gave to the crown so many exclusive privileges, and extraordinary claims, different from those of the subject, was founded, in good measure, if not altogether, upon the divine right of kings, or, at least, upon a sense of their exalted dignity and pre-eminence over all subjects, and upon the notion that they are entitled to peculiar favor, for the protection of their kingly rights and office. Parliamentary grants never enjoyed any such privileges. They were always construed according to common sense and common reason, upon their language and their intent. What reason is there that our legislative acts should not receive a similar interpretation? Is it not at least as important in our free government that a citizen should have as much security for his rights and estate derived from the grants of the Legislature, as he would have in England? What solid ground is there to say, that the words of a grant in the mouth of a citizen, shall mean one thing, and in the mouth of the Legislature shall mean another thing? That in regard to the grant of a citizen, every word shall, in case of any question of interpretation or implication, be construed against him, and in regard to the grant of the government, every word shall be construed in its favor? That language shall be construed, not according to its natural import and implications from its own proper sense and the objects of the instrument, but shall change its meaning, as it is spoken by the whole people or by one of them? There may be very solid grounds to say, that neither grants nor charters ought to be extended beyond the fair reach of their words, and that no impli-

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cations ought to be made, which are not clearly deducible from the language and the nature, and objects of the grant.

In the case of a legislative grant, there is no ground to impute surprise, imposition, or mistake, to the same extent as in a mere private grant of the crown. The words are the words of the Legislature upon solemn deliberation, and examination, and debate. Their purport is presumed to be known, and the public interests are watched and guarded by all the varieties of local, personal, and professional, jealousy; as well as by the untiring zeal of members devoted to the public service."

We think the terms of the Act of 1851 should be construed favorably to the grantee: 1st. Because it is not a grant made at the suit, or upon solicitation of the grantee. 2d. That it is a grant upon a valuable consideration, and was in the nature of a contract, the grantee assuming the trouble and cost of managing and disposing of the land, and being bound to pay to the State twenty-five per cent. upon all money received from sales of the property conveyed, which was done. 3d. That it is the deliberate public act of the Legislature.

Judgment affirmed.

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By the Mexican law, one-half interest in the community property vested in the wife upon the death of the husband, and was not subject to his testamentary disposition.

The same rule prevails under our statute.

The case of the matter of the *Estate of Buchanan*, (8 Cal. 507,) affirmed.

Under the Spanish and Mexican law, property acquired by husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either of them, by lucrative title solely, constituted the separate property of the party making the acquisition. The fruits, and profits, and increase, of the separate property, also, belonged to the community. By onerous title was meant that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges, to which the property was subject. Lucrative title was created by donations, devise, or descent.

Where a Mexican grant contained the following clauses designated in the instrument as conditions, namely: "1st. Neither the grantee nor his heirs can divide, nor alienate the premises granted to them, nor place upon said premises any mortgage or other charge, even though such mortgage or charge be for pious purposes, nor shall they convey the said premises in mortmain. 2d. He may inclose the premises without prejudice to the roads and the easement: he shall enjoy the premises freely and exclusively, devoting them to such cultivation and use as he may see proper. 3d. When the property shall be confirmed to him, he shall ask the proper Judge that he give him juridical possession in virtue of this title, for which purpose

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the boundaries shall be marked, and some landmarks shall be placed about said premises. 4th. The land which is embraced in this grant, is only that which is named in the petition of the grantee, and which is delineated in the sketch attached hereto, and the Judge who shall give him possession thereof, shall make to this government a report of the quantity of land comprised in the grant." *Held*, that these clauses were not properly conditions, and that there was nothing in any of the provisions which was onerous or burdensome to the grantee, or which could be regarded as a valuable consideration, moving the government to make the grant.

Donations may be absolute, or accompanied with conditions, the performance of which may be essential to the enjoyment of the property donated. It would seem that under the Spanish and Mexican law, a more comprehensive meaning was attached to the term donation than that usually given to it in our jurisprudence.

Onerous conditions were not necessarily attached to grants issued under the colonization laws of Mexico.

The land granted with the conditions above specified, constituted the separate property of the grantee, and passed to his devisees. The conditions did not change the transaction from that of donation to one of contract or purchase.

The recital in the grant that the grantee solicited the land for his personal benefit and that of his family, does not control the operative words of the grant.

APPEAL from the Third District.

This case was presented upon an agreed statement of the case under the 377th Section of the Practice Act. The facts are as follows: In February, 1830, Ygnacio Alviso and Maria Louisa Peralto were intermarried. In July, 1835, Alviso petitioned the Governor of California for a grant of the place called "Rincon de los Esteros." The Governor referred the petition to the Ayuntamiento of San José, and to the Reverend Father, minister of the Mission of Santa Clara. A favorable report was received from both the Ayuntamiento and the Minister, and in February, 1838, Juan B. Alvarado, then governor of California, issued to Alviso a grant for the place for which he had petitioned. This grant was afterwards confirmed by the Departmental Assembly of California. The following are copies of the petition of Alviso, the order referring the same to the Ayuntamiento and Reverend Father, their reports in relation to the same, the decree of the Governor thereon, the grant to Alviso, and the certificate of the confirmation of the grant by the Departmental Assembly:

"SEAL THIRD—TWO REALS.

Provided provisionally by the Maritime Custom-House of Monterey, Upper California, for the years one thousand eight hundred and thirty-four and thirty-five.

FIGUEROA.

A. RAMIREZ."

"Superior Political Chief:

The citizen Ygnacio Alviso, of the Pueblo de San José Guada-

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lupe, before your Excellency presents himself, and says, that to secure the cattle and horses which he has, I apply to your Excellency to grant to me the place named Rincon de los Esteros, according to the accompanying map, bounding with José Maria Alviso, José Higuera, the Pueblo de San José Guadalupe and the Mission of Santa Clara. Wherefore, I pray your Excellency to grant it to me, if you see proper, by which I shall receive favor, swearing to what is necessary.

YGNACIO ALVISO.

Santa Clara, July 27, 1835."

"MONTEREY, August 12th, 1835.

In accordance with the laws relative to the subject the Ayuntamiento of San José Guadalupe will report whether the petitioner possesses the requisites to entitle him to what he asks, if the land he asks for is not comprised in the twenty limiting leagues, but in ten littoral leagues mentioned in the law of August 18th, 1824; whether it belongs to any individual, mission, corporation, or pueblo, and all else relating to it. This done, transfer this expediente to the reverend fathers, Ministers of the Mission of Santa Clara, that they may report in relation to the matter. José Figueroa, General of Brigade, General Commandant and Inspector, and Superior Political Chief of the Territory of Upper California, so I order, decree, and sign, which I certify.

JOSÉ FIGUEROA,
FRANCISCO DEL CASTILLO,
NEGRETTE, Sec'y."

"This illustrious Council having examined with care as well the petition of the citizen, Ygnacio Alviso, as the respectable decree of your Excellency, of the date of August 12th, 1835, has seen fit to make the following report: The land is not irrigable, but subject to the season, having watering-places; it is not comprised within the twenty limiting leagues, nor the ten littoral leagues. The petitioner is a Mexican citizen, who has performed many services to the country, and is a retired Sergeant: that the land does not belong to any individual or mission, and it does belong to the commons of this pueblo, in view of the fact that the petitioner possesses it with the consent of this council,

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and does no injury. Your Excellency, considering the whole subject, will do what is proper.

Pueblo de San José Guadalupe, Sept. 14, 1835.

ANTONIO MA. PROO.

Transfer this expediente to the Reverend Father, Minister of the Mission of Santa Clara."

"Superior Political Chief:

In obedience to the preceding decree of your Excellency, I say, that the place asked for does not belong to this mission, nor to any individual, but it does belong to the commons of the pueblo of San José Guadalupe. It is subject to the season; has watering-places, and is not irrigable. Also, that it is not comprised within the twenty limiting leagues, but is within the ten littoral leagues.

The petitioner is a Mexican citizen, a retired Sergeant, with numerous cattle. He has a family, and is deserving and meritorious for his services done for the territory, for which, in my opinion, he is deserving of any favor.

Mission of Santa Clara, Sept. 19, 1835.

FATHER RAFAEL DE JESUS MORENO,

Minister of said Missions."

"MONTEREY, February 10, 1838.

Having examined the petition with which this expediente commences, the report of the municipal authority of the Pueblo de San José, with all else, in conformity with the laws relating to the subject, Ygnacio Alviso is declared the owner in property of the land called Rincon de los Esteros, according to the accompanying map, and within the limits marked upon it, subjecting himself to the conditions established by the laws of August 18th, 1824, and the regulations of November 21st, 1828. Let the corresponding dispatch be issued and a record made in the proper book, and direct this expediente to the Most Excellent Deputation for its approval, in which case the grantee to whom this decree is made known will present his title again that it be re-validated. So Juan B. Alvarado, Political Chief *ad interim* of Upper California decreed, which I certify.

JUAN B. ALVARADO."

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GRANT TO YGNACIO ALVISO.

The Citizen Juan B. Alvarado, Political Chief ad interim of Upper California:

Whereas, Ygnacio Alviso, a Mexican by birth, has solicited, for his personal benefit and that of his family, the land known by the name of Rincon de los Esteros, between the marked lines in the map, which accompanies the petition for the said tract; having previously taken the proper steps according to what is prescribed by the laws and regulations, in virtue of the power in me vested in the name of the Mexican nation, I have granted the said property to him by these presents, in conformity with the law and subject to the approval or disapproval of the Departmental Assembly and the following conditions:

1. Neither the grantee nor his heirs can divide nor alienate the premises granted to them, nor place upon said premises any mortgage or other charge, even though such mortgage or charge be for pious purposes; nor shall they convey the said premises in *mortmain*.

2. He may inclose the premises without prejudice to the roads and easements; he shall enjoy the premises freely and exclusively, devoting them to such cultivation and use as he may see proper.

3. When the property shall be confirmed to him, he shall ask the proper Judge that he give him juridical possession in virtue of this title, for which purpose the boundaries shall be marked, and some landmarks shall be placed about said premises.

4. The land which is embraced in this grant is only that which is named in the petition of the grantee, and which is delineated in the sketch attached hereto, and the Judge who shall give him possession thereof shall make to this government a report of the quantity of land comprised in the grant.

Wherefore, I order that these presents shall constitute his title, and shall be deemed good and sufficient, and that a memorandum of it shall be inscribed in the proper book, and that these presents be delivered to the grantee for his use.

Given in Monterey, in the Department of the Californias, on the tenth day of February, one thousand eight hundred and thirty-eight.

JUAN B. ALVARADO.*

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The approval of said grant by the Departmental Assembly:

"Juan B. Alvarado, Constitutional Governor of the Department of the Californias:

The most excellent Departmental Assembly, in session on the 26th day of May of the present year, approved the concession which this government made under date of 10th of February, 1838, of the land called Rincon de los Esteros, to the citizen Ygnacio Alviso, in the words following: 'Sec. 1st. The grant made by the Departmental Government, under date of February 10th, 1838, of the land called Rincon de los Esteros, to the citizen Ygnacio Alviso, is hereby approved.'

Certified for the benefit of the grantee, May 30th, 1840.

JUAN B. ALVARADO.

Manl. Jimeno, Departmental Secretary."

Alviso died in 1848. His wife, Maria Luisa Peralta, survived him, and was living on the 5th of November, 1857. There were no children by this marriage, but by a previous marriage Alviso had several children, among whom was a son named Domingo, and a daughter named Dolores. Domingo was married, and had several children in the lifetime of Alviso.

Alviso left a last will and testament, by which, after directing his executors to sell, for the payment of his debts, the portion of the rancho which lies between the Coyote and the Penitencia creeks, he undertook to devise the half of what remained, lying to the northwest, to his daughter, Dolores, and the half lying to the southeast, to the children of his son, Domingo; excepting, however, from the portion so devised, the place called Chino, which he directed "might be at the disposal of the widow of his son, José Maria"—but leaving no portion whatever of the rancho aforesaid to his widow, Maria Luisa.

Whatever title Dolores derived from the will of her father, in the portion of the rancho devised to her, is now held by the defendant. Whatever interest the widow, Maria Luisa, held in the same tract of land, by virtue of her marital rights, was conveyed by her, on the 5th of November, 1857, to William T. Wallace, and on the 22d of December of the same year was conveyed by Wallace to the plaintiff.

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Upon this state of facts, the defendant claimed to own the whole tract thus devised—the plaintiff claimed to be a tenant in common with him, and to own the undivided half of the said tract; and the parties prayed the judgment of the Court whether the plaintiff was entitled to recover the undivided half claimed by him.

The Court below rendered judgment in favor of the defendant, and the plaintiff appealed.

William Mathews, for Appellant.

If, by the grant made to Alviso in 1838, the land became his separate property, the Appellant admits that the devise to the daughter, Dolores, was valid; or at least, that neither the widow of Alviso, or any person holding under her, can dispute its validity. Assuming it to be community property of the marriage, the devise had no legal effect, as to more than an undivided half of the land, as against the surviving spouse.

The community property of a marriage, in consideration of the Mexican law, was on the death of one of the spouses, at the instant of death, divided between the survivor and the children of the deceased. (*Esrache Diccionario*, Tit. Bienes Gananciales.) On the other hand, the will of the testator only took effect after his death. (*Buchanan's Estate*, 8 Cal. 519; *Beard v. Knox*, 5 Id. 256.)

Whether this land belonged to the community property of the marriage, or to the separate estate of Alviso, must be determined by the Mexican law as understood in California at the time of its grant—in other words, by the Mexican law and the customs of the country.

Ganancial property is thus defined by Esriche: "Whatever the husband and wife acquire during the marriage and living together, by common lucrative or onerous title; or that which the husband and wife, or either of them, during the marriage and living together, acquire by purchase or by means of their labor or industry; as also the fruits of the separate property which each brings to the marriage; and of that which either acquires for himself by any lucrative title, whilst the conjugal society subsists." (*El Diccionario*, Tit. Bienes Gananciales.) This definition is less felicitous than that given by Feb-

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tero: "Whatever is acquired or gathered together during the marriage, by the husband and the wife, or by either of the two, is called ganancial property; as likewise the fruits of the separate property which either had brought to the marriage, or had taken for themselves, while it subsisted, by any title whatsoever." (Febrero, Tom. 1, p. 76.) This principle has been fully adopted by our statute. (Wood's Dig. 2d Ed. 487.) "The ganancial property is the common property of the husband and wife, and belongs the half to each of them; although the husband has more separate property than the wife, or the wife more than the husband; although one, after marriage, acquires more than the other; and although it may be one alone who by commerce or toil, accumulates the property; since by virtue of the marriage, there is established between the two consorts, a partnership, though legal, different from others, in that the acquisitions are the property of each, in equal proportion." (Escriche, Ubi, Supra.)

As the natural fruits of the separate property of each of the spouses are to be regarded as somewhat the result of labor, they are considered as belonging to the community. (Id.)

On the contrary, the improvements and augmentations to the property of one of the spouses, caused by nature or time alone, without labor or skill, are regarded the separate property of such spouse. (Id.)

Guided by these principles, it is submitted that the grants of land by the Mexican Government, for the purposes of colonization, are to be regarded as the community property of the marriage, and not the separate property of the spouse, in whose name the land is granted.

The object of Mexico in making her grants was to colonize the country. The empire, and afterwards the republic, possessed immense tracts of wild land, which, when inhabited at all, were inhabited by savages whose depredations desolated her frontiers. The territories of Coahuila and Texas, New Mexico, and the Californias, were eminently in this condition. The introduction and establishment of settlers in these territories was the means adopted by her to remedy this evil.

A citizen could leave the country, and might alienate his lands before his departure, but he could not abandon the country and

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still hold his lands. (Id. Art. 23; *Holliman v. Peebles*, 1 Texas, 673.) Most of the colonization grants contained the recital that the grant was made for the "personal benefit" of the applicant, and that "of his family." Such a recital is found in the grant in the record. The history of the country shows that these inducements and advantages offered to colonists were necessary. (*Reading's Case*, 18 How. 5.)

The method of soliciting the grants was tedious and costly. The proceedings extended not infrequently through a series of years. The proceedings in the record commenced in 1835, and ended in 1838.

Surely these grants, obtained and held with such difficulty, are not to be considered gifts from the government, but as purchases dearly paid for. They were so regarded by the Mexican law. Escriche, in enumerating the various classes of community property, places in his list "that which the husband acquires by military or governmental services, and the recompense for them, which the government gives him, provided he serves without pay, and maintains himself from the common resources of the marriage." (Tit. Bienes Gananciales; Ley 2, Tit. 4, Lib. 10, Nov. Rec.)

The colonization grants were so regarded by the Courts of California, and so treated by its population; the custom of the country in this respect had the force of law. (*Arredondo's Case*, 6 Pet. 715; *Von Schmidt v. Huntington*, 1 Cal. 56; *Castro v. Castro*, 6 Id. 160; *Tevis v. Pitcher*, 10 Id. 477; *Stafford v. Lick*, 10 Id. 12.)

The Supreme Court of the United States has held, in the Florida, Louisiana, and Missouri cases, that concessions and grants made on condition that the grantees should occupy, cultivate, work or graze, the lands granted, were contracts between the government and the grantees. (*Seton's Case*, 10 Pet. 309; *Südbald's Case*, Id. 313; *Arredondo's Case*, 6 Pet. 691; *U. S. v. Heirs of Forbes*, 15 Id. 173; *Same v. Heirs of Buyck*, Id. 215; *Same v. O'Hara et als.* Id. 275; *Same v. Smith*, 10 Id. 327; *Same v. Boisdore*, 11 How. 63.)

These cases differ from those based on unconditional grants, made by the government in consideration of past meritorious services. Such were the following cases: *U. S. v. Fernandez et al.* 10 Pet. 303; *Segui's Case*, Id. 306; *U. S. v. Benjamin Chaires*

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et al. Id. 308; *Same v. Antonio Huertas*, 9 Id. 171; *Same v. Clark*, Id. 168.

These grants were the separate property of the husband, or the community property of the marriage, according to whether the grant was or was not made in payment for services rendered during the marriage.

In the California cases, the Court has acted upon the same views. It holds the grants to be contracts, and admits it was in the power of the Mexican Government to declare these lands forfeited upon the failure to perform the conditions annexed to them. (*Fremont's Case*, 17 How. 542.)

The Texas cases establish the doctrine which the Appellant contends for. The chain of authorities in that State is unbroken. (*Yates v. Houston*, 3 Tex. 433; see, also, *Burris v. Wideman*, 6 Id. 231; *Edwards v. James*, 7 Id. 372; *Parker v. Chance*, 10 Id. 513; *Smith v. Strahan*, 16 Id. 314.)

S. O. Houghton, for Respondent.

The grant to Ygnacio Alviso commences with the recital that "Whereas, Ygnacio Alviso, a Mexican by birth, has solicited, for his personal benefit and that of his family, the land known by the name of Rincon de los Esteros," etc. and then follows the grant by the Governor: "I have granted the said property to him by these presents, in conformity with the law," etc.

The Spanish law in force in California at the date of the grant provides that: "Everything acquired or purchased by husband and wife jointly they shall have equally by halves; and if it be a gift from the King, or from another, and it be given to both of them, the husband and wife shall have it equally, and if it be given to one of them, that one alone shall have it to whom it is given." (L. 1, Tit. 41, Lib. 10, Nov. Recop.; L. 1, Tit. 3, Lib. 3, del Fuero Real.)

Community property under the Spanish law is defined to be that which the husband and wife, during marriage and while living together, acquire by a joint lucrative title, or by onerous title, and that which the husband and wife, or either of them, during marriage and while living alone, acquire by purchase or by laborious industry. (*Escrache*, Bienes Gananciales.)

Property acquired by gift, devise, or descent, is held under lucrative title. (*Escrache*, Lucrativo.)

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An onerous title is one by which we acquire anything paying its value in money, or in something else, or in services, or by means of certain charges or conditions to which we are subjected as purchase, exchange, hiring, and dower. (*Escrache*, Tit. Oneroso.)

The so-called conditions in this grant are not properly conditions, but restrictions. If they can be regarded as conditions, they are not onerous; they are merely nominal, and the fact that mere nominal conditions are annexed to a grant does not determine the character of the property. If the conditions are burdensome it is an onerous title, and goes to the community; otherwise it is lucrative, and is the separate property of that one of the spouses to which it is granted. (*L. & F. Frigue v. Hopkins*, 4 Mar. N. S. 214.)

The Texas grants, which have been held by the Courts of that State to be community property were made under the colonization law of Coahuila and Texas, the 22d Section of which provides for the payment by the grantee of a certain sum of money to the State. Those grants, therefore, are essentially different from the grants made to Alviso; they were titles by purchase; this is a gift from the government. The fact of there being a money consideration determines the character of the Texas grants; it is not the amount of the consideration, but the fact of a consideration being exacted, that fixes the character of the property.

As to the custom proved, it could only relate to grants with onerous conditions, and not to grants without such conditions.

Mathews, in reply, contended that the conditions annexed to the grant were onerous, and referred to the clause subjecting the grantee to the law of 1824 and the regulations of 1828.

FIELD, J. delivered the opinion of the Court — **TERRY**, C. J. concurring.

The only question presented by the record for determination in the present case is, whether the land granted by the Governor of California to Alviso, was his separate property, or the property of the community existing at the time between himself and wife. Alviso intermarried with Maria Luisa Peralta in 1830;

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the grant was issued in 1838; Alviso died in 1848; his wife survived him, and was living in 1857. There was no issue of this marriage, but by a previous marriage Alviso had several children, among whom were a son, named Domingo, and a daughter, named Dolores. Domingo married and had children during the lifetime of Alviso. To his daughter, and the children of his son, Alviso devised the land granted to him, with the exception of certain specified portions. The defendant claims title under Dolores; and whatever interest the widow Maria Luisa possessed, by virtue of her marital rights, in the land, was conveyed by her, in 1857, to Wallace, and by him to the plaintiff.

The case must be determined by the Mexican law in force at the time. If by that law the land was the separate property of the husband, it passed under his will, and judgment must be rendered for the defendant; if it were the property of the community, one-half interest vested in the wife upon the death of the husband, and was not subject to his testamentary disposition. "The wife," says Escriche, "at the death of the husband, acquires full property in, and control of, one-half of the community property of the marriage, and may freely dispose of it, as well by contract *inter vivos*, as by will, without being compelled to preserve it for the children of the marriage, provided, in her devises, she respects the rights of forced heirs." (Diccionario, Tit. Bienes Gananciales.)

The same rule prevails as to the rights of the wife, and the power of testamentary disposition of the husband, in reference to common property, under the statute of this State, as was held in *Beard v. Knox*, (5 Cal. 256.) In that case the Court said:

"The husband and wife, during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present definite and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after the death of the testator, cannot affect it, for such a conveyance can only operate after death, upon the very happening of which the law of this State determines the estate, and the widow becomes seized of one-half of the property."

The rule of the Mexican law as we have stated it, was recognized by this Court in the matter of the estate of Buchanan, de-

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cided at the October Term of 1858, (8 Cal. 507.) Buchanan died in June, 1855, leaving property, real and personal; some of the real estate having been acquired previous to the passage of the Act concerning the rights of husband and wife — April 17, 1850 — and a portion afterwards; and this Court held that the property — that acquired previously, as well as that acquired subsequently — belonged to the community, (excepting only a portion set apart as a homestead,) and that the same did not pass under the will of the deceased. "The law of Mexico," said the Court, "in force here until our statute took effect, was the same, so far as relates to the merits of this question. The property belonged to the community, and upon the death of the husband the widow took one-half. The husband had the power of disposition while living, but not by will, which could only take effect after his death. (Schmidt's Civil Law of Spain and Mexico, 12, 14, Arts. 43, 44, 51, 52; 1 Cal. 513; 5 Id. 111, 257.)"

It may be observed, that the property in relation to which the decision in the matter of the estate of Buchanan was made, was acquired by *purchase*, although the fact is not stated in the report of the case. It was not essential to the decision that it should have been stated, for the presumption attendant upon the possession of property during the marriage, under the Mexican law, was that it belonged to the community, and exceptions to the rule were required to be proved. (See *Meyer v. Kinzer*, 12 Cal. 248, and *Smith v. Smith*, Id. 217.)

It is proper to observe, also, that the decision in the Buchanan matter, which we affirm in the present case, does not conflict with the views expressed by Mr. Justice Bennett, in *Panaud v. Jones*, (1 Cal. 512,) as to the control of the husband over the common property *after the death of the wife*, and his power of testamentary disposition of the same. Indeed, in that case, the Court cite the authority of Febrero, to the effect that, upon the death of the *husband*, the *wife* becomes the absolute owner of the one-half of the common property; and then proceeds to show, that, upon the death of the *wife*, the husband still retained the control and right of disposition of the entire common property; that no estate in such property vested in the children on the decease of the mother; that they had only a contingent and defeasible interest in it, which never became perfect until the

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death of the father, and then only after the payment of his debts. There is no conflict in the two decisions.

The question then recurs, whether the land granted to Alviso in 1838 was his separate property, or the property of the community. Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either of them, by lucrative title solely, constituted the separate property of the party making the acquisition. The fruits, and profits, and increase, of the separate property, also, belonged to the community. By onerous title was meant that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges to which the property was subject. (Escriche, Tit. Oneroso.) Lucrative title was created by donation, devise, or descent. (Escriche, Tit. Lucrativo.) The Mexican law as to what constituted common property was very similar to the law of this State. Our statute does not seem to provide for property acquired by gift to the husband and wife jointly, but, with that exception, there is no substantial difference, unless, perhaps, the meaning of the term donation, under the Spanish and Mexican law, was more comprehensive than the term in our jurisprudence. The inquiry, then, is whether the property conveyed by the grant was held by Alviso under a lucrative or onerous title; in other words, whether it was a donation or a purchase. The grant purports to convey the land, subject to the approval of the Departmental Assembly, and contains various clauses which are designated in the instrument as conditions. The conditions, as they are termed, are not in fact such, but simple restrictions upon alienation, reservations of easements, and provisions for judicial possession, and the marking of boundaries of the specific tract granted. The first condition provides that neither the grantee or his heirs shall divide or alienate the premises, or subject them to any mortgage or other charge, even for pious purposes, or convey them in *mortmain*. The second condition provides that the grantee may inclose the premises, without prejudice to the roads and easements, and enjoy their free and exclu-

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sive possession, subjecting them to such cultivation and use as he may think proper. The third condition provides that, upon the confirmation of the property, the grantee shall request the proper Judge to give him judicial possession, in virtue of his title, and, for that purpose, the boundaries shall be designated, and landmarks placed around the premises. The fourth condition limits the land included in the grant to that designated in the petition of the grantee, and delineated in the sketch annexed, and provides that the Judge giving possession shall report to the government the quantity embraced in the grant. It is evident, from this statement, that the clauses of the instrument which are termed conditions, are not properly such. The first is a restriction; the second is the expression of the power of the grantee with a reservation of easements; the third is a provision for giving bounds and precision to the grant; and the fourth is a specification of the land intended to be conveyed, with a requisition upon the judicial officer to report to the government. There is nothing in any of these provisions which is onerous or burdensome to the grantee, or which can be regarded as a valuable consideration, moving the government to make the grant. Donations may be absolute, or accompanied with conditions, the performance of which may be essential to the enjoyment of the property donated. Thus, a gift of fruits would not lose its character as a gift because accompanied with the condition that the donee should gather them, nor would a gift of land be less a donation because the beneficiary was required to measure off the specific quantity given and designate it by metes and bounds. And it would seem that under the Spanish and Mexican law, a more comprehensive meaning was attached to the term donation than that usually given to it in our jurisprudence. Conditions are sometimes attached to donations which would be regarded as common law as changing the character of the transaction from one of gift to one of purchase. "Donations *inter vivos* and testaments may be made on conditions, and subject to restrictions imposed either on the person or the thing, and they may contain clauses of substitution and restitution." (Schmidt's Civil Law of Spain and Mexico, Art. 966.) "A donation may be made simply and without any condition or incumbrance; or it may be made for a certain time and as remunera-

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tion for benefits received." (Id. Art. 988.) "That which is made conditionally remains effective until the condition happen." (Id. Art. 989.) "A donation made on condition that the donee shall do something is revocable, if the donee fail to fulfill the condition." (Art. 990.)

"Men are sometimes induced to make donations from certain causes or particular reasons, without which they would not have made them; as where one man gives another a sum of money, or an estate, expressly declaring at the time he make the donation that he gives it in order that the donee may, by that means, be always provided with a horse and arms for his service; or where he makes the donation to any artificer, and declares openly that he makes it for certain work or service which the donee was to render him. Wherefore, we say, that if the person who receives a donation in the manner above mentioned, complies with the agreement or condition, or does that for which it was given, the donation will be valid in every respect; but if he should not comply therewith or faithfully execute that for which it was given, he may be compelled to comply with what he had promised, or to abandon the donation which had been made to him. We likewise say, that if one man give another a vineyard, or garden, or an estate, or any other thing whatever, declaring expressly at the time he made the donation, that he gave the thing with the intention that a certain portion of the fruits arising from it should be given to another person for his maintenance, or to redeem him from captivity, or for any other like purpose, if the donee comply with the object for which it was given, the donation will be valid; and if he should not, the donor may revoke it. And donations of the kind mentioned in this law are called, in Latin, *sub modo*; which means, in common speech, a donation made for a certain purpose—so *otra manera*." (2 Moreau & Car. Partidas, 647, 648.)

In *Gayoso de Lemos v. Garcia*, (1 Mar. N. S. 333,) the Supreme Court of Louisiana, in speaking of a claim, asserted by the plaintiffs in that case, that the land granted to their father by the King of Spain belonged to the community, said: "The title of the plaintiffs is founded on a grant made to their father during marriage, and it has been urged that the land thus acquired, entered into and made a part of the community subsisting between

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husband and wife. Whatever support this argument may derive from the practice which, we believe, has prevailed in some parts of the State, to regard lands granted by the sovereign as property common to both spouses, it is certain that it is not only unsupported by authority, but that the law most positively says it shall not be common to both, but that it shall belong exclusively to the individual to whom the King grants it. (Novissima Recop. Liv. 10, Tit. 4, Leyes 1, 4, y. 5, Febr. p. 1.)”

In *Frique v. Hopkins et al.* (4 Martin's Rep. N. S. 214,) it was also claimed that land granted to the ancestor of the plaintiffs, by the King of Spain, was common property, and the ruling in *Gayoso de Lemos v. Garcia*, was referred to and expressly affirmed. The consideration, or moving cause of the grant, was stated in the instrument to be the public good, and in order to increase the population of the city. After citing the Spanish law, by which it was declared that whatever might be given by the King, or another, to both husband and wife, should belong to them jointly; but that if given to any one of them, it should be considered as belonging to the individual to whom it was given, and mentioning that the commentators understood the law to apply to all cases coming within its letter, except those where the King gave in remuneration of services rendered by the husband, when he served without pay, and was maintained at the expense of the community, and referring, in support of that view, to a law of the *Fuero Real*, the Court said: “The correctness of the application of these laws to a grant of lands by the former sovereign of Louisiana, has been contested on two grounds:

1st. That there is a material difference between a donation and a concession.

2d. That as it appears by all regulations made here by the Spanish Government, in relation to concessions for lands, that the quantity conceded was greater or less, according to the circumstance of the grantee being married and having children, or being single; grants made to a man who was married, must be the common property of both husband and wife.

As to the first of these grounds, we apprehend there is nothing in it which requires our particular consideration. We are unable to perceive any material difference between a donation and

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a concession of lands, such as the former government of Louisiana was in the habit of granting. It is true, concessions may be made, on consideration moving from the donee, which would take from them the character of a donation. But lands given by the King, without price paid for them, and not in remuneration of any services rendered, certainly are donations. If they be not, we are ignorant under what denomination they should be classed.

The second ground was most relied on in argument. It did not escape our attention in the case already alluded to, though no notice is taken of it in the opinion delivered. But we were unable then, as we are now, to discover in it a sufficient reason for taking the case out of the plain and positive provisions of the statute. The consideration which induced the grant or donation, cannot change its character, unless there is a positive provision of law which makes the exception; as in that given from the *fuero real*, where the thing granted is in remuneration of services rendered at the expense of the community. Were we to take this as valid ground for evading the positive enactment of the Legislature, it would lead us, we apprehend, much further than is contemplated by those who press it on our adoption. By the regulations of the Spanish Government, if the individual who applied for land was unmarried, a certain quantity of land was given to him; if he had a wife, this quantity was increased; and if he had children, an additional number of acres were conceded. Now if the circumstance of his being married made the thing given become the property of both husband and wife, we must, on the same principle, hold, that where children were the moving cause, they, too, should be considered as owners in common of the land conceded. But that such was the effect of the donee having a family, we believe was never even suspected — it certainly is unsupported by law. Many donations are made, in which the donee's having a wife, and being burdened with a large family, is a great consideration for the beneficence of the donor; but this motive in him does not prevent the person to whom the gift is made, from being considered its owner, nor prevent the thing given from descending to his heirs.

It was, however, said that the object in making these grants was to encourage the settlement of the country; and that to

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carry that object into effect, it was necessary that the lands should be considered as given to both husband and wife. To this it might be answered, and with great force, that if the government were of that opinion, it is strange they did not at once say so, and by making the concession in the name of both, place the matter beyond doubt; and not, by granting it to one of the spouses, leave it to the operation of a positive law which repelled the idea. But if we could enter into political considerations, in order to ascertain whether they could repeal statutes, we would, in this case, be led to the examination of a nice and refined question of policy in relation to the effect on national prosperity, of giving to the wife a distinct interest in the property acquired during marriage, one on which men would be found to differ according to their education and particular modes of thinking."

To these Louisiana cases, and the absence of express onerous conditions in the grant, the plaintiff only answers that the grant in question was issued under the colonization laws of Mexico, and that, by force of them, onerous conditions were necessarily implied. We do not understand that such conditions were necessarily attached to colonization grants. There may be a marked difference between the concessions in the Louisiana cases and the grants made under the decree of 1824, and the regulations of 1828. The object of the decree and those regulations was the settlement of the vacant lands of the republic, and for that purpose grants were generally made subject to the conditions of cultivation or occupancy. But where, as in the present case, such occupancy already existed, accompanied with the construction of a house, and its habitation, it would have been to no purpose to have inserted the conditions. The fact of occupancy may have been, and probably was, the reason both for the issuance of the grant, and the omission of the usual condition. But the reason moving the government constituted no consideration changing the character of the grant from a donation to a purchase. It created no obligation, and conferred no rights.

We are of opinion that the grant in question was a simple donation, and that the land it contained constituted the separate property of Alviso, and passed under his last will and testament; and as a conclusion therefrom that the judgment must be affirmed. Ordered accordingly.

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On rehearing, at a subsequent term, the following opinion was delivered by FIELD, C. J. — BALDWIN, J. and COPE, J. concurring.

Since the rehearing ordered in this case was had, we have carefully reviewed the opinion delivered at the April Term, and are satisfied that its conclusion as to the character of the grant in question is correct. If it be admitted, as contended by the counsel of the plaintiff, that the usual conditions of cultivation and occupancy were annexed to the grant by force of the decree of 1824, and the regulations of 1828, the result would be the same. These conditions would not change the transaction from that of donation into one of contract or purchase. Their performance constituted no consideration to the government in the nature of a price for the land. They were annexed to colonization grants, in furtherance of the general policy of the republic in the settlement of the country, and their performance was exacted to prevent that policy from being defeated. They only operated as a requirement that the lands should be appropriated to the purposes for which they were granted.

The recital in the grant that the grantees solicited the land "for his personal benefit and that of his family," cannot control the operative words of the grant. In point of fact the recital is untrue. The petition is set forth in the record, and contains no mention of the petitioner's having any family. In it the petitioner solicits the land "to secure the cattle and horses which he has" — and states no other object for which the land was desired. The recital was probably taken from the usual forms in which grants were written; it certainly was not inserted or intended to have any influence upon the direction of the title. The grant is made to Alviso individually, and its terms determine the person in whom the property vested.

The term "family" is not limited to the husband and wife. Alviso had at the time several children by a previous marriage, and if the use of the term in the recital can have any effect upon the direction of the title, it is difficult to see why those children might not claim to have received an interest in the property equally with the wife, or the community existing between the husband and wife. Such an effect was never supposed to exist, it is believed, by any one. Judgment affirmed.

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MOORE *et al.* v. WILKINSON *et al.*

WHERE a grant is for four leagues of land, within a larger tract, the right to measure off the specific quantity granted rested with the former government, and upon the cession, passed with other public rights to the United States. That right is political, and cannot be exercised by the judicial department. Courts may ascertain and fix the position of boundaries which are designated, but cannot give boundaries to a specific quantity which has none, and lies in a larger tract.

The judiciary must determine whether the prior rights of third persons have been interfered with by the survey and patent, but it cannot correct the one nor the other. The survey and patent are conclusive in actions of ejectment.

Even though the title of a grantee, in a particular case, to a specifically described or designated tract be perfect, without further action by our government, yet if such action be had, and the grantee accepts the land described in his patent as satisfying his claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with. This is a matter between the government and the grantee, with which strangers have no concern.

The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination — the judgment of the appropriate department of government that the survey does conform to such decree. That determination or judgment is not the subject of review by the judiciary. It is conclusive upon the Courts in actions of ejectment as the adjudication of a competent tribunal, upon a subject within its exclusive jurisdiction.

A patent cannot be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. For these matters the right of interference rests only with the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them.

The 15th Section of the Act of Congress of 1851, provides that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interest of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties.

A patent takes effect, by relation, at the date of the presentation of the petition of the patentee to the Board of Land Commissioners. And where such petition was presented in March, 1852, at which time the pre-emption laws of the United States were not extended to California; the rights, if any, of parties, claiming under those laws, are subordinate to the result of the proceedings then pending by the grantee before the tribunal and officers of the United States.

Where claimants had, prior to the issuance of a patent, published a notice that they had become the owners of the grant, specifying its boundaries, and warning off trespassers; *Held*, that they were not estopped from claiming, under their patent, land outside of those boundaries.

Query: Whether such notice would protect third persons against any demand for damages until the approved survey?

APPEAL from the Ninth District.

Ejectment to recover land situated in Butte County. The plaintiffs claim title under a Mexican grant, and a patent of the United States, issued upon its confirmation. The following is a copy of the grant:

"Pio Pico, Constitutional Governor of the Department of California:

Whereas, the Mexican citizens by birth, Maximo and Dionisio Zenon Fernandez, have solicited for their personal benefit, a

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tract of vacant land in the immediate vicinity of the river Sacramento, bounding on the north with the base of the Snowy Mountains, on the south with the land of Don Juan A. Sutter, and on the east with Feather River, having previously made the corresponding inquiries and investigations as are provided in conformity with law of 12th August, 1824, and regulations of 21st November, 1828, I have assented by decree of this date, in the exercise of the powers conferred upon me, in the name of the Mexican Nation, to grant to them the tract aforesaid, declaring to them the fee of the same by these presents with reservation of the approval of the most excellent Departmental Assembly, and under the following conditions:

1st. They may fence in the same without prejudice to the cross-roads and servitudes. They shall enjoy it freely and exclusively, dedicating it to the uses or cultivation which may suit them.

2d. They shall solicit from the respective Judge that he give them judicial possession in virtue of this patent, by whom shall be marked out the boundaries by the necessary monuments.

3d. The land of which donation is made merely four square leagues, (or four ranges of neat cattle,) in conformity with the map annexed to the proceedings, (*expediente*.) The Judge who may give them possession will cause the same to be measured according to the ordinance, leaving the remainder which may result in the nation for its proper uses.

I therefore ordain that, holding the present document of title as firm and valid, note be taken of it in the respective book, and it be delivered to those concerned for their protection and other purposes.

Given in the city of Los Angeles on this common paper, for the absolute want of stamped, the twelfth day of June, one thousand eight hundred and forty-six.

PIO PICO.

José Mateas Moreno, Provisional Secretary.

Note has been taken of this Superior Patent in the respective book.

MORENO."

On the trial the defendants, among other things, offered to

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prove that two of the plaintiffs, and the grantor of the other plaintiff, on the 4th of March, 1856, published in the *Butte Record*, a paper of general circulation in the neighborhood where the premises are situated, a notice stating that they had become the owners of the tract of land known as the Fernandez grant, and setting forth its boundaries, and notifying persons not to trespass upon the tract. The notice was at the same time produced in connection with the offer of the defendants. The object of introducing it was to show that the plaintiffs did not claim, by the boundaries designated in the notice, the premises in controversy. The Court excluded the notice, and the defendants excepted.

All other material facts of the case are stated in the opinion of the Court. The plaintiffs recovered judgment, and the defendants appealed.

Robinson & Beatty, for Appellants.

I. If the grant was for a certain specific tract of land, defined by metes and bounds which were capable of being ascertained and accurately defined by the ordinary modes of judicial investigation, and the said boundaries contained four leagues and no more, then the grant of the Mexican Government conferred on the grantees a perfect title. As a corollary to this proposition, the plaintiffs, having derived a perfect title from the Mexican Government, need not have presented their claim to the Board of Land Commissioners. It is true, that the Act of Congress requires all claims to be presented, and says that all lands not confirmed shall be "deemed held and considered" public domain. But this is a mere *brutum fulmen*. Congress could not pass a law forfeiting the property of a citizen without compensation, and for no crime but failing to do an act which should perfect a title which was already perfect. (*Lytle et al. v. State of Arkansas*, 9 How. 314.) If, however, the grantees had a grant for four leagues of land not defined by any specific boundaries, but contained within more extended boundaries—say within thirty leagues—then the question arises, who would have the right to segregate and select the four leagues out of the thirty, the grantees or the government? If the government has the right to elect, it has no right to go outside of the thirty leagues.

It was suggested by the Court that this land, having been patented by the United States, the government would never advertise it for sale, consequently defendants could never get a title. This we think an imaginary difficulty. The land has been conveyed by the government to the plaintiffs by a sort of quit-claim, reserving the rights of third parties. The Appellants are third parties holding an equity against the government. The government patent passes the land subject to that equity. Appellants can tender the one dollar and twenty-five cents per acre, and file their bill to compel Respondents to deed the land. Or Respondents can file their bill to compel Appellants to pay the money or surrender their equity. We admit that, if this grant did cover an extent of thirty leagues, no pre-emption right could attach within that thirty leagues. But we offered proof to show that the land in controversy was outside of the utmost limits of the grant.

II. A pre-emptor who settles on public land under and by virtue of the United States laws, is, from the time of his settlement, a purchaser in good faith. He has a vested right, of which the government cannot deprive him by Act of Congress. His settlement and his improvement of the land are the consideration that he pays the government. (*Lytle v. State of Arkansas*, above cited.)

III. The notice published by two of the plaintiffs and the vendor of the third, as to the boundaries of their grant, was competent evidence, and should have been received. It was one link in the evidence to establish the allegation in the answer of the defendants, that they had made their improvements, "encouraged by the representations of the plaintiffs," that the premises "were public lands, and not included in any Mexican grant." If the plaintiffs did make such representations, they are estopped from claiming any back rents, and may be compelled to pay for improvements made by defendants, if indeed they are not estopped to sue for the land.

IV. The Appellants are the "third persons" mentioned in the 15th Section of the Act of March 3d, 1851, whose interests the decree of confirmation and the patent do not affect. If the Appellants held under the United States by right acquired *per-*

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dente lite, they would be privies. It can only be supposed that they acquired their rights *pendente lite* by confounding the acts of the Courts with those of the Surveyor-General. If, while the claim of the Respondents was pending before the Board of Commissioners, or the United States District Court on appeal, they acquired any right from the United States adverse to the claim they presented, they acquired it *pendente lite*, and the same would be barred by the decree against the United States. But they admit the validity of Respondents' claim, and the correctness of the decree in their favor. They abide in everything the Court and Commissioners did. The decree was a legal adjudication that the title was and had been a good one. After that adjudication, the political department of the government commenced to act, and they say, surveyed land not decreed to belong to Respondents.

If Respondents asked for one piece of land, and the Appellants finding litigation about that, bought another and different piece, this was not buying *pendente lite*, because there was no suit about the piece they bought. It was a suit between the same parties, but not about the same property. The Surveyor is in no way connected with the Courts or Board of Commissioners.

The first proceeding terminated with the final decree. If that decree was for this land, the Appellants cannot hold it, as they are purchasers *pendente lite*. But if the decree does not include it, then they are not precluded from setting up rights acquired before the survey was made. That was the first indication of a claim to this land. It is that survey they wish to contest, not the decree. They did not purchase pending the survey.

Wm. H. Rhodes, for Respondents.

I. By the treaty of Guadalupe Hidalgo, the United States reserved and incurred the duty of surveying and segregating the domain previously granted by the government of Mexico. (*West v. Cochran*, 17 How. 403; *Stanford v. Taylor*, 18 Id. 412; *Stoddard v. Chambers*, 2 Id. 316; *U. S. v. Sutherland*, 19 Id. 364; *Willot v. Sanford*, 19 Id. 80; *Menard's Heirs v. Massey*, 8 Id. 294; *Guitard et al. v. Stoddard*, 16 Id. 512.)

II. The grant having been confirmed, surveyed, and patented, the defendants cannot question the proceedings on the

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ground of having, as third persons, rights to the land in controversy; the survey and patent are conclusive. (*West v. Cochran*, 17 How. 402; *Stanford v. Taylor*, 18 Id. 412; *Bryan et als. v. Forsyth*, 19 Id. 334; *Stephenson v. Smith*, 7 Missouri, 610.)

The terms "third persons," in the Act of Congress of 1851, do not apply either to the U. S. Government or to the claimants, for they are the immediate parties to the proceedings. They have reference solely to the claimants of conflicting grants.

In what sense can a settler be deemed a third person? He must be so by virtue of some interest in the premises derived from an independent source. His interest derived from the parties litigant is, by a general rule of law, merged in that of the parties through whom he claims. All actions at law and in equity bind parties thereto. But the term "parties" signifies: 1st. The persons immediately before the Court. 2d. Privies in estate. 3d. Privies in blood. 4th. Privies in law. (1 Green. Ev. Secs. 523, 536.)

The true position of affairs is this: 1. The United States purchased certain vacant land from Mexico. 2. The United States, as a matter of bounty, agreed to sell that land to actual settlers. 3. The land in controversy is admitted by the United States to belong to the Respondents, and that they never owned a foot of it; and third persons are bound by this admission. (*Stringer et al. v. Young*, 3 Pet. 341; *Gatt et al. v. Galloway*, 4 Id. 342, cited with approval in *Bagnell v. Broderick*, 13 Id. 446; *West v. Cochran*, 17 How. 403; *Stanford v. Taylor*, 18 Id. 412; *Willot et al. v. Sanford*, 19 Id. 80; Id. 209.)

Again, the defendants cannot claim as pre-emptors, because the land is exempted from the operation of the pre-emption laws. Nor can they claim to be settlers in good faith without notice. 9 U. S. Statutes at Large, 632, Sec. 13; 10 Id. 246, Secs. 6, 3; Act of 1851 relative to settling land claims.)

III. There is no error in the location of the grant. The grant commences its boundary with the north line, not the south. It fixes the *faldas* of the Sierra Nevada range as its starting point. According to the Spanish dictionary, the word means, primarily, *radix montis*. It is sometimes translated *base of a mountain*, *sometimes skirts of a mountain*, and sometimes *trail of a dress*. But it has nowhere an independent existence.

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It necessarily adheres to something greater — is a component part of a larger thing. In this case it is attached to the terms Sierra Nevada range of mountains. It cannot, therefore, mean the foot-hills of that range. It must mean the *radix* of the range itself.

FIELD, J. delivered the opinion of the Court — TERRY, C. J. and BALDWIN, J. concurring.

This is an action of ejectment, to recover the possession of a tract of land situated in Butte County. The plaintiffs deraign their title to the premises from a grant issued to Maximo and Dionisio Fernandez, by Pio Pico, formerly Mexican Governor of California, and a patent issued, upon its confirmation, on behalf of the United States. The grant bears date on the twelfth of June, 1846; the claim under it was presented for confirmation to the Board of United States Land Commissioners in March, 1852, and was confirmed by that Board to the claimants in July, 1855, and subsequently by the United States District Court in March, 1857. The Attorney-General of the United States soon afterward gave notice that no further appeal would be prosecuted on the part of the United States, and by an order of the District Court, the claimants had leave to proceed as upon a final decree. The grant describes the land as lying in the immediate vicinity of the river Sacramento, and as bounded on the north by the base of the Snowy Mountains; on the south by the lands of John A. Sutter, and on the east by Feather River. No boundary on the west is specified, but to the *espediente* a map of the tract was annexed, and to this map reference is made in the grant, the third condition of which is in the following language: "The land of which donation is made is merely four square leagues (or four ranges of neat cattle), in conformity with the map annexed to the proceedings (*espediente*). The Judge who may give possession will cause the same to be measured according to the Ordinance, leaving the remainder which may result to the nation for its proper uses." In April, 1857, four leagues — the specific quantity granted — were laid off and surveyed under the directions of the Surveyor-General of the United States for California, and the survey was, in May following, approved by that officer. Upon this survey, and in pursuance of the confirm-

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ation, a patent on behalf of the United States was issued to the claimants, bearing date on the 14th of October, 1857, for four leagues of land with the specific description of the official survey. This patent includes the premises in controversy, and the defendants were in their occupation at the commencement of the action.

To resist a recovery, the defendants offered parol evidence, to show that the four leagues, as surveyed and patented, were different from the tract designated in the grant, and the map to which the grant makes reference; that a correct location of the tract, as granted, would not include the premises in suit; that the defendants are citizens of the United States, and had each entered upon a separate quarter section of the premises, claiming the privileges of pre-emptioners under the laws of the United States, and made the improvements required in such cases, and had, in May, 1856, filed their separate declaratory statements in the office of the United States Register, at Marysville, insisting that as such pre-emption claimants, they had acquired vested rights, and that the confirmation of the grant, and the patent issued thereunder, were not conclusive against them under the provisions of the 15th Section of the Act of Congress of March 3d, 1851. The Court below excluded the evidence offered, and its ruling in this respect constitutes the principal error assigned for a reversal of the judgment.

This ruling of the Court, we think clearly correct, and the position of the defendants untenable. It will be seen from the grant that there were no certainty and precision in the boundaries. No official survey of the northern line of the lands of Sutter was ever made under the former government, and none has as yet been made under the government of the United States. The position of that line was a matter still to be determined when the grant to Fernandez was issued. The point where the Sierra Nevada may properly be said to commence, was at the time, and is to this day, a matter of uncertainty. The term *faldas* is used in the original grant, and is sometimes translated "slope of the mountains," and sometimes "base" of them. It represents no independent existence, but only something pertaining to that which is greater. As applied to the Sierra Nevada, it must mean either their "base" or "slope," and not those ele-

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vations which precede the general rise of the mountains, and are termed "foot hills." The commencement of such base or slope is not fixed by any marks which give to it precision and certainty. The western boundary is not given at all. It is very evident that the Governor only intended to indicate by the boundaries designated the general outlines of the tract within which the four leagues were to be taken. Between the *faldas* of the Sierra Nevada — not meaning thereby the foot hills, but the base or slope of the mountain — and the line of Sutter, as given by the witness, Bidwell, who made the map referred to in the grant to Fernandez, there is an extent greatly exceeding four leagues. The western boundary is not, as we have stated, given, and between Feather River on the east, and the Sacramento River, in the vicinity of which the land is stated in the grant to lie, there is a much greater width than one league.

If, then, the grant in question is to be regarded as conveying an interest to four leagues lying within a larger tract, the right to measure off and give precision to the specific quantity granted, remained with the former government, and passed with all other public rights to the government of the United States, upon the cession of the country. That right belongs to the political department of the government, and cannot be exercised by Courts of Justice. The Courts can ascertain and fix the position of boundaries which are designated, but cannot give boundaries to a specific quantity which has none, and lies in a larger tract. To give precision and location to such specific quantity a survey must be made by the proper department of government, in which the subject is vested by the legislation of Congress. (See *Waterman v. Smith*, 13 Cal. 373.) With the action of that department, the judiciary cannot interfere. The judiciary must determine, it is true, whether prior rights of third parties have been interfered with by the survey and patent issued thereon, but it cannot correct the one nor the other, and locate the land, where, in its judgment, the location ought originally to have been made. The survey and patent are conclusive upon it in actions of ejectment, except when in conflict with the prior rights of third persons, and then their inconclusiveness can be asserted only to the extent essential for the protection of such prior rights.

We do not understand the counsel of the defendants as ques-

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tioning the correctness of these views, but as insisting that the map annexed to the grant embraced the precise quantity of four leagues granted, and as that quantity was to be taken in conformity with such map, the title of the grantees was perfect, requiring no further action of the government, and must be restricted to the land contained in the map; that the subsequent confirmation, survey, and patent, of the United States did not add to the grantees' title, nor could they, without the grantees' assent, in any way have impaired it.

The title of the grantees to the land contained within the map may be admitted to have been perfect, and yet no conclusion follows against the claim of the plaintiffs. If they have accepted the land described in their patent as satisfying their claim, no other persons can object that a portion of the land thus taken is without the boundaries of the grant, unless their prior rights are interfered with. This is a matter between the government and the grantees, with which strangers have no concern. The answer, however, to the position of counsel is this: The government has provided a Board for the determination of the validity of claims to lands held under Mexican grants, and a system for the survey and location of the lands upon the recognition and confirmation of such claims. The survey and location are to follow the decree of confirmation. The approval of the survey by the proper officers is the determination — the judgment of the appropriate department of government, that the survey does conform to such decree. That determination or judgment is not the subject of review by the judiciary. It is conclusive upon the Courts in actions of ejectment, as the adjudication of a competent tribunal, upon a subject within its exclusive jurisdiction. The patent, which is the final document issued by the government, is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey, and its conformity with the conformation, and of the relinquishment to the patentee of all the interest of the United States in the land. It cannot be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. For these matters the right of interference rests only with the government. Individuals can resist the

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conclusiveness of the patent only by showing that it conflicts with prior rights vested in them. And this brings us to the inquiry whether the defendants possess any such prior rights. The 15th Section of the Act of Congress of 1851, provides that the final decree of confirmation and patent, shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties; and in *Waterman v. Smith*, ante, 373, we held that the third persons mentioned in the Act were those whose title was at the time such as to enable them to resist successfully any action of the government respecting it. The patent took effect by relation, at the date of the presentation of the petition of the patentees to the Board of Land Commissioners, in March, 1852. At that time the pre-emption laws of the United States, under which the defendants assert their acquisition of rights, were not extended to California. Any rights which they possess were subsequently acquired, and must be subordinate to the result of the proceedings then pending by the grantees before the tribunals and officers of the United States. These proceedings had for their object the recognition of the grantees' claim, and the determination of its location with such precision as to leave no room for subsequent dispute and litigation. If settlers, after steps taken for confirmation, could by location acquire such rights to the premises as to authorize them to compel a patentee, in every suit for the recovery of his land, to establish the correctness of the action of the officers of government in their survey and location, the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation, and the settlement of land titles in the country be delayed a quarter of a century. The patentee would find it established in different suits, to the utter destruction of his rights, that his land should have been located in as many different places within the exterior boundaries of the general tract, designated in his grant, as the varying prejudices, interests, or notions of justice, of witnesses and jurymen might suggest.

The notice published by two of the plaintiffs and the vendor of the third, in 1856, stating that they had become the owners

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of the grant, and specifying its boundaries, and warning trespassers not to come upon the land with such boundaries, was properly excluded. Such notice could not operate as an estoppel upon the plaintiffs, for two reasons. First, it was only evidence of the *opinion* the parties entertained of the boundaries of their claim; that opinion could not control the action of the officers of government, or affect the validity and effect of the patent. The pre-emptioners are presumed to have known, as such was the law, that the right of survey and location rested exclusively with the government, and was not subject to any direction of the grantees. Nor is it reasonable to hold that the plaintiffs intended to abandon all rights to any other land, provided the official survey did not conform to the boundaries they indicated. The most that can be asserted from the notice is, that until the location of their tract, the parties limited their claim to the land within certain boundaries. It may be possible that such notice would operate as a protection against any demand for damages until the approved survey was made. We do not affirm even this, but certainly it can have no greater effect. In the second place, the settlement was made by the defendants in 1853, and could have not been induced, of course, by the notice published in 1856.

Judgment affirmed.

See *Waterman et al v. Smith*, (*ante*); *Yount v. Howell*, (14 Cal.)

MOORE *et al.* v. ROFF *et al.*

Moore v. Wilkinson, (*supra*.) affirmed.

The facts of this case are similar to the facts in *Moore et al. v. Wilkinson et al.* with the exception that the defendants have never filed any declaratory statement of their intention to preempt the quarter sections which they occupy. The case, if possible, is more barren of merit than the one cited, and on that authority the judgment is affirmed.

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ANNA TRYON v. SUTTON *et al.*

If no motion be made in the Court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at Appellant's cost.

Mere indefiniteness of description in a mortgage is no objection to its enforcement as it is written, whatever the effect of the sale under such a description. The mortgagor cannot complain.

There is little, if any, practical difference between the Court ruling out testimony upon the strength of a fact proven to the Court, and permitting the case to go to the jury, and then denying effect to such testimony, upon proof of the same fact.

A married woman cannot make an assignment of a mortgage without the concurrence of the husband. [The property was common.—*REV.*]

By the common law, a note payable to the wife is *prima facie* the property of the husband, and can be indorsed by him, but not by her alone.

A party dealing with a *feme* is bound to inquire into her rights and powers. The fact that papers are drawn directly to the wife does not estop either husband or wife from refusing effect to her sole act.

The case might be different if the husband represented the wife to be a *feme sole*, and with authority to deal as such with the common property, or assigned to a transfer by her; but the fact that a note or mortgage is executed to her is not conclusive proof of any such representation.

Where the complaint avers that the note and mortgage sued on were made to "E." a married woman, and by her assigned to plaintiff, he cannot recover, because the right to assign was in the husband; and this, too, where the *proof* was that both husband and wife assigned the note and mortgage. In chancery cases the party must recover according to the *pleadings*, and not the proof, where there is a variance.

APPEAL from the Sixth District.

The case is sufficiently stated in the opinion.

J. H. Ralston, for Appellant. The Court below erred in excluding the assignment by E. Schroeder of the two thousand dollar note and mortgage to Bertha McKay. The complaint counted on the note as payable to Mrs. E. Schroeder, and by her alone assigned to plaintiff. The fact that she had a husband is nowhere averred. Defendant admits the execution of the note to her, and sets up payment to her assignee. Under this state of pleading the defendant had a right to go to the jury upon the question whether E. Schroeder was married in fact, or whether she was a sole trader, and hence competent to assign. Defendant had a right to try his case according to the issues framed.

Wm. S. Long, for Respondent. 1. Error in the decree as to description of the property, cannot be taken advantage of in the Appellate Court for the first time. 2. E. Schroeder, being a *feme covert*, could not assign the mortgage. Besides, there is no proof that the note was assigned, and this could be bought by plaintiff even if the mortgage had passed to McKay.

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BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

1. It is conceded by the counsel for the Respondent that there is an error in the decree in this case by an omission to give credit for one thousand dollars entered on the note. This seems to have been a clerical error, which the pleadings themselves disclose, and the Respondent is willing that it should be corrected here. As no motion was made for the correction in the Court below, the error would be corrected here at the cost of the Appellants, and the decree otherwise affirmed, if there were no other error in the record.

2. There seems to be another error in the decree, also shown by the pleadings and exhibits. In one of the mortgages attempted to be foreclosed the property is described as the south half of Lot 5, in square between J and K, Ninth and Tenth streets, and in the other mortgage, as *part of Lot, No. 5*. The decree directs the sale of the lot as first described under both mortgages, and, of course, a foreclosure of the mortgagor's title and equity. It is very true that the mere indefiniteness of the description in the mortgage is no objection to the enforcement of the mortgage as it is written, whatever the effect of the sale under such a description would be. It does not lie with the mortgagor to say that he conveyed the property by so loose or indefinite a description that no title could pass to a purchaser at a sale of the mortgaged premises. If nothing passes, it is the misfortune of the mortgagee, but the mortgagor is not hurt; if anything does pass, the mortgagee is entitled to it. But this does not meet the objection; the complaint is that, by this particular description, property is or may be made to pass or be sold which the mortgagor never conveyed. But this error, which attaches to only one of the mortgages, can be corrected by the record.

3. We have intimated that this was a bill filed to foreclose two mortgages — one made 2d April, 1856, by Joseph Sutton and wife, to Anestina Schroeder, to secure a note of two thousand dollars, due at twelve months from date, with interest; the other mortgage, made the 10th day of October, 1857, by Sutton and wife, to the plaintiff here, for one thousand dollars, to secure a note of that date, due at six months, with interest.

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It seems that a jury was empaneled under the direction of the Court, who were instructed to find a special verdict. They found as follows: "We, the jurors, do not find any evidence to satisfy us that there has been any alteration in the papers since the execution." The Court reserved its judgment, and directed the Clerk to compute the amount due the plaintiff. After the Clerk had returned his report of the amount due, appears in the transcript a motion for a new trial and statement. By this it seems that the case was tried in July, 1858, by the Court, and a final decree entered for the plaintiff. The defense, in this case, was that Mrs. Schroeder, on the 21st day of August, 1857, assigned this two thousand dollar mortgage to Miss Bertha McKay, who entered satisfaction on the 10th day of October, 1857, on the records, in these words: "Satisfied in full, this 10th day of Oct. 1857, Miss Bertha McKay, assignee of Anestine Schroeder, by her Attorney in fact, R. H. Stanley."

A copy of the assignment was offered, which purports to be for the consideration of the sum of two thousand dollars, and to be an assignment of the note and mortgage, and to be made without recourse. It is signed in the presence of R. H. Stanley, by, or in the name of A. Schroeder. It purports to be acknowledged before Stanley, Notary Public, and recorded on the day of its date.

The plaintiff, in making out his case, after the introduction of the mortgage, offered the note, which was payable to Mrs. Anestine Schroeder or order, and was indorsed, "Sacramento, Nov. 13, 1857, assigned and transferred without recourse. A. Schroeder, H. R. Schroeder." After the introduction of the assignment by the defendant, the plaintiff moved to exclude it, and, for that purpose, offered evidence tending to show that Mrs. A. Schroeder was a married woman at the time of the assignment, being then and still the wife of one H. R. Schroeder. The Court heard this proof and excluded the assignment. Perhaps this was irregular. Probably it would have been more accordant with right rules of practice to permit the defendants to go on with their proof, and then, after they had closed, to have given the plaintiff the opportunity to rebut it, thus turning the question from one of the admissibility of evidence to a question of the effect of it. But no objection for irregularity seems to have been made; and there is

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little, if any practical difference between the Court ruling out testimony upon the strength of a fact proven, and denying effect to such testimony upon proof of the same fact; and the failure of the defendants to except to this order and mode of proof, must be considered a waiver of objection to it.

The question then is: Can a married woman make an assignment of a mortgage without the concurrence of her husband? We say, without the concurrence of her husband, for it is not necessary to inquire whether this concurrence must, in such cases as this, be in the statutory mode required for the conveyance of the separate estate of the wife. We are not aware of any authority which holds this doctrine. It is true that the note and mortgage were made directly to the wife. But this does not show that she was a *feme sole*, nor that even this note or the mortgage, (the mere incident to it,) was her separate estate, even if this last fact would help the defense. As we have held, *prima facie*, property conveyed to, or acquired by, either spouse during the coverture, under one system, is common property, and the control and disposition of this common property is given, by statute, to the husband. The wife has no right to dispose of it. At common law, the note made payable to the wife, would, *prima facie*, be the property of the husband, who could indorse it in his own name. (Chitty on Bills, 22.) Probably the indorsement of the wife was not necessary, but it did not hurt or make less effectual the indorsement of the husband. A party dealing with a *feme* is bound to inquire into her rights and powers. She or he is no more estopped by the fact that the papers are drawn directly to her than she or he would be bound to give effect to her sole deed, if she were named as grantee in a conveyance of real estate. The case might be different if the husband expressly represented the wife to be a *feme sole*, and with authority to deal as such with the common property, or assented to this transfer by her, but this representation is not made in any such a manner as to conclude the parties by the mere fact that a note is taken to the wife, or a mortgage to secure it, executed to her: for this is consistent with the title or right of the husband.

4. Another point taken by the counsel for the Appellants is more formidable. According to the views we have taken of this

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case, the sole title and right to transfer this note and mortgage were in H. R. Schroeder, the husband. The title of the plaintiff was through his assignment of the note to the plaintiff here. But the complaint does not show this title or count upon it. The proof supports it, but not the pleading. Upon the pleadings, the same case is not made as in the proofs. In a chancery case, a party has a right to insist that the legal conclusion to be deduced from the pleadings—whatever may be the proofs—shall be applied. Therefore, upon this case, so made, the plaintiff was not entitled to his decree so far as this first mortgage was concerned. The decree was wrong, therefore, as the case was presented to the Judge; for the complaint alleges that the two thousand dollar note was made to, and signed by, E. Schroeder.

But the plaintiff may have the pleadings amended so as to conform to the proofs. The bill can easily be amended, averring that the note and mortgage were made to Mrs. Schroeder, a married woman, and that Schroeder and wife indorsed the note, carrying with it the mortgage to the plaintiff.

The decree is reversed, and the cause remanded for further proceedings and a new trial, in pursuance of this opinion.

Ordered accordingly.

MORRISON v. WILSON AND WIFE.

A perfect equity united with possession is, under our system, equivalent for all purposes of defense, to a legal title.

The wife cannot convey her separate estate, acquired before the Act of 1850, whether legal or equitable, except by the joint deed of herself and husband.

The doctrine of estoppel *in pais*, has no application to the estates of married women. The Act of 1850 is enabling, and the estate vests only after compliance with the mode of conveyance prescribed by the Act.

Generally, a conveyance by a *feme covert*, not executed according to the forms prescribed by statute, is invalid.

The doctrine that fraud vitiates all contracts, must, when applied to married women, under our statutes, be limited to this: that a contract, so infected, can not be enforced; not that a fraudulent representation will divest a *feme's* title in the face of a statute declaring a different and exclusive mode of divestiture.

Where the deed of land bought for a married woman, is taken in the name of a third person, under an executory agreement on his part to convey to her, on the payment of a certain sum, and she goes into possession, she enters under claim of right, with a vested equitable interest in the land, which, on payment of the sum agreed, becomes a perfect equity.

And if, in such case, before the payment of the money she acquires the real title from another source, the first deed being from parties without title, this real title is not divested in favor of a vendee or mortgagee of such third person, because she holds the inferior title from him, or entered, or claimed under it.

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Claiming or taking the one title is no abandonment of the other. And her possession, if not to be referred to the good title, would not be referred exclusively to the bad.

The title of a married woman cannot be divested by an estoppel, based upon the fact of her taking possession under a bad title.

Possession of land is notice of the equity under which the party holds. And if, in this case, the good title was recorded, the person dealing with the land had notice, notwithstanding her representations that she held under the bad title. Her ignorance will not forfeit her estate.

▲ A deed to a married woman is *prima facie* valid. And where it recites that the consideration is paid by another, for her exclusive benefit, the deed, *prima facie*, creates a separate estate in her.

APPEAL from the Twelfth District.

Ejectment for a lot in San Francisco.

Complaint, among other things, avers that defendants entered under one Ford, and not otherwise; and, that plaintiff holds a title deraigned from Ford under mortgage sale.

Defendant, Wilson, claims no interest in the lot except such as results from the possession by his wife; denies the title and possession of Ford, and sets up title in his wife. Mrs. Wilson denies the exclusive possession of Ford, as averred in the complaint, or that she entered under him, or that there was any consideration for the mortgage from Ford to Perkins, and avers title in herself, derived through Perkins.

The Court, among other things, charged the jury in effect, that if they believed the defendants entered into possession under Ford, they were estopped from setting up title against Ford, and if plaintiff had acquired title from Ford, the verdict must be for plaintiff. The Court also charged, that if Perkins was induced to waive his lien and take the mortgage from Ford upon the representation on the part of defendants, that they had no interest in the lot, and that it belonged to Ford alone, and that plaintiff acquired title from Ford, then, whether Mrs. Wilson entered under Ford or not, defendants are estopped, as before.

The jury found for plaintiff, judgment accordingly. Defendants appealed.

J. D. Thornton, for Appellants, argued: that, as Mrs. Wilson was a married woman, she could not be estopped by her acts and declarations; that any concurrence, on the part of the wife, with the acts, declarations, or admissions, of the husband, relied on as an estoppel, would be rejected, on the presumption of law

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that she was under the influence of her husband; and that the only way to divest the estate of a married woman, is by deed, signed and acknowledged, as prescribed by statute. (Wood's Dig. 483, Sec. 2.)

G. F. & W. H. Sharp, for Respondent.

Appellants having entered into possession under Respondent's grantor's title, the Court was right in giving Respondent's first instruction, and this Court will disregard all evidence of adverse title in Appellants or the homestead claim. (*Jackson v. Scissam*, 3 John. 499; *Jackson v. Bard*, 4 Id. 230; *Jackson v. Dennison*, 4 Wend. 558; *Bank of Utica v. Mersereau*, 3 Barb. Ch. R. 528; *Jackson v. Harper*, 5 Wend. 246; Greenleaf's Ev. Vol. 1, 137; 7 Cow. 717, 637; 15 Wend. 615; 6 How. 288.)

Defendants did not connect themselves with the title of Soule. (*Winans v. Christie*, 4 Cal. 70.)

The doctrine of estoppel is correctly given in the charge of the Court below. (*Hoen v. Simmons*, 1 Cal. 120; *Mathews v. Light*, 32 Maine, 305; *Whittington v. Wright*, 9 Geo. 23; 1 Story's Eq. Juris. Sec. 385; *Pickard v. Sears*, 6 A. & E. 469; *Welland Canal v. Hathaway*, 8 Wend. 483; 2 Hare & W. Lead. Cases in Eq. 47.) Defendants entering under Ford are also estopped. Acts of John Wilson must characterize the entry of family.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

We understand the merits of this controversy to depend upon this state of facts: One Ford obtained a deed for the lot in dispute, from Hitchcock and Van Winkle, who had no title, but claimed under a Colton grant. Ford bought for Mrs. Wilson, though the title was taken in the name of Ford for her, and at her instance. Nearly contemporaneously, Ford executed to Mrs. Wilson an agreement to convey to her, as her separate property, this lot, on the payment of three hundred dollars, which sum there was evidence to show she paid, and the money was advanced as a gift to her by her son. Previously to this time, she had received a deed from another source, and this last seems to be the better title. The plaintiffs offered evidence tending to show that in consideration of a debt due for the

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building of the house, and a waiver of a lien on it, to one Perkins, Ford, at the instance of Wilson and wife, executed a mortgage on the premises, the latter representing at the time that Ford was the owner, and in consequence of this representation, the mortgage was so taken. Plaintiff claims through this mortgage and sale under it. He asserts that this gives to him the right as against Mrs. Wilson, on the ground of estoppel. 1. Because she, having entered under Ford, cannot dispute his title, or that of Ford's representative, the plaintiff here. 2. Because these representations acted on, estop her from denying the title to be in Ford.

We think neither ground can be maintained. If the purchase were made by Ford in his own name for the benefit of Mrs. Wilson, Ford would be morally, if not legally, her Trustee; and if Ford, at or shortly after this time, gave her a writing to convey to her, on payment of the three hundred dollars, the two papers may be construed together, if they are shown to be parts of one general transaction. On the payment of the purchase money, Mrs. Wilson had a perfect equity, which, united with the possession, was equivalent, in our system, for all purposes of this defense, to a legal estate. This estate she could not convey except by joint deed of her husband and herself, any more than if it were a legal estate. The cases of *Jenkins v. McConico*, (26 Ala. 213,) and *Lee v. Bank of the United States*, (9 Leigh, 219,) and the authorities cited are conclusive on this point, even in the absence of statutory provisions like the Sixth Section of our Act regulating the disposition of estates of *femes covert*. The case of *Ingoldsby v. Juan*, 12 Cal. 564, in this Court, is not opposed to this view, for the doctrine there is limited to conveyances of married women of separate estates vested before the passage of the Act of 1850. The doctrine of estoppel *in pais* has no application to the estates of married women; for the Act of 1850 is enabling, the estate vesting only after compliance with the mode of conveyance prescribed by the statute.

Palmer v. Cross, (1 Smedes & Marshall, 48,) is a case upon a statute similar to our own. It was shown there that the wife stood by and saw some personal property sold by the husband as his own; and it was contended that she was estopped from afterwards claiming it. But the Court said: "The law has

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thrown certain guards around a married woman to protect her from the influence of her husband. It has provided a mode by which alone she can be deprived of her real estate and, to use no stronger language, it is certainly very doubtful whether she can be deprived of her separate personal estate in any other mode than the one prescribed by the instrument of settlement. The Supreme Court of the United States, in the case already cited from 13 Peters, 107, decided that the mere silence of Mrs. Lee, as to her title, and her failure to obtrude her rights upon the notice of others, could not divest her of her property." The general rule is, that if the conveyance of a *feme covert* be not executed according to the forms prescribed by the statute, it is not valid. (*Elliott v. Petersol*, 1 Peters, 328; *Hepburn v. Dubois*, 12 Id. 345; *West v. West*, 10 S. & R. 445. See, also, *James v. Fisk*, 9 Smedes and M. 152). And, accordingly, it has often been held that when the acknowledgment was defective in any substantial particular, the *feme's* title did not pass. It would be strange if a mere defect of this kind avoided the deed, though regularly signed, and proven to have been fairly and voluntarily made, and yet a loose declaration of the *feme*, in the presence of the husband, and, possibly, made by his connivance or constraint, and in total ignorance by the wife, of its legal effect, or even of the real facts of the transaction, could pass her estate. It is obvious, if this be the rule, that every deed of the husband might be an estoppel, whether acknowledged or not, according to law, or even signed by the wife, since the representation in the presence of a purchaser or mortgagee, by the wife, of the property being the husband's, would be sufficient to estop her from denying the title to be in him. In truth, the paper signed by him, in her presence, purporting to convey the property as his, would amount to such representation and consequent estoppel. It is true that it is said by some writers that fraud vitiates all contracts, even those made by infants or *femes*; but, we apprehend, that in cases of married women, under statutes like ours, this doctrine is limited to this — that a contract so infected cannot be enforced; but not that a fraudulent representation will divest a *feme's* title in the face of a statute declaring a different and exclusive mode of divesture.

The second instruction asked for by the plaintiff, and given

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by the Court directly contravenes this view. For the learned Judge below told the jury that, even if the defendants did not enter into possession of the lot under Ford, yet if they disclaimed title to induce Perkins to waive his lien and take a mortgage from Ford, this estopped her from contesting the title of plaintiffs deraigned through Ford.

It was a disputed fact whether the defendant entered under Ford, and, perhaps, the weight of evidence was that she did not.

If we concede that Mrs. Wilson entered under this executory agreement with Ford, she did so under claim of right, and with a vested equitable interest in the property, which, on payment of the purchase money, became a perfect equity. This equity, as we have said, she could no more dispose of by estoppel *in pais*, than if it were a legal estate; but if she could, having received the real title from another source, we do not perceive how that title is divested in favor of the plaintiff here, merely because she held an inferior title from Ford, or even entered, or claimed, under it. The result of such a doctrine would be to destroy the whole effect of the statute, for all a creditor or stranger would have to do, in order to divest the title to real estate of a *feme covert*, would be to get her or her husband to take and consent to hold under a bad title, and then both titles, by the doctrine of estoppel, might be subjected to a claim held by a predecessor under the vicious title. The good title was older in date than that acquired by Ford, and the evidence is by no means satisfactory, that she entered under Ford, or that, in getting in the Van Winkle and Hitchcock title, she did, or meant to do, anything more than to strengthen the title she held before, by getting in the outstanding claim. Besides, if the fact be, as stated by witnesses not contradicted, that Ford really bought for her, and made the executory agreement alluded to, we cannot perceive that she stood towards Ford in any other relation than any other purchaser, having two titles; or, that claiming or taking the last is any abandonment of the first. The possession, in such a case, if not referred to the good title, would not be referred exclusively to the bad. But if we hold that a *feme covert* cannot be divested of a title by parol or an estoppel *in pais*, directly operating upon the title, it would be illogical to hold that such divestiture could be effected by an estoppel created by taking possession under a bad title.

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It is not pretended that she entered as tenant of Ford. She entered, if at all, as purchaser. She held the equitable estate, Ford merely the legal title. Being in possession, this was a notice of the equity. The payment of the purchase money perfected this equity, leaving nothing but the naked legal title outstanding in Ford, with a right to call for it at any time by Mrs. Wilson. Any person dealing with the estate was bound to inquire as to the true state of the title; and if the party in possession had a deed recorded, this was a notice of his or her title. A different question might arise, if a *feme covert* was in possession, under a deed or an executory agreement, not recorded, and a person dealing with the property on the faith of an apparent legal estate in another, inquired of her, and she represented that she had no title, but that the title was in another, and the inquirer then dealt with that other as the owner. But we do not understand that was this case—at least, it does not seem to be so put to the jury. In this case, the mortgagee did not see the legal title in Ford, for it was not in him, and therefore did not deal with the property on the faith of it. It may be very true that Mrs. Wilson, being in possession under the good title and the vicious title, said to Perkins she held under the Ford title—and that it was the real title; but a *feme covert* could scarcely be held to forfeit a good title because she was not learned enough in land law in 1851 or 1852, to know, what has so puzzled the Courts to determine—the relative strength of San Francisco titles.

We have all along assumed the fact that Mrs. Wilson held a good title under the deed from Minor. This deed was executed 7th of May, 1851, and is made to her in exclusive property. A deed to a married woman is *prima facie* valid. (*Harmon v. James et ux.* 7 S. & M. 118.) And this deed recites that the consideration money was paid by George W. Soule, for the exclusive benefit of Mrs. Wilson. This, it seems to us, *prima facie*, created a separate estate in Mrs. Wilson. The deed, too, is witnessed by the same George W. Soule. It is true, that on the 3d of May before, Minor executed a deed of the lot to Soule, but this deed was not acknowledged until the 21st of April, 1852, or recorded until April 27th, 1852. When it was delivered does not appear. As between Soule and Mrs. Wilson, it would seem that the

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witnessing of the deed to Mrs. Wilson, with this recital, and especially with the possession taken by Mrs. Wilson — if such was the fact — would strongly imply that the deed to Soule by Minor, was not delivered at the date of the deed to Mrs. Wilson, or, if delivered, that the unrecorded deed of Soule was, by contract or consent, postponed to the latter deed. If the money paid by Soule was furnished by Mrs. Wilson, would not this be an estoppel against Soule's setting up his secret deed? Could he encourage or assist in giving effect to the last deed, and yet hold it good for nothing? It is not necessary to consider this point further, as it has not been argued; for, upon the ground last taken, the judgment must be reversed; and this whole matter may be more fully presented on a future trial.

Nor is it necessary to decide whether, if Mrs. Wilson and Ford were in possession, and Perkins having no notice, by the record, or otherwise, of Mrs. Wilson's title, inquired of Wilson and wife, and Ford, as to the title, and was informed that the title was in Ford, and accordingly dealt with Ford as if he were owner, and thereby released a valuable right, the title of Mrs. Wilson would be bound by such a transaction. This question is left open and unaffected by this opinion.

Judgment reversed and cause remanded.

On petition for rehearing, the following opinion was delivered by BALDWIN, J.—TERRY, C. J. concurring:

The rehearing is denied. The main ground of reversal was the instruction of the Court, that whether Mrs. Wilson entered under Ford or not — which was a disputed fact before the jury — if the defendants, (Mrs. Wilson being one,) disclaimed title to induce Perkins to waive his lien and take a mortgage from Ford, this estopped her from contesting the title of plaintiffs, deraigned through Ford. We meant to assert, and think we sustained the proposition by reason and authority, that a *feme covert* under our statute, cannot divest her separate estate in any other mode than that pointed out by the Act; for to hold otherwise, would be to hold that the statute, where it says that the estate shall only be divested by joint deed of husband and wife, means that it may be divested by estoppel *in pais*.

As this error is sufficient to reverse the judgment, we so modify

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the opinion as to leave the other points discussed in it open to future discussion, as it is suggested, with some plausibility, that a fuller examination may throw some light upon the questions, and the facts can be more fully presented.

DORE *et al.* v. COVEY *et al.*

In an undertaking on appeal, the names of the sureties need not appear in the body of the paper.
 The stay of proceedings, accorded by the statute to the execution of the undertaking, is a sufficient consideration.
 Non-compliance with the directory provisions of the statute, intended for the benefit of the Respondent, does not vitiate the undertaking.
 Residence of the sureties, and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions.
 The execution of the paper, the delivery of it to the Clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is *prima facie*, a sufficient proof of delivery, if delivery is essential, as if the instrument were sealed.

APPEAL from the Sixth District.

Action by plaintiffs against the defendants upon an undertaking executed by them, on an appeal to the Supreme Court, in the suit of *M. Dore & Co., v. J. R. Hardenbergh.*

For the undertaking, see opinion of Court. The appeal in that case was duly prosecuted, and the judgment affirmed, with ten per cent. damages. Demurrers were interposed, and being overruled, answers were filed.

On the trial, the Court below ruled out the undertaking, as evidence for plaintiff, except for three hundred dollars, for reasons which appear in the opinion of this Court. Plaintiff offered to prove further, as to defendant, Covey, that, after signing the instrument, he had admitted that he signed it for the full amount named; and that, after judgment of affirmance by the Supreme Court, he had promised to pay the same to plaintiff. The Court excluded the evidence, plaintiffs excepting. Under instructions, the jury found for plaintiffs three hundred dollars. Plaintiffs excepted to the instructions, and appeal.

H. H. Hartley, for Appellants.

The Court erred in ruling out the undertaking offered in evidence by the plaintiffs.

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I. Because the undertaking was in substantial compliance with the provisions of the statute. (Wood's Dig. Arts. 1082, 1083, 1088.) It is but one integral undertaking, and not two separate undertakings on the same paper; it has but one recital of the parties, the Court in which the judgment was rendered, the nature of the appeal, and the conditions of the obligation. And the signature of the defendants at the bottom of the instrument made it *prima facie* theirs, and bound them for the whole penalty. 2. It was a good undertaking; although executed in blank. (*Smith v. Crocker*, 5 Mass. 537; 7 N. H. 230; 1 Texas, 9; 7 Cow. 484; *Parker v. Bradley*, 2 Hill, 584; *Scott v. Whipple*, 5 Greenl. 337; 17 Sergt. & Rawle, 438; 4 McCord, 239; Id. 203; 2 Dana, 142; and the filling up of a blank is not a material alteration; *Smith v. Crocker*, Sup.; *Hunt, Administrator, v. Adams*, 6 Mass. 522; *Granite Railway Co. v. J. Bacon*, 15 Pick. 239; *Humphreys v. Crane*, 5 Cal. 173; *Barrett v. Thorndike*, 1 Greenl. 73; *Turner v. Billgraham*, 2 Cal. 520; *State v. Cilley*, 1 N. H. 97; 1 Saund. Pl. & Ev. 76; *Hale v. Russ*, 1 Greenl. 334; 4 Bing. 123; 5 Taunt. 707; 1 Brod. & Bing. 426; *Kershaw v. Cox*, 3 Esp. 24; 6 Id. 57; *Hale v. Russ*, 1 Greenl. 334.)

II. Because the insertion of the place of residence and occupation of the sureties is immaterial, and the want of it will not avoid an undertaking when an appeal has been had.

1. Those requirements are only inserted for the Appellee's benefit, and he can waive them. (17 Wend. 67; Dudley, Geo. 22; Id. 66; 4 Texas, 4; *Ives v. Finch*, 22 Conn. 101; 7 Monroe, 118.) Mere irregularities in appeal bonds do not vitiate them. (*Swan v. Graves*, 8 Cal. 549, and cases cited; *Bennachan v. Webb*, 6 Iredell, 57; *Whitsett v. Womack*, 8 Ala. 466; *Iredell v. Barbee*, 4 Iredell, 250; *Teall v. Von Wyck*, 10 Barb. 379; *Gully v. Gully*, 1 Hawks, 20; *Stockton v. Turner*, 7 J. J. Marshall, 192; 4 Mon. 448; 3 Id. 392; *Wendham v. Coates*, 8 Ala. 285; 1 Wend. 464; 12 Id. 306; 2 J. J. Marsh. 473; 4 Mon. 225; 17 Wend. 67; 26 Wend. 502; 8 Barb. 81; 1 Watts & Sergt. 261.) As to a proper delivery of the undertaking, see 6 Geo. 202; 3 No. Ca. R. 384; 4 Id. 270; *Hare v. Horton*, 2 Nev. & M. 428; 5 B. & Adol. 715.

2. But if the undertaking was invalid and void for want of strict conformity to the statute, yet it was good as a voluntary

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undertaking. (11 Ill. 417; 6 Hump. 234; 10 Miss. 663, 698; 8 Cow. 138; 5 Id. 27; 3 Scam. 347.)

3. Conceding that the undertaking filed might not have stayed execution for want of certain informalities, yet the Appellee having waived the taking out of execution, and the obligors having had the benefit of the appeal, are estopped from setting up any errors in the undertaking.

W. S. Lang, and Robinson, Beatty & Heacock, for Respondents.

1st. Whenever there is a blank in an instrument, and that blank can only be filled up in one way, so as to be consistent with the balance of the instrument, any one may fill it up. (*Smith v. Crocker*, 5 Mass. 537.)

2d. Where it must be inferred from the form and nature of the instrument, that the party who executed it with the blanks, intended to confer upon the party to whom it was delivered, or upon some other person designated by the nature of the instrument, the authority to fill up the blanks, they may be so filled. (*Bank of the Commonwealth v. Curry*, 2 Dana, 143.)

The instrument under consideration cannot come under the first class; for the blank may be filled up by the name of Covey, or of any other person, and be equally sensible and consistent in all its parts. With respect to Justis, it does come under the second class. The irresistible inference is that he authorized the person to whom he delivered the instrument, to fill up the blanks, and that, with the name of any citizen of California, who could take the necessary oath with regard to solvency. (Case of *Day v. Brown*, 2 Ham. 345; or, Ohio Rep. condensed; U. S. Dig. Supplement, Vol. 5, Sec. 74, Tit. Surety; U. S. Dig. Vol. 3, Sec. 4, Tit. Surety, referring to *Walsh v. Bailie*, 10 Johns. 180; 2 Penn. 27.)

But the instrument must be interpreted by what it contains. Justis and Covey undertake positively for three hundred dollars, and Justis undertakes for six thousand eight hundred dollars more, on the condition that Hardenbergh will procure another person, who can qualify as to responsibility, to become bound with him; failing in that, he is only bound for the three hundred dollars. (*Sharp v. United States*, 4 Watts, 21.)

As this is an instrument not under seal, it comes within the

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18th Section of the statute of frauds. It is the undertaking of sureties to answer for the default of the principal. It was executed according to law, so far as the first branch of the undertaking is concerned, and is binding on the parties. With respect to the second branch of the undertaking, it complies with the law in no respect. The amount of the undertaking is less than double the amount of judgment—the judgment being for three thousand four hundred and fifty-four dollars—besides thirty-five dollars and twenty-five cents costs, and the undertaking for six thousand eight hundred dollars. The name and residence, but not the occupation, of one surety is given; but neither the residence, name, or occupation, of another is given. It is not made in accordance with the statute. (See Sec. 349 of Practice Act.) It does not express a consideration for the second undertaking. (*Wain et al. v. Walters*, 5 East, 10.) There was no consideration unless the undertaking stayed execution. It did not, *ex necessitate*, stay execution. (Pr. Act. Sec. 378.)

“But,” says the Appellant, “we waived the right to issue execution, and allowed the undertaking to operate as a stay.” Then the consideration is nothing in the undertaking, but a waiver outside of it. That waiver must be proved by parol evidence, and not by the instrument. But the statute, as interpreted by the Courts, says, you can prove no part of the consideration by parol. There must be a sufficient consideration expressed in the instrument.

There are cases in which the payee of a bond may waive defects in it. But it is not every bond, and certainly not every undertaking without a seal, which may be made valid by a waiver of defects. Imperfect appeal bonds are divided into two classes: those which are void, and those which are merely voidable. A bond absolutely void, produces no effect. (See 7 Monroe, 117.) If, however, a bond, is not absolutely void, but merely voidable, the party to whom it is payable, may elect either to treat it as an insufficient bond, and move to dismiss the appeal, or to waive the imperfections of the bond, and call up the appeal on its merits.

The instrument, in this case, is absolutely void, as an undertaking to stay execution. The statute expressly makes it so. But if this were only a voidable bond, what evidence is there,

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or what is there in the pleadings showing that plaintiff did waive his right to a better bond? It appears that no execution issued, pending the appeal, but how does it appear that this undertaking prevented the issuance of execution?

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Suit was brought by the plaintiffs below, Appellants here, upon the following instrument; and, upon a proper construction of its terms, the appeal depends. The paper is in these words:

“STATE OF CALIFORNIA, County of Sacramento.

In the District Court, Sixth Judicial District.

M. Dore & Co. plaintiffs, *v. J. R. Hardenbergh*, defendant:
Whereas, on the twenty-sixth day of March, 1857, judgment was rendered in the above entitled cause, in favor of said plaintiffs, for the sum of three thousand four hundred and fifty-four dollars and fifty cents, and the sum of thirty-five dollars and twenty-five cents costs; and, whereas, the said defendant is about to appeal from the judgment of said District Court to the Supreme Court of this State:

Now, therefore, we, the undersigned, do agree, undertake, and become bound, on the part of the Appellant, to the effect that the said Appellant will pay all damages and costs which may be awarded against him on his appeal, not exceeding three hundred dollars; and, whereas, said Appellant is desirous of a stay of execution in said cause, we, the said Charles Justis, residing at Johnson's Ranch, in the county of Sutter,

do further undertake, and become bound, in the sum of six thousand and eight hundred dollars, that if the judgment appealed from, or any part thereof, be affirmed, the Appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the Appellants upon this appeal.

(Signed)

CHARLES JUSTIS,
H. R. COVEY.

County of Sacramento, ss:

Being each for himself duly sworn, doth depose and say, that

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he is worth double the amount specified in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHARLES JUSTIS,
H. R. COVEY.

Sworn to before me, this 29th day of March, 1857, by Charles Justis.

N. R. WILSON,
Notary Public.

Subscribed and sworn to before me, by H. R. Covey, April 1st, 1857.

N. R. WILSON,
Notary Public."

Proceedings were stayed in the District Court in the case of *Dore & Co. v. Hardenbergh*, and this Court rendered judgment of affirmance, with ten per cent. damages. No objection was taken to the undertaking in the Court below, or in this Court on appeal.

The stipulations of this undertaking are two-fold. The first is that the Appellant will pay all damages and costs not exceeding three hundred dollars. The second, to pay the amount directed to be paid by the Supreme Court, on affirmance of the judgment in whole or in part. The undertaking recites the amount of the judgment. In the condition it proceeds: "We, the undersigned, do agree," etc. In the second part it reads: "We, the said Chas. Justis, residing at Johnson's Ranch, in the county of Sutter, do further undertake," etc. "to become bound in the sum of six thousand eight hundred dollars," etc. It is signed by both Justis and Covey. An affidavit is appended, as made by both, that each is worth the amount specified in the foregoing undertaking.

The undertaking is one entire contract, though containing two several stipulations. It is the act of both the parties signing. There was no necessity for any mention of the names of the stipulators in the body of the paper to make it obligatory. All the use of this recital would be to show who executed the paper, and the signatures sufficiently indicate this fact. It is scarcely necessary to refer to authorities to establish this proposition.

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But see *Ex parte Fulton*, 7 Cow. 434; *Scott v. Whipple*, 5 Greenl. 396.

We regard, therefore, the evidence offered of the admissions of Covey as to his intent in executing the instrument as wholly immaterial.

2. It is next contended that this undertaking is void under the Statute of Frauds, 13th Section, because no consideration is expressed in the writing. We cannot see how this point can be maintained. The writing shows that the defendant in the action, Hardenbergh, is about to take an appeal, and then, in the second part, recites that, whereas, he is desirous of a stay of execution, the stipulators undertake, etc. The statute accords the effect of a stay to the execution of the undertaking. This stay is sufficient consideration. The stay was had. The plaintiff below acquiesced in it, and the officers gave it effect, it seems, as a sufficient and valid undertaking. It is argued that this undertaking did not operate as a *supersedeas*, because the undertaking was not in precise conformity to statutory provisions, in two particulars: 1. Because the residence of the parties and their occupation were not inserted in it. 2. Because the penalty is less, by thirty-three dollars, than double the amount of the judgment. But it is well answered that the first direction was only designated for the benefit of the other party, and he could waive it, if he chose, just as a description of the person, age, etc. of the sureties.

We think the execution of the writing in less than double the amount of the judgment does not vitiate it as a statutory undertaking. This provision is merely directory. This principle was held in the case of *Anderson v. Rhea*, (7 Ala. 106.) That was a case on a statutory bond, on which, by the statute, summary judgment could be taken in the Clerk's office, or, rather, which being forfeited, had the effect of a judgment. The Court say: "The requisitions of the statute that the bond shall be taken in double the amount of the execution, and that it shall be stated that the property shall be delivered at twelve o'clock, noon, are directory merely. That the penalty of the bond was for less than double the amount of the execution, and that the defendant had the whole of the day to deliver the property in, were for her

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benefit, and she cannot complain of them." This was a proceeding at the instance of the surety to set aside the bond.

The case of *Van Dousen v. Hayward*, (17 Wend.) follows the same course of reasoning. Bronson, J. said in that case: "The Court has often had occasion to consider the sufficiency of appeal bonds, under the Act of 1824, and it has generally been said that the Appellant must comply strictly with the requirements of the statute, or he can derive no benefit from the appeal. The question has usually arisen on the motion of the Appellee to quash the proceedings. (4 Cow. 80, 540; 6 Id. 592, 593; 7 Id. 423, 468; 9 Id. 227.) Within the principle of these decisions, the appeal of Hayward might have been quashed, on motion, because the bond was less beneficial to the plaintiffs than the statute required. But the plaintiffs made no objection to the sufficiency of the bond. Hayward has had the full benefit of his appeal, and I think the defendants should not now be allowed to object that their own voluntary obligation was less onerous than it should have been. I will not say that this opinion can be reconciled with all the decisions that have been made in relation to appeal bonds, nor that all the cases on that subject are entirely consistent with each other; but upon general principles, I think the defendants should not be heard to make this objection. The bond was not contrary to law, nor against good morals. It contained *all that the statute required*, and was only wrong in the addition of a *further clause*, which rendered it more favorable to the obligors. Where the bond is more favorable to the Appellee than the statute requires, it has been repeatedly held that he cannot complain that the statute has not been followed. (5 Cow. 27; 8 Id. 138.) That principle is applicable to this case and should conclude the defendants." *Ives v. Finch*, (22 Conn. 101,) is to the same general effect. *Clinton v. Phillips*, Administrator, (7 Monroe, at page 119, bottom) entertains the same doctrine. (See, also, for the mode of interpretation of appeal bonds, *Swain v. Graves*, 8 Cal. 551.)

The Respondent's argument that the undertaking shall not stay execution unless made in precise conformity with the statutory rules, is answered by the authorities cited, which hold, in effect, that these provisions are intended for the benefit of the other party, and that he may waive them, just as if the statute de-

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clared that no judgment should be rendered without service of process; but the defendant might waive the process of service. This waiver was made by the plaintiff below. He considered the appeal as regularly made, made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument.

The execution of the paper, the delivery of it to the Clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, were, *prima facie*, a sufficient proof of delivery, if delivery is essential, as if the instrument were sealed.

The rulings of the Court below were not in accordance with these views, and the judgment is reversed and the cause remanded for a new trial.

SMITH v. DALL.

Possession of a tenant not notice of his landlord's title. *TERRY, C. J.*
The omission, in the record of a deed, to make a copy of the seal or some mark to indicate the seal, does not vitiate the record. It is sufficient if it appear from the record, that the instrument copied, is under seal — as, for instance, where the deed purports to be under seal, and to be signed, sealed, and delivered, in the presence of the Notary before whom it was acknowledged. *TERRY, C. J.*

APPEAL from the Twelfth District.

The case is stated by the Court.

D. W. Perley, for Appellant, cited 2 Sug. Vend. 555-558; *Attorney-General v. Backhouse*, 17 Vesey; *Flagg v. Mann*, 2 Sumner; *Beebee v. Butler*, 26 Missouri, 321; *Vaughn v. Tracy*, 25 Id. 321; *Veaser v. Baker*, 23 Maine, 171; *Knox v. Selloway*, 10 Id. 207; *Jacques v. Weeks*, 7 Watts, 273; *Hardy v. Sowers*, 10 Gill & J. 317; 11 Met. 248; *Flagg v. Mann*, 2 Sum. 555.

TERRY, C. J. delivered the following opinion:

This is an action of ejectment for a lot in San Francisco: both parties deraign title from the same source, through various meane conveyances; the defendant claiming under a prior unrecorded title, accompanied by possession in himself or his tenants.

It appears from the record that the premises in question were originally granted by T. M. Leavenworth, Alcalde of San Fran-

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cisco, to Charles Richardson, who, acting by his Attorney, John H. Brown, conveyed the same to Malachi Fallon, by a deed which was never recorded.

Afterwards the same property was conveyed by Charles Richardson to Whitcomb and Lien, and by them to the plaintiff. The deed from Richardson to Whitcomb and Lien, was under seal and duly acknowledged. It was recorded on the day after its execution; but on the books of the record there is no copy of seal, or mark, indicating that there was a seal to the instrument. At the time of the conveyance from Whitcomb and Lien to the plaintiff, defendant was absent from the State, and the premises were in the possession of his tenants, and plaintiff was a purchaser for a valuable consideration, and had no actual notice of the existence of the deed from Richardson to Fallon. The Referee reported a finding and judgment in favor of plaintiff, which report was set aside and a new trial granted, and from this order plaintiff appeals.

Two questions are presented by the record:

- 1st. Is the possession of a tenant notice of his landlord's title?
- 2d. Does the fact that the Recorder failed to make some mark upon his books to indicate that there was a seal to the conveyance recorded vitiate the record?

Upon the first point, the weight of authority is that possession (if notice at all under the recording act,) is notice of the title of the possessor alone, and no other. "Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate, sells to a person who purchases *bona fide*, and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession." (2 Sug. on Vendors, 558.)

In *Flagg v. Mann*, (2 Sum. 555,) Judge Story says: "It would be pushing the doctrine of constructive notice to a great degree of extravagance, to hold that a purchaser was bound to know, not only the title of the party in possession, but all its derivative sources. Indeed, the American Courts seem indisposed to give effect to this doctrine of constructive notice from possession, even in its most limited form." After referring to the authori-

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ties upon the proposition, he further says: "These cases do, as I think, admonish Courts of Equity in this country, when registration of deeds as matters of title is universally provided for, not to enlarge the doctrine of constructive notice, or to follow the English cases on this subject, except with a cautious attention to their just application to the circumstances of our country and to the structure of our laws." This view is consistent with the former rulings of this Court, and does not conflict with the opinion of the majority of the Court in *Hunter v. Vance*.

Upon the second point there seems to be no direct decision.

The object of registration of a deed is to give notice to the public of the fact that the title to the property has passed from the vendor, and thereby prevent others from dealing with him as the owner. The conveyance itself is required to be copied into the record, in order that parties may determine its sufficiency and the character of the estate conveyed. To accomplish this end, it is not necessary that the seal should be copied upon the book; it is enough if it appear from the record that the instrument copied is under seal. This, we think, is sufficiently shown by the record of the conveyance from Richardson. The deed purports to be under seal, and to have been signed, *sealed*, and delivered, in the presence of the subscribing witness, who was the Notary before whom it was acknowledged.

The order setting aside the report of the Referee is reversed, and the cause remanded to the Court below, with instructions to enter judgment upon such report.

FIELD, J.—I concur in the judgment.

DINGMAN v. RANDALL *et als*.

WHERE a mortgagee released a mortgage made by two parties, and took a new mortgage made by one, to whom the other had meanwhile sold, the new mortgage being for a less sum, by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud, to induce a Court of Equity to interfere, and give the mortgage priority over intervening liens.

APPEAL from the Eleventh District.

Bill to foreclose a mortgage, and give plaintiff priority over

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certain other mortgages and rights, claimed by virtue of a Sheriff's deed, made in pursuance of sale thereunder, on the ground of fraud.

Defendants, Enos and Williams, had judgment, and plaintiff appeals.

Tuttle & Hillyer, for Appellants.

B. F. Myers, for Respondent.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

In August, 1856, defendants, Randall and Enos, executed a mortgage to plaintiff, on a place known as "Smith's Ranch," to secure a debt of twenty-five hundred dollars, the purchase money. On 1st of December, 1856, these same defendants executed a mortgage on the same property to defendant, Emanuel Joseph, to secure the payment of their note for six hundred dollars. In June, 1857, Enos sold his interest in the property to Randall. On July 4th afterwards, Randall married defendant, Teresa, and they occupied the property as a homestead. On July 31st, 1857, defendant, Randall, executed a mortgage to defendant, Enos, to secure a debt of nine hundred dollars. In September, 1857, Enos assigned his mortgage and note to Joseph, who commenced suit on his and Enos' note, and foreclosed the mortgage by decree, October 27th, 1857. In November, 1857, Sheriff sold — Williams purchased at the sale, and Sheriff's deed executed June 14th, 1858.

July 31st, 1857, plaintiff discharged his mortgage, and took a new note and mortgage, signed by Randall alone.

Enos and Williams alone answer the bill. The foregoing facts are undisputed. Defendants, Randall and Joseph, confess by failing to answer.

There is no proof tending to show that, when the new mortgage was given, Dingman was to give ten months' extension on the old one, and was not to allow any other liens over his; and, also, that this arrangement was procured by fraud, for the purpose of letting in the junior mortgage of Enos and of Joseph, now held by Williams. That, by this fraud, of which it is charged all these parties had knowledge, and in which they participated, the plaintiff, unless he can get relief in equity, will lose his debt. And the

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case turns upon the proper decision of this question of fact. The proofs are not a little conflicting.

When Dingman released his old mortgage on Enos and Randall, he took the separate note of Randall, and the mortgage executed by Randall and wife, and received five hundred dollars in cash. He then surrendered the old papers, and executed a release of record of the old mortgage. The evidence is by no means satisfactory, that the arrangement was at all different from what the papers show; and a very clear case should be made before a Court will suffer them to be contradicted, or deny to the transaction the character which they impress upon it. It is true, one or two of the witnesses say that Dingman understood that the new arrangement was an extension of the old mortgage—so, in a loose sense, it was—but it seems to be an extension, deliberately made, on a new contract, with a new consideration—two and a half per cent. interest being included in the new note—and with a new party included and one of the old ones omitted.

It is not necessary to inquire whether Randall was a competent witness, as his testimony is not sufficient, if admitted, to alter the aspect of the case, as we consider it on the proofs. But the direct effect of his testimony would seem to be to make Enos pay one-half of his debt.

The homestead question is not so made that we can consider it, if there be anything in it.

The agreement at the sale not having been set up in the answer, is not involved in the decision of this case. If the plaintiff has any rights under that agreement, he can set them up in another form.

Decree affirmed.

HARRIS v. REYNOLDS *et al.*

THE words "tenant in possession" in Section 236 of the Practice Act, embrace the judgment debtor, as well as his lessee. The purchaser at Sheriff's sale of a "water ditch," is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant.

Where statutes use words and phrases of a well-known and definite meaning in the law, they are to be expounded in the same sense in the statute.

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Where a judgment debtor remains in possession of a "water ditch" after Sheriff's sale, and collects the rents and profits during the six months following, he is a Trustee of the fund for the purchaser at the sale, and, if the fund be in danger of loss, a bill in equity to account, will lie.

APPEAL from the Eleventh District.

John Hume, for Appellant. 1. The phrase "tenants in possession" in the 236th Section of the Practice Act, does not include the owner of property. (*Sampson v. Shaeffer*, 3 Cal. 196; *Ramirez v. Murray*, 5 Id.; *Tewksbury v. Emory*, 5 Id.; *Reynolds v. Lathrop*, 7 Id. 43; *McDevitt v. Sullivan*, 8 Id. 592; *Knight v. Fair*, 9 Id. 117.) 2. Equity has no jurisdiction. Defendant is entitled to a jury to fix value of use and occupation.

Sanderson & Newell, and *Hewes*, for Respondent.

I. The word "tenant" is defined to be "one that holds or possesses lands or tenements, by any kind of title, either in fee, for life, years, or at will." (3 Tomlinson's Law Dic.; 2 Burrill's Law Glossary; 2 Bouvier's Law Dic.) The expression "tenant in possession" is a legal, and therefore a technical, expression, and when found in a statute, or a law book, has a fixed legal and technical meaning, and the Legislature in the one instance, and the writer in the other, are presumed to have used it in its legal and technical sense. (*United States v. Magill*, 1 Wash. C. C. 463; *State v. Smith*, 5 Humph. 394; *Adams v. Turrentine*, 8 Ire. 147; 4 Pick. 405; *State v. Mace*, 5 Md. 337; 8 Port. 404; 17 Vt. 479; 18 Me. 308; 12 Geo. 526.)

The Legislature having used a general expression, which includes the judgment debtor, the Courts must give that expression its broadest and most comprehensive meaning. (25 Miss. 571.) The Legislature not having attempted to define, or limit, or qualify, the words used, the Courts must look to the books to ascertain their meaning. (12 Pick. 223, 226; 26 Ala. 145.)

II. Bill in equity lies, because: 1. The Appellant, by reason of his position as Treasurer of the company, and the rules of the company, which require him to declare a dividend each month, and pay the same over to the parties entitled thereto, is a Trustee of all the proceeds of the canal, and holds them for the benefit of the owners, whoever they may chance to be.

2. By the sale, and by the operation of the law governing the

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sale, and fixing its consequences, the judgment debtor being in possession, and still vested with the legal title to the property, is made, as to the proceeds of the property, pending the time allowed for redemption, the Trustee of the purchaser, or his assignee, and holds those proceeds for his benefit, and must pay them over to him. (2 Story's Eq. Jurisp. Secs. 964, 839—841; 3 Daniel's Ch. Pr. 1965, and cases cited, 1958, 2008; *Keys v. Bush*, 2 Paige, 211; *Haggarty v. Pittman*, 1 Paige, 298.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This bill is filed to settle and recover the value of the rents and profits of a certain ditch, or interest therein, bought by the plaintiff at Sheriff's sale. The defendants are in possession. The proceeds of the sales of water, etc. sought to be recovered arise from the property since the Sheriff's sale, and before the expiration of the period limited by statute for the redemption. Treating this species of property as real estate, subject to its incidents and laws, we are brought to consider, as the main point presented by this appeal, whether these intermediate rents or profits go to the purchaser at the Sheriff's sale, when the judgment debtor is in possession. This question involves the construction of the 236th Section of the Practice Act, (Wood's Dig. 198.) That Section is in these words: "The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof." It is very true, as argued by the Appellant, that a purchaser, by the mere fact of his purchase, does not get title to real estate. His right is rather the right to get a title in a given contingency, and the transaction an executory, not an executed, contract. But it does not follow, because he is not clothed with a perfect title, or even because he is not personally entitled to the possession, that he has no rights in the premises. He may have a perfect statutory right to the profits, without having a right to the subject out of which the profits proceed. Indeed, it is conceded by the Appellants that this is true as regards the party in possession, if that party is a tenant of the judgment

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debtor. A privilege or redemption is given to the judgment debtor; but it is uncertain whether he will exercise it. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. There is no presumption that the property sells for less than its present value; and there is no compulsion upon the part of the debtor to redeem, if he is able, and if he does not, the purchaser runs the risk of the title, the depreciation or destruction of the property, and in fact, all the risks attending the ownership of property. As the law holds him to the responsibilities of owner, it entitles him to the benefits of owners, so far as the right to the profits is concerned; but it gives this right without allowing the purchaser to disturb the possession of the debtor. This redemption system is a highly artificial plan, devised with care by the Legislature, and introducing new and specific rules in respect to judicial sales. It must be supposed that the Legislature have used legal terms, according to their received legal interpretation.

The phrase "the tenant in possession," is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not; but the phraseology designed, evidently, to fix a general right, applying to all cases of tenancy, for none are excluded.

It is not very easy to see the reason for such a distinction as that contended for. It would give but little help to the purchaser, since the debtor, on the eve of judgment, might change a possession of tenancy, and take possession personally; or change the terms of tenancy so as to make of little or no value the purchaser's right; and why should a debtor be any more inhibited from getting profit from rent than getting profit from use—in this case, from authorizing other persons to sell water, and selling it himself? The definition of "tenant in possession" embraces, within the natural and usual meaning of the words, a judgment debtor as well as his lessee. The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of tenant is, "one that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will."

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The rule of construction of statutes is plain. Where they make use of words and phrases of a well-known and definite sense in the law, they are to be received and expounded in the same sense in the statute. (*United States v. McGill*, 1 Wash. C. C. 463; *Adams v. Turrentine*, 8 Ire. 149; *State v. Smith*, 5 Hump. 396; *Ex parte Vincent*, 26 Ala. 145.)

The concluding words of the section of the statute we are considering lends some strength to the construction we give; for, after providing for the recovery of the rents of the property sold, the words "or the value of the use and occupation" are added; these latter words applying to, and covering, the case of the possession of the debtor.

If we could see a stronger reason for the distinction insisted on than we have been able to perceive, yet, as the language of the Act is precise, and makes no exception of the judgment debtor, we could not without interpolating a new provision into the statute, include a class of persons fully within the definition, any more than we could include a class not embraced by its terms.

The only other question is as to the remedy. It is argued that, conceding the plaintiff's right, a bill in equity of this sort is not the appropriate means of relief. But we think otherwise. The defendants being in possession of this property, were Trustees for the plaintiff. The profits consisted of many sales and transactions, requiring the settlement of a long and complicated account, which could not well be settled at law; besides, many other equitable circumstances exist here—the alleged insolvency of defendants; the partial conversion of the fund; the threatened loss of it; the interest of other parties requiring adjustment and settlement. The further fact that Reynolds was the Treasurer of the ditch company into whose hands the installments due on the interest sold as his came, is also of force in showing the propriety of this remedy. The whole bill, however, might well rest on these facts, that the defendants were merely Trustees of this fund for the plaintiff, and that the fund was in danger of loss; and these facts would uphold the power of chancery to protect the trust property.

Decree affirmed.

Indian Cañon Road Co. v. Robinson.

INDIAN CAÑON ROAD CO. v. ROBINSON *et al.*

Neither the general Incorporation Act, nor the Act of May 12th, 1853, concerning plank roads and turnpikes, gives any exclusive privileges to the corporation first established. Others may build a road, on or near the same line of travel.

The general doctrine in the United States now is, that the grant of a ferry, bridge, or road franchise, does not carry with it a restriction upon the granting power to make a similar grant to other grantees, though the last grant necessarily interferes with the profits and business of the first.

APPEAL from the Eleventh District.

For case, see opinion. The Court below sustained a demurrer for want of facts sufficient to constitute a cause of action. Plaintiff appeals.

P. H. Sibley, for Respondent.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The plaintiff claims to be a corporation, organized under the general statute of this State, passed May 12th, 1853, touching turnpike roads. The purpose of the corporation was to construct a turnpike road between the towns of Iowa Hill and Wisconsin Hill, in Placer County. The plaintiff complains that the defendants have threatened, and are going on to carry into execution the purpose of building another road of like character between the same points, and that the line of the road of defendants is near that of plaintiff and will take the same travel and custom, of which plaintiff claims the monopoly.

The plaintiffs, on these facts, pray an injunction.

This was refused by the Judge of the Eleventh District; and, we think, rightly. The point presented, most favorably stated for Appellant, is simply this: Does the grant of the franchise to the plaintiff exclude the right of all others to build a road on or near the same line? The old doctrine was as is now contended for. But the modern doctrine is to the contrary. Since the case of *Charles River Bridge v. Warren Bridge et al.* (11 Pet. 421,) the rule on this subject in the United States, as generally recognized, is that the grant of a ferry, bridge, or road franchise, does not carry with it a restriction upon the granting power to make a similar grant to other grantees, though the last grant necessarily interferes with the profits and business of the first.

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The whole subject is thoroughly discussed in the case of *Charles River Bridge v. Warren Bridge*, (11 Pet. 421,) and in *Dyer v. Tuskaloosa Bridge Company*, (2 Porter, Ala. 296,) and the principle may now be considered so well settled, that it would be an affection of learning to parade the authorities.

Under our corporation law, respecting roads, etc. it never was intended to give to the company first organized for the construction of a road an absolute monopoly of all the travel along the line of the route. The consequences of such a doctrine would be startling. Some enterprising company might lay out a road between two prominent points in the mountain or other counties, and claim a perpetual monopoly of all the travel done along the line, however extended that line might be, or however large the travel. While the public interest requires the protection of capital in all the enterprises into which it may enter, the public safety requires, also, that all the leading highways or avenues of communication between towns and counties should not be monopolized by a few men who may have been more enterprising than the rest in first seizing upon the lines of communication. While the road of the plaintiff could not be trespassed upon, yet a parallel line of communication may be constructed by others, acting under the same general authority as that of the plaintiff.

Neither the general Act of Incorporation, nor the special Act to authorize the formation of corporations for the construction of plank or turnpike roads, (C. L. 291,) gives any exclusive privileges to such corporations to take all the travel upon the line. Even where such corporations have been chartered by express Act of the Legislature, it has been held that such an Act is not in the nature of an exclusive grant of all the travel between the termini. The question in respect to roads is somewhat different from that in respect to ferries and bridges; for, in respect to these, the law forbids even a license or grant by the Board of Supervisors of the county within a mile of that granted, except in certain contingencies. But here there is nothing of the kind. The evident intent of the Legislature was to leave this business open to individual or corporate enterprise. As many roads may be made between the same points, as capital can be found to make, and made by individuals, if they own, or can obtain the right of way, as well as by incor-

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porated companies, so long as the property or possession of one is not invaded by the other.

Understanding this to be the case made by the bill, we affirm the judgment of the District Court.

WHITE v. FRATT, MORGAN, STANFORD, *et al.*

A BILL, *quæ Hæret*, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law. But where the damages, resulting from the breach of such agreement, are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances.

Where an indemnity bond is given to a Sheriff to hold him harmless, and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie.

Where a Sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the Sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the Sheriff. Each bond must be sued on as an independent obligation.

Whether each obligor is liable to the Sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them; *Quæry*.

Where a bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the Appellate Court, even though no demurrer be filed.

APPEAL from the Sixth District.

For facts see opinion. The Court below decreed that defendants, Schwartz & Bosler, and Stanford, pay to Wood, according to the prayer of the bill, their proportionate share of the balance due on Wood's judgment. Schwartz & Bosler having already paid one thousand five hundred and thirty-two dollars, there was due Wood one thousand six hundred and thirty-one dollars and sixty-one cents; and of this sum the Court decreed Stanford should pay one thousand and twenty-three dollars and thirty-one cents, and S. & B. one hundred and seven dollars. Stanford alone appeals.

Clark & Gass, for Appellant.

Bill in equity does not lie in this case, the plaintiff having an adequate remedy at law. Besides, the plaintiff avers his insolvency; and hence he cannot lose, and has no right to relief.

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(*Champion v. Brown*, 6 Johns. Ch. 404, 405.) A bill of peace will not lie, when the rights and responsibilities of the several parties neither arise from, nor depend upon, nor are in any way connected with, each other. Nor will a bill *quia timet* lie, unless the plaintiff may be subjected to loss, by the neglect, inadvertence, or culpability, of another. (*Randolph's Adm'r v. Kenney et als.* 3 Randolph, 394.)

Wallace & Rayle, for Respondent.

1. Defendant concedes the equity of the bill by failing to demur.
2. This is a proper case for specific performance. (1 Ver. 189; 6 Johns. Ch. 398; 2 Story Eq. Jurisp. 35, 36, and cases cited.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This was a bill, filed by the plaintiff, in which he avers that he was Sheriff of Sacramento County, on the 8th September, 1857. That, on that day, Schwartz & Bosler sued out an attachment, against Bullard & Son, for six hundred and twenty-four dollars, and placed it in the hands of plaintiff, as Sheriff; and that on the 10th September, 1857, defendant, Stanford, put in plaintiff's hands an attachment against the same Bullard & Son, for three hundred and seventy-two dollars; that the Sheriff executed these writs in their order of precedence as to time; when defendant, Wood, served a notice on the Sheriff, that he was the owner of the property, and demanded its surrender and return. On this, plaintiff notified these creditors of this demand, and requested an indemnifying bond, whereupon the defendants, Fratt and Morgan, for, and on behalf of, Schwartz & Bosler, executed a bond or undertaking of indemnity, in the usual form; and Stanford, on his own account, also executed a bond of indemnity. The bill further charges that judgment in both these attachment cases has been rendered, and that executions issued on them, a sale of the property had, and the money arising therefrom, paid over, viz: Schwartz & Bosler, six hundred and seventy-one dollars and thirty-one cents, and L. Stanford, three hundred and ninety-one dollars and eighty-three cents; that after the execution of these bonds, Wood instituted an action in the District Court of the

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Sixth District, and in January, 1858, judgment was had against the plaintiff and Schwartz & Bosler for two thousand four hundred and fifty dollars, and forty two dollars costs. On this judgment, execution was issued and returned "unsatisfied," for want of property. The bill avers that he has requested and demanded of Pratt and Morgan, and Stanford, to comply with the terms and conditions of their undertaking, and pay the judgment to Wood, but they have refused; that he, the plaintiff, is wholly insolvent, and cannot pay off the judgment; that, therefore, he has no remedy at law on the bond, thus exposing himself and his sureties, on his official bond, liable to be harrassed. The prayer is that these parties be decreed to pay this judgment.

The undertaking of Stanford is different in form from that of Schwartz & Bosler. The instrument, after reciting the premises, says: "I agree to save harmless the said White, and to pay any judgment or judgments which may be rendered against him by reason, or in consequence, of the levy of said attachment first aforesaid, or the sale of said goods under said execution."

This is a bill *quia timet*, and to enforce the specific execution of this agreement. The ground of the interference of chancery in such cases is, that there is no other adequate remedy. If a plain, speedy, unembarrassed, remedy exists at law, equity will not interpose. As a general rule, chancery will not interfere in cases sounding in damages. But there are exceptions to the rule; as where there was a contract for the sale of a large quantity of iron, to be paid for in a certain number of years, by installments, a specific performance was decreed, (3 Atk. 384; 1 Sim. & Stu. 607); and so of contracts for the delivery of certain timber at specified periods. (3 Atk. 383.) But in those cases, the jurisdiction is put on the ground that compensation in damages would not afford a full, complete, and satisfactory, remedy, and it is denied when this is attainable at law. And the jurisdiction attaches also in cases of apprehended injury, as by sureties, etc. where no loss has as yet followed. (2 Story's Eq. 35.) It has been held, in analogy to this last principle, that in cases of a general covenant to indemnify, although sounding in damages, equity will decree specific performance. Of this class of cases is *Ranelagh v. Hayes*, 1 Vernon, 189; and *Champion v. Brown*, 6 Johns. Ch. 398; and *Chamberlain v. Blue*, 6 Blackf. 491,

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maintains the same principle. But we have not been able to find any case, where the damages resulting from a breach of a personal contract are susceptible of precise admeasurement, in the absence of some peculiar equitable circumstances, in which specific performance has been decreed. The general principle, which lies at the foundation of this jurisdiction, seems to ignore the existence of such a remedy.

The question arises, what would be the measure of the plaintiff's recovery for the breach of Stanford's obligation? It has been seen that the condition is to pay *any* judgment against White, recovered in consequence of the levy of Stanford's attachment, etc. For a breach of this duty of paying the judgment, when notified, if notice be necessary—what is the measure of Stanford's liability? We think very clearly that it is the amount of the judgment. We do not think that it is important whether White was solvent, or insolvent; or whether his official sureties could be held, or not. If a man sells his property, or contracts with another, on good consideration, that the latter shall pay his debt—for a breach of the obligation, the measure of damages would be the amount. The law supposes in such a case, that the payment of the debt is equivalent in value to the debtor to so much money in hand.

There have been great conflicts of decisions, and much discussion as to the measure of recovery in actions upon contracts for general indemnity and agreements for protection from general and specific liability. The New York cases are conflicting upon this subject. But the doubt and difficulty have arisen from the terms of the instrument—whether they imported a specific duty of protecting the party indemnified from a loss or the cause of it, or only amounted to a guaranty of reimbursement upon a payment by the indemnified. (*Churchhill v. Hunt*, 3 Denio, 321,) is a leading case. There the bond was to save harmless and indemnify the obligee against his liability as the maker of a promissory note, then held by a third person, and to pay the same, or cause it to be paid. It was held that the obligee might, without having paid anything, recover the amount of the note against the obligor upon the failure to pay the holder. The case was fully argued. The Court say: "The plaintiffs were undoubtedly entitled to recover the amount of the note and interest thereon;

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for to that extent the condition of the bond was express and absolute. (*Post v. Jackson*, 17 Johnson, 239, and authorities there referred to; *In the matter of Negus*, 7 Wend. 499.)

Thomas v. Allen, (1 Hill, 145,) is to the same effect.

These cases are very similar in the facts, and identical in principle with this case.

There was no obstacle to the plaintiff's recovery at law, and for precisely the same sum for which the defendant is responsible here, if the plaintiff were entitled to recover at all; and the rules governing the contract, and the defendant's liability on it, are precisely the same in law and equity.

It is true that other parties are joined in the suit, and a kind of joint liability sought to be created. But we do not see very clearly how this can be done. Stanford did not contract jointly with these other defendants. He is to be held on his own contract — not theirs; and, unquestionably, upon ascertained facts, the law affixes a definite measure of recovery to his liability. Whatever the equities, or rights, or liabilities, of these different obligors may be *inter sese* — a matter we cannot here decide — it is very clear that each of them, on his separate instrument, sustains his own independent position towards the plaintiff. It may possibly be that each is responsible to the plaintiff to the full amount of this entire judgment — leaving the question of contribution to be settled between them, or they may show that the measure of recovery is different on a trial of the whole case; but, as the plaintiff states his case, Stanford is either liable for the judgment, or not at all.

We cannot settle these questions, as, besides their difficulty, a case of great importance is now pending before us, in which they are directly presented; and it is not at all necessary to a decision of this case that we should now decide them.

This appeal is taken by Stanford alone, and it is enough to pass upon his case.

The ground here taken was not taken by demurrer. But this was not necessary; for, in an equity case, when the plaintiff's case as made by his bill, shows that he has no title to the relief, this is an incurable infirmity which follows the case everywhere, and no decree can be affirmed which is shown by the bill to be erroneous in substance.

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The decree below, so far as it affects the interest of Stanford, is reversed, and the bill, as to him, dismissed.

SWIFT v. KRAEMER *et al.*

R, AN unmarried man, executed two mortgages upon a lot of land. Subsequently he marries, and then executes a new mortgage to persons who pay off the first mortgages upon their being released. The release of the old, and the execution of the new, mortgage, were on the same day. The wife did not sign the new mortgage. *Held*, that, in equity, the transaction is an assignment of the first mortgages in consideration of the money advanced by the second mortgagees; not the creation of a new incumbrance, but changing the form of the old.

In such case, neither R, nor a purchaser of the property from him after the death of the wife, can hold it free of the second mortgage.

APPEAL from the Twelfth District.

Bill in equity for an injunction.

John Revalk being the owner of certain property situate in San Francisco, on the twenty-eighth day of June, 1854, executed a note and mortgage for two thousand dollars, to Lorenzo Leck and Louis Fontacelli. On the nineteenth day of July, 1854, Revalk executed another note and mortgage on same property for fifteen hundred dollars to Respondent, Charles Kraemer; both of which mortgages were recorded on the day of their respective dates. On the _____ day of September, 1854, Revalk married; and from that day forward resided with his wife upon the mortgaged property. On the eleventh day of December, 1854, the mortgagees, Leck, Fontacelli, and Kraemer, surrendered their notes to Revalk, and executed releases of their respective mortgages, and on the same day, Revalk, alone, executed a mortgage to Respondents, Kraemer and Eisenhardt, to secure the payment of a promissory note of four thousand dollars, money loaned on that day to take up the two first mortgages. Respondents subsequently brought their action against Revalk to foreclose the last mentioned mortgage. Revalk appeared, admitted the execution of the note and mortgage, but claimed the premises as his homestead. The Court decreed the whole premises to be sold, with the exception of a small portion set apart as the homestead, from which decision Revalk appealed to this Court, but the appeal was dismissed at the July

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Term, 1857, on the ground that "the judgment in this case did not affect either Revalk or his wife, so far as the question of a homestead was concerned, and he alone had no right to appeal."

On the tenth day of October, 1856, the wife of Revalk died, leaving no issue. On the twentieth day of October, 1856, Revalk, for a valuable consideration, conveyed the premises in question, to Fox. And on the twenty-ninth day of October, 1857, Fox, for a like consideration, conveyed the same property to plaintiff.

Respondents, subsequent to the dismissal of Revalk's appeal, issued their order of sale, and on the seventh day of December, 1857, were about to sell the premises, when plaintiff, the then and present owner, brought his action, and enjoined the Sheriff's sale, on the ground that said sale, though void and conveying to the purchaser no title, would cast a cloud upon plaintiff's title, and otherwise do him irreparable injury.

On hearing, the Court dissolved the injunction, and decided that the mortgage of Revalk to Respondents, dated December 11th, 1854, was a lien on said premises to the extent of thirty-five hundred dollars, being the continuation of two prior mortgages executed by said Revalk before his marriage, and before any homestead right accrued—and for which sum and interest, from the eleventh of December, 1855, at the rate of two per cent. per month, judgment was entered on the tenth day of November, 1858.

Plaintiff excepted generally to the parol evidence offered by defendant, as to the time and circumstances of the execution of the releases, and of the new mortgage.

Plaintiff appeals.

Pixley & Smith, for Appellants.

I. The questions of homestead in this property have been decided by this Court. (*Kraemer v. Revalk*, 8 Cal. 75; *Revalk v. Kraemer*, Id. 66; *Van Reynegan v. Revalk*, Id. 75.)

These decisions are the law of this case. (*Dewey v. Gray*, 2 Cal. 374.)

II. The mortgage for four thousand dollars to Respondents, dated December 11th, 1854, was not a continuation of the two mortgages, one to Leck and Fontacelli, the other to Kraemer.

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III. The parol evidence on the subject of these releases was improper. (17 Mass. 325; 4 Brq. Ch. 514; 4 Dorr, 65; 1 Johns. Ch. 429; 6 Hill, 219; 6 Vesey, 334 N.; 3 Stark on Ev. 1009; 3 Mason, 383; 1 Hill, 606; 1 Greenl. Ev. 275; Id. 276-278; 1 Phil. Ev. 549-566; 2 Stark Ev. 544-577; 2 Story's Eq. 3, 15-31.)

IV. A mortgage fairly released under seal, without fraud or mistake, is forever gone as a lien. (*Fraser v. Inslee*, 1 Greenl. Ch. R. 242; *Sarewood v. Eldrich*, 2 Id. 145; *Wade v. Howard*, 6 Pick. 492; *In matter of Coster*, 2 Johns. Ch. R. 502; *Belding v. Manly*, 21 Vt. 556; *Lewis v. Starke*, 10 Sm. & Mar. 128; *Poylts v. Clark*, 5 Pet. 480; *Sugden on Vendors*, Vol. 3, 438; *Parry v. Wright*, 1 Sim. & St. 369; *Brown v. Stead*, 5 Sim. 536; *Stevens v. Godfrey*, 4 Ship. 478; *Phelan v. Olney*, 6 Cal. 478; *Taylor v. Bassett*, 3 N. H. 298.)

V. The payment being made upon the same day that the mortgage in question was executed, does not make this payment and execution simultaneous transactions. (4 Kent's Com. 38, 39.)

VI. Recitals in a deed bind all parties to the deed, except where fraud, accident, or mistake, is shown to have occurred; therefore, Respondents cannot question the releases. (5 Ham. 194; 7 Id. 227.) The releases themselves disclose the intention, and they cannot be inquired into by reference to matters *aliunde*.

VII. Swift had no notice of Respondent's reserved rights under these mortgages. The notice to Smith (if any) was insufficient to charge Swift, and he is an innocent purchaser without notice.

VIII. Respondents cannot be substituted to the rights of all the prior mortgagees, for the reason that Leck & Fontacelli are not parties to this action, and Eisenhardt had no privity with either of the other mortgagees. (*Taylor v. Bassett*, 3 N. Hamp. 298.) The cancellation of the prior mortgage was evidence of the intention to abandon the lien.

Sidney V. Smith, for Respondent.

I. If Revalk and his wife were the Appellants, there could be no doubt as to the correctness of the decree of the Court below.

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(*Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Id. 104; *Carr v. Caldwell*, 10 Id. 380.) The only question is, whether the rule therein laid down extends to Appellant, Swift, who is purchaser of the property after the death of Revalk's wife. The mortgage of Respondents was of record, and imparted notice to Swift. And if it were competent for him to impeach its validity by parol evidence of a homestead, it was just as competent for the Respondents, by the same kind of evidence, to sustain it, which they did, by showing that, by the doctrines of subrogation, it was perfectly valid to the extent of the two prior mortgages, which had been made before any homestead had existed, and to cancel which it had been given. It was the duty of Swift, finding, as he did, a mortgage of four thousand dollars duly recorded, to inquire of the mortgagees as to the character of their claim. (1 Sug. Vendors, 8.) Swift relied on the fact of homestead as proving the mortgage null and void. But its invalidity did not depend alone on that fact. (*Carr v. Caldwell*, above.)

II. Respondents should have all the security which belonged to the mortgages to which they are subrogated. This action is a bill of review. (2 Barb. Ch. Prac. 90.) And on a bill of review a final decree can be opened and altered so as to make it conform to the justice of the case. (*Bennett v. Winter*, 2 Johns. Ch. 205.) The Court below not having authorized Respondents to foreclose their mortgage against the whole lot, this Court has the power to correct the decree. (*Grayson v. Guild*, 4 Cal. 122.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

One Revalk, an unmarried man, in 1854, owned a lot in San Francisco; Leck and Fontacelli had a mortgage of two thousand dollars, and Kraemer a mortgage of one thousand five hundred dollars, on this lot. Revalk married in 1857, and, after his marriage, made the mortgage, the validity and effect of which this suit questions. His wife did not join in the mortgage. The consideration of this last mortgage was that Kraemer canceled his prior mortgage of one thousand five hundred dollars and gave five hundred dollars in cash, in addition, to Revalk, and one Eisenhardt paid the prior mortgage of two thousand dollars to Leck and Fontacelli. The release of the old, and the redemp-

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tion of the new, mortgages, were done on the same day. Revalk's wife died, and Swift, the plaintiff here, purchased the mortgaged premises. He claims now that, as he knew that the property was homestead at the time of the last mortgage, he was a purchaser without notice of any adverse claim, and that he takes the title free of the claim of the mortgagees. We do not think so. So far as the five hundred dollars is concerned, probably, within a recent decision, the husband had no right to incumber the property to that extent. But, as to the debts secured by the original mortgage to Leck and Fontacelli, and Kraemer, we regard the cancellation of the old mortgages and the substitution of the new, as contemporaneous acts. It was not creating a new incumbrance, but simply changing the form of the old. A Court of Equity, looking to the substance of such a transaction, would not permit a release, intended to be effectual only by force of, and for the purpose of, giving effect to the last mortgage, to be set up, even if the last mortgage was inoperative. It would not permit Revalk to take Kraemer and Eisenhardt's money and apply it in extinguishment of a prior incumbrance, and then claim that the property should neither be bound by the new mortgage or the old. These last mortgagees would be, in equity, assignees of the debts they paid, and be subrogated to the rights of their assignors; for, in equity, the substance of the transaction would be an assignment of the old mortgages in consideration of the money advanced. This, in effect, has been held in *Dillon v. Byrne*, 5 Cal. 455; *Birrell v. Schie*, 9 Id. 106; *Carr v. Caldwell*, 10 Id. 380.

Nor does Swift stand in any better position than Revalk himself. Swift can only claim that he bought with notice of a parol fact — not that he was the purchaser of an apparent legal title, and ignorant of any better title or equity. In other words, he bought with knowledge of the fact, which *seemed* to show a title in Revalk and wife. But this fact may be explained. What existed in parol might have been explained by parol. The mortgage on record was, at least, sufficient to lead him to inquiry, and then he was bound to make full inquiry. That would have resulted in information as to the true state of things. But we are not aware that it has ever been held that a party is estopped except by his own act or deed, or that of his privies. Revalk's possee-

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sion of the premises, with his wife, was no estoppel of Kraemer to show that the premises were not homestead. If they seemed to be, from the fact of this family occupancy, and Swift bought on the strength of this appearance, he took the risk of this appearance turning out to be the reality; and, if he was deceived, it is one of the unfortunate blunders common to all speculation.

The decision of this Court in the numerous cases of Revalk touching this property, make nothing for the Appellant, for this question was not involved in those cases; and *facts* are not settled by judicial precedents, but only questions of law.

Decree affirmed.

SMITH v. MAYOR AND COMMON COUNCIL OF SACRAMENTO CITY *et als.*

WHEREAS the charter of a city authorizes the City Council "to make by-laws and ordinances, not repugnant to the Constitution and laws of the United States, or of this State; to make appropriations for objects of city expenditure; to purchase, receive, and hold, for the use of the city, real and personal estate; and to pass such other by-laws and ordinances for the regulation of said city as they may deem necessary;" the authorities may employ Attorneys to protect the interests of the city in litigation. And this is true, even if the charter provides for a City Attorney to attend to the business of the city; other counsel may be employed when necessary. The appropriation of five thousand dollars to Alpheus Welch, legal.

APPEAL from the Sixth District.

The case is sufficiently stated in the opinion. The Court below granted a perpetual injunction against the payment of the fee. Defendants appeal.

Moore & Welty, for Appellants.

1. The validity of municipal ordinances is purely of common law cognizance. (26 Wend. 131; 10 Paige, Ch. 539; 9 Id. 22, 388; 6 Met. 425; 1 Edw. Ch. N. J. 588; 1 B. Munroe, 216.)

2. The 7th Section of the City Charter confers ample power to pass the ordinance in question.

Clark & Gass, for Respondent.

I. Equity has jurisdiction: 1. Because the plaintiff had no adequate remedy at law. 2. If the plaintiff had a right of action for damages, then each tax-payer in the city had the same right,

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and equity interferes to prevent a multiplicity of suits. 3. The taxes raised each year are for specific purposes, and are held in trust by the Common Council, and equity will compel the proper application of the fund. We seek not to interfere with the Common Council in the exercise of its legislative functions, but to prevent the Mayor and Treasurer acting under an unconstitutional ordinance. (15 Barb. 213-264; 13 Id. 567; 16 Id. 392; 24 Id. 187; 12 How. Pr. R. 496; 3 Id. 441; 3 Edw. Ch. R. 421; 22 Conn. 552; 1 Barb. Ch. Pr. 640; 6 Paige Ch. 88.)

II. Municipal corporations have no power or authority, except what is expressly granted by their charters. (*Low v. City of Marysville*, 5 Cal. 2-14; Angell & Ames on Cor. 97; 13 Mass. 271; 2 Denio, 110; 4 Pet. 164; 2 Cal. 524.) That clause in the charter authorizing the Common Council "to make appropriations for any object of city expenditure," must be limited to those particular objects which are specified in Sec. 7 of the charter, and which are purely of a municipal character. (5 Cal. 214; 13 Mass. 278; 22 Conn. 552; 2 Denio, 110; 4 Pet. 170.) If money is required for any other than the ordinary purposes, it must be raised by an extraordinary tax, sanctioned by a vote of the citizens. (City Charter, Sec. 16.)

The Council were not authorized to employ any person to assist the City Attorney, or to perform his duties. (3 Cal. 122; Charter, Sec. 39; 12 Mo. 446.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This was a bill filed by the plaintiff, a tax payer of Sacramento City, to restrain the payment of five thousand dollars, appropriated by the late city authorities to Alpheus Felch, as a fee for contesting before the Supreme Court of the United States, the title of John A. Sutter, to lands within the limits of the city.

Leaving out minor questions, the principal point on which the case turns, is, whether the Common Council had power to pass this ordinance.

The charter authorizes the City Council "to make by-laws and ordinances, not repugnant to the Constitution and laws of the United States, or of this State; to make appropriations for objects of city expenditure; to purchase, receive, and hold, for

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the use of the city, real and personal estate; and to pass such other by-laws and ordinances for the regulation of said city as they may deem necessary."

It seems to be conceded that the city claimed certain real estate within the municipal limits which *might* be injuriously affected by the litigation in question.

We are not aware of any well recognized rule of construction which goes to the extent of holding that under a general provision like this, the power of protecting the interests of the city by the employment of counsel, is denied to the city authorities. The legal protection of the property may be as much involved in procuring competent Attorneys, or counsel, as in paying the costs and expenses of defending actions brought for the recovery of its real or personal property. We apprehend if a delinquent Treasurer escaped with the money of the city to San Francisco, the city would be authorized under the old charter, to employ Attorneys there to recover the money; or if bonds of the city had been improperly sent to New York for sale, that the authorities might employ a lawyer there to restrain their negotiation. The duty of protecting the public property carries along with it the duty to employ the usual means of protecting it. Legal assistance stands, as a means for the protection of property, in direct relation to the general power to hold, acquire, preserve, and protect it. There is no difference in this respect between one sort of protection and another, between the charge of the lawyer and the charge of the Clerk, between laying out money to buy a safe to keep the money in, and laying out money to employ a lawyer to recover the money improperly withheld. It is true, the charter provides that an attorney shall be elected by the people to attend to the business of the city; but this does not prevent the employment of other counsel when it is impossible for the Attorney of the city to discharge the required duty. Nor is it important that the suit was one in which the United States was nominally or beneficially a party. The interest of the city would be the same in securing a peculiar and particular attention to the litigation as if she were the sole party contesting with the claimant of the property.

We say nothing here of the policy, or justice, or motive, of this act.

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It is urged with great force that the tax-payers have been made by this ordinance to pay out of their own property for clouding and defeating its title. If this claim involved only a contest between two sets of titles, represented nearly equally by the people of the city, unquestionably such partial and oppressive procedure as would tax one-half for the benefit of the other half, and make the former contribute the means to destroy their own titles, would be so flagrant an abuse of power in the representatives of all, as to call for the restraining powers of the Courts.

But the case is not so presented. As it stands here, it professes to be the mere effort of the city authorities, who were the Trustees of the city property, to protect the true estate, by an expenditure which seems to us to be within the limits of their power. Whether they should have exercised it is another question. That is a question of legislative expediency, with which we have nothing to do.

Judgment reversed, and cause remanded for a new trial.

FINDLA v. CITY AND COUNTY OF SAN FRANCISCO.

THE Ayuntamiento of San Francisco, in 1850, by an order, authorised its Alcalde to grant to plaintiff "a quantity of land, in conformity with the survey of the town, as near as possible to the location of" certain other lots which plaintiff was to surrender to the town. The Alcalde accordingly conveyed, by deed, to plaintiff, a lot which had been previously granted by the town to one Gerke. *Held*, That an action for the breach of covenants of warranty in this deed will not lie against the city.

The true meaning of the order is, that the Alcalde was to grant the city's land only, and neither the town nor its successor is bound for an act done beyond the limit of its authority.

Whether a city can bind itself by a contract purporting to dispose of property to which it has no claim; *querry*.

APPEAL from the Fourth District.

The defendant demurred to the complaint, as set forth in the opinion, that it did not contain facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff appeals.

Waller & Moore, for Appellant.

F. P. Tracy, for Respondent.

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BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The complaint in this singular case sets out, that about the 18th of March, 1850, the Ayuntamiento, or Town Council of San Francisco, then a pueblo, made an order authorizing the Alcalde, J. W. Geary, to receive back certain grants of lots, made to the plaintiff by the authorities of the town, in September, 1848, to cancel them, and to grant to plaintiff, in lieu thereof, an equal quantity of land in conformity with the survey of the town, as near the location of the former lots as could be given.

Geary, acting, or professing to act, as Alcalde, made a deed under this order, to the plaintiff, for a lot, which had before been conveyed to one Gerke; and it is for a supposed breach of the implied covenants of warranty in this deed that this suit is brought.

But the Respondent's counsel reply to this complaint that it shows no cause of action, for the true meaning of the order is, that the officer of the city was only authorized to grant the city's land, and not Gerke's land; and, therefore, neither the town nor its successor is bound for an act done beyond the limit of its authority. Indeed, it would be very questionable whether the town itself, under the power to dispose of its own property, could bind itself by a contract purporting to dispose of property to which it had no claim. But, certainly, when it authorizes its agent to make a deed for its own land, *that authority* does not impart to the agent a right to bind it to convey or warrant the title to a lot belonging to a stranger.

Thus, it has been held in Mississippi, in several cases, that where a Commissioner, under an order of sale from the Probate Court to sell real estate of the intestate, sold land not belonging to it, the sale was void as exceeding the authority of the agent, and the notes given for the purchase-money not recoverable.

The demurrer was properly sustained.

Judgment affirmed.

Whitney v. Buckman.

WHITNEY v. BUCKMAN.

THAT property mortgaged is so indefinitely described as not to pass title by sale on foreclosure, is no objection to the enforcement of the mortgage against the mortgagor.

Where the description was, that "certain tract or parcel of land situated in said county of Napa, consisting of a pre-emption claim of one hundred and sixty acres, and commonly known as the 'Soda Springs,' and embracing the said springs, and the improvements thereunto belonging, and being about five miles from Napa City, in a northerly direction, together with all and singular the tenements," etc.; *Held*, to be *prima facie* sufficient.

The right to a pre-emption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a pre-emption right, or any other purpose, or the land itself, may be mortgaged; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it.

If a mortgage under seal expressly declares and recites an indebtedness, this is sufficient evidence of the indebtedness in a foreclosure suit. No law requires any note, bond, or the like, in addition to such a mortgage.

An affidavit by defendant, in effect acknowledging the debt for which suit is brought, is admissible in evidence for plaintiff, though made in a former suit between the parties. And although the affidavit was unnecessary, still, this being an equity case, defendant cannot complain that plaintiff proved his case too clearly, or introduced redundant testimony, because the mortgage was uncontradicted and conclusively established the debt.

Errors in the computation of interest should be corrected by motion, in the Court below.

APPEAL from the Seventh District.

Bill to foreclose a mortgage executed by defendant to Sullivan & Allen, and by them assigned to plaintiff. The mortgage runs, that the defendant, "for and in consideration of the sum of ten thousand dollars, to him, defendant, in hand paid by the parties of the second part, Sullivan & Allen, doth grant, bargain, sell, and confirm, unto the said parties of the second part, etc. all the undivided one-half of all that certain tract or parcel of land situated in said county of Napa, consisting of a pre-emption claim of one hundred and sixty acres, and commonly known as the 'Soda Springs,' and embracing the said springs and the improvements thereunto belonging, and being about five miles from Napa City, in a northerly direction, together with all and singular the tenements," etc.

"This conveyance is intended as a mortgage to secure the payment of ten thousand dollars, payable two years from date, with interest at the rate of two per cent. per month, interest payable annually, and if not paid at the expiration of the first year, to be added to, and become a part of, the principal, and thereafter to bear the same rate of interest."

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To this complaint the defendant demurred: 1. Statute of Limitations. 2. Insufficient allegations to constitute a cause of action.

The Court overruled the demurrer, and defendant filed his answer verified, containing: 1st. A general denial of every allegation in the complaint, except the execution of the mortgage. 2d. A special denial of any indebtedness or consideration whatever for said mortgage. 3d. A denial of any promise by defendant to pay said sum of ten thousand dollars, or any part thereof. 4th. The Statute of Limitations.

Upon the trial, plaintiff offered in evidence, the mortgage with the assignment to him; an affidavit of defendant made by him for the purpose of obtaining a discharge of an attachment levied upon his property at the instance of the plaintiff in another action; and a letter from defendant to E. L. Sullivan, both, in effect, acknowledging this mortgage debt.

Plaintiff rested.

Whereupon defendant moved the Court to dismiss plaintiff's bill, upon the following grounds:

1st. Because the mortgage is upon a pre-emption claim, and is therefore null and void.

2d. Because it does not describe the lands either by metes and bounds, or any other such description as would enable the Court to enter a decree of sale thereof; nor does the complaint contain any better description or location of the same. Neither has plaintiff attempted to locate said land by testimony, or to show that the land by the name of "Soda Springs," has any existence or location in fact, or that there are any boundaries whatever to the same.

3d. Because there is no proof of any consideration for the execution of said mortgage, other than the recital in said complaint and mortgage, defendant in his answer having plead want of consideration, under oath.

4th. Because plaintiff has failed to show the existence of any debt whatever.

5th. Because if there was any debt existing at the time of the execution of the mortgage, more than two years having elapsed before the commencement of the action, plaintiff was precluded from recovering.

6th. Because plaintiff having failed to prove a transfer of the

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debt, a transfer of the mortgage alone, conferred no right of action on the plaintiff.

The Court overruled the motion, and entered judgment for plaintiff.

Defendant appeals.

Langdon, Hopkins & Pond, for Appellant.

1. The mortgage contained no sufficient description of the premises. 2. The mortgage of a pre-emption claim is null and void. (7 *Smedes & Marsh*. 234; Act of Congress, March 3d, 1853; Act of March 1st, 1854.) Under this Act, this mortgage is also void, because under the Act of Congress, 1841, Sec. 12, "all assignments and transfers of the right hereby secured, prior to the issuing of the patent shall be null and void." (*Brislois v. Sibley et al.* 1 Minn. 230; *Dillingham v. Fisher*, 5 Wis. 475; *Hudson v. Milner*, 12 Ala. 659.)

A. Thomas, for Respondent.

1. A bond or covenant to pay, is not essential to a mortgage. (4 Kent, 145; *King v. King*, 3 P. Wm. 358; *Mellar v. Lees*, 2 Atk. 494; *Elder v. Rose*, 15 Wend. 218; 10 Id. 675; 2 Bac. Abr. 279; 2 Cow. 536; 1 Chitty, 101, 102, 299, 346; *Congor v. Lancaster*, 6 Yerg. 477; *McCarty v. Beach*, 10 Cal. 461; *Tartar v. Hall*, 3 Id. 263; Chitty, 101, 102, 299, 346.)

2. Defendant is estopped from setting up that the mortgage is void, because of insufficient description, or because it is upon a pre-emption claim. (3 Cal. 263; 4 Id. 247; *Houseman v. Chase et al.* 12 Id.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

There are no merits in this appeal, either in justice or in law.

1. If the property is indefinitely described, so that no title could pass from the sale on foreclosure, this defect is as much the fault of the maker as the taker of the mortgage; and it is no just objection on the part of the mortgagor, that the mortgagee has got, or will get, nothing from the security. We think, however, the property *prima facie* is sufficiently described.

2. There is nothing in the fact that this is public land. We

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have recognized the title, resting on possession in public land, in cases innumerable; all the ditch and mining claims in the State rest on the same basis. The mortgage does not pretend to transfer to the mortgagee the right to a pre-emption; this is not assignable, but the possession of public land, whether taken for the purpose of getting a *pre-emption* right, or any other purpose, may be mortgaged, or the land itself; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it.

3. The mortgage expressly recites and declares an indebtedness. This is evidence, under the seal of the party, that there existed that indebtedness, at least for the purpose of the foreclosure of the security, unless, indeed, we should hold that if a man says, in a casual conversation, he owes another money, that declaration is evidence of the debt; but if he solemnly asserts it under seal, it is not. The mortgage does not show that any separate paper evidencing the debt — as a note or bond — was ever executed; and we know of no authority which requires it.

4. The affidavit and letter of defendant, acknowledging, in effect, the debt, though unnecessary, were admissible; but the evidence was conclusive without these proofs, and the defendant, in an equity case, cannot complain that his adversary proved his case too clearly, or introduced redundant testimony, when there is no contradiction of that which sufficiently establishes the fact. If the proof were wholly inadmissible in such a case as this — the mortgage uncontradicted establishing conclusively the debt — we should not reverse for the cause assigned.

5. The Statute of Limitations had nothing to do with the case. The mortgage shows a debt due within the statute period.

6. If there was error in the computation of interest, the defendant should have moved to correct it below. But we are not satisfied there was such error. If we were, we would not be disposed to correct the decree on account of it, but should permit it to stand, leaving the excess over the proper amount to go as compensation to the Respondent on account of this appeal.

Decree affirmed.

See *Tryon v. Sutton et al.* (ante.)

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CHARTERS of corporations are special grants of power. The corporation has no powers except those expressly given, or which are necessary to the exercise of those expressly given.

The powers delegated by the government to municipal corporations, are trusts, not subject to be delegated by the corporations.

Under the Act of 1852, incorporating the town of Oakland, the corporate and municipal powers were lodged in a Board of Trustees. The Board had power "to lay out, make, open, widen, regulate, and keep in repair, all streets, bridges, ferries, public places, and grounds, wharfs, docks, piers, slips, sewers, and alleys, and to authorize the construction of the same." Under this clause the Board, by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing, and regulating, wharfs, etc. within the city, for thirty-seven years. *Held*, that the ordinance was void, as being a transfer of the corporate powers of the Board; and that the present city of Oakland, being the successor in law of the town of Oakland, can come into equity to have the ordinance declared void, and the wharfs, etc. held by defendants thereunder, delivered up.

Where the charter of a city vests the corporate powers in a "Board of Trustees to consist of five members, who shall be elected," etc., and the law provides, that "at all meetings of the Board a majority of the Trustees shall constitute a quorum to do business," a majority of those elected can organize and act at the first meeting, as well as at any subsequent meeting.

If defendant, by conspiracy with others, procured them and himself to be elected to the Board of Trustees, for the purpose of defrauding the town of this property and these franchises, for his benefit, the whole transaction is illegal.

And if defendant, as member elect of the Board, neither resigning nor qualifying, took advantage of his position to advance his personal interests, at the expense of those of the corporation, it was a fraud for which equity will hold him responsible.

Nor would a ratification by a subsequent Board, fraudulently elected by defendant's efforts, validate the transaction.

The statute of limitations would not begin to run until after the election of a new and innocent Board.

An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the Statute of Limitations applicable to such actions.

APPEAL from the Third District.

Thompson, Irving & Pate, for Appellant.

1. The deed and ordinances were void, because five trustees were elected, and only four qualified. If the Board was first legally constituted by the election and qualification of five members, as required by law, (Act May, 1850,) then a majority could perform any official duty; not otherwise. (*Leonard v. Darlington*, 6 Cal. 123.) Hence, these deeds and ordinances are void. Where a deed, upon its face, purports to be executed in conformity to law, and the want of authority to execute it does not appear upon the deed, then the Court will declare the deed fraudulent and void, and will direct its cancellation or a reconveyance. (See 2 Story's Eq. 694: 1 Newland on Contracts, Ch. 94, p. 493; 1 Story's Eq. 91.)

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2. Had the Board been properly constituted, yet the grant of the exclusive privilege of constructing wharfs, piers, docks, and of regulating the tolls thereon, and receiving the same, was null and void. These were public rights inherent in the corporation, and inalienable by the Trustees. (*Minturn v. Larue et al.* McAlister's C. C. R. 370; *Charles River Bridge*, 11 Peters, 545; *Fanning v. Gregor*, 16 How. 524; *Thatcher v. Dartmouth Bridge*, 18 Pick. 501; *Mills v. St. Clair*, 8 How. 569; *Susquehanna Canal Company v. Bonham*, Sergt. & Rawle.)

3. The charges of fraud in the complaint are sufficient.

4. It is contended that the act of limitations is a bar, and is available on demurrer.

The 17th Section, upon which the Respondent relies, applies only to actions other than those for the recovery of real property. Where suit is instituted for the recovery of real estate, although that real estate may have been obtained by the fraud of the defendant, it cannot be limited by the section relied on, for this would lead to the absurd conclusion that the Legislature meant to shield a possession obtained by fraud, by a limitation shorter than that fixed for the recovery of real property, or its rents, or servitudes, where no fraud exists.

Besides, the suit is instituted against Horace W. Carpentier, a Trustee of an express trust, who has obtained possession of property committed to his charge by a fraudulent combination with his co-Trustees, and hence the statute of limitations is no bar. The case comes up to the principles on which Courts of Equity, in the exercise of their jurisdiction, repudiate the bar of the act of limitations in cases of trust.

E. W. F. Sloan, for Respondent.

I. Where a number of persons are intrusted with powers not of a mere private confidence, but partaking of a general nature, when all have met, a majority can conclude a minority, and their act will be that of the whole. The cases of corporations go further; there, it is not necessary they should meet; it is enough if notice be given. (Per Ayre, Ch. J. in *Grindley v. Barker*, 1 Bos. & P. 236; *Attorney-General v. Davy*, 2 Atkyns, 212; *King v. Burton*, 3 T. R. 592; *Ree v. Bellringer*, 4 T. R. 822.) Nor can there be any difference in principle or reason, between the case

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of a resignation by one member after his election and qualification, and that of a refusal or failure by one to qualify after an election. It seems not to be necessary, even, that the whole number should be elected. (*Matter of the Union Ins.* 22 Wend. 599; *Vide Ex parte Willcocks*, 7 Cow. 408.)

II. As to the fraud, perhaps an act in the nature of a private Act of the Legislature, can be annulled for fraud. (10 Amer. Jurist, 297, and cases cited.) This is not exactly a private act. But Appellant cannot attack the act, and yet claim rights under it. The fraud alleged in passing the ordinances, and in making the conveyances to Carpentier, are vague. How can a Court notice it? What is the injury to Oakland? It nowhere appears that the grant of the land or wharf privileges was made without consideration, or upon inadequate consideration. The grant was "upon conditions." Carpentier was to construct the wharfs at his own expense, and it does not appear that these conditions were unfair to the town, or that C. has failed to perform them. Neither the deed nor the ordinances are set forth. In short, it does not appear from the bill how Oakland has been injured; and courts do not decide on abstract questions. The fraud alleged must have injured some one. (*Chittenden v. Craig*, 2 Bibb, 474; 1 Story's Eq. Juris. Sec. 203.) This is a case in which relief can only be granted upon terms. It is a case in which the plaintiff must offer to do equity to the defendants. The bill makes no such offer, and is clearly demurrable for that reason. (1 Story's Eq. Jur. Sec. 64; 2 Id. Secs. 693, 694.) The ratification by ordinance in 1853, was made with a full knowledge of the facts. Chancery has no power to rescind contracts arbitrarily; and where new stipulations have been made concerning them, the Court will not interfere. (3 J. Ch. 23; 17 J. R. 437; *Sadler v. Robinson*, 2 Stew. 510; 1 Story's Eq. Juris. Sec. 203; *Gas Co. v. City of San Francisco*, 9 Cal. 453.)

III. The Statute of Limitations constitutes a complete bar to the relief sought; and is available on demurrer. (*Vide* Story's Eq. Plead. Secs. 503, 750, 751; 1 Dan. Ch. Pr. 623, 624, *Park. Ed.*;) *Sublette v. Tinney*, 9 Cal. 423.) Our Statute of Limitations applies alike to suits in equity and actions at law. It was suggested by counsel for the Appellant, that the case does not fall

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within the provisions of the 3d Chapter of the Act of Limitations; that the second chapter is the only one applicable to suits in respect to real estate. Chapter 2 does not apply to proceedings for the purpose of setting aside legal titles as fraudulent, but to an action for the recovery of possession after a successful determination of the former proceedings.

Whether this case comes within the provisions of Section 19, or the second class in Section 17, it is still barred.

There is no pretence of recent discoveries; on the contrary, whatever is known must have been discovered at the time.

The wharf privilege is but a chattel interest, and clearly falls within the second class of cases mentioned in Section 17.

The right or power of the corporation to demise for a term the right of constructing wharfs, and the taking of wharfage, cannot be questioned. (*Kent's City Charters; Costar v. Brush*, 25 Wend. 631.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This is a bill in equity filed by a municipal corporation to set aside a contract or lease made of certain franchises and real estate. The bill charges that the city of Oakland is the legal successor of the town of Oakland by Act of the Legislature, passed March 25, 1854. That the town of Oakland was incorporated by law on the 4th of May, 1852, and, by the same Act, was vested with a title to certain lands comprising the water front within the corporate limits; also, with certain privileges touching the erection of wharfs, docks, etc.; that, by the Act incorporating the town of Oakland, the corporate and municipal powers were lodged in a Board of Trustees, to consist of five members, whose election was given to the qualified voters of the town, the election fixed on the second Monday in May in each year, and the term of office one year, and until their successors were qualified. That an election for Trustees occurred in pursuance of the Act, but only four of them qualified as Trustees; and, at a meeting of the four persons so elected and qualified, a resolution, purporting to be an Ordinance, was passed, whereby the Trustees pretended to convey to one Horace W. Carpentier and his representatives the exclusive right and privilege of con-

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structing wharfs, piers, and docks, at any point within the corporate limits of the town of Oakland, with the right of collecting wharfage and dockage as he might deem reasonable, upon certain conditions expressed in the ordinance. That, by this pretended ordinance, and for the considerations therein set forth, a pretended grant was made to the said Carpentier and his assignees or legal representatives, with all the improvements, rights, and interests, belonging to said town, in and to the lands lying within the limits of the town of Oakland. That Carpentier afterwards, by fraud, procured certain men to be elected again as the Board, who ratified this contract; that the first ordinance was fraudulent, Carpentier having procured himself to be elected Trustee for the purpose of getting it and having his agents on the Board of Trustees. Various other charges of fraud are made, some of which will be noticed in the course of the opinion.

The defendants filed a demurrer to the bill. The ground is, that it does not state facts sufficient to show a cause of action, and that the claim of the plaintiff, as stated, is barred by the Statute of Limitations. Final judgment was rendered on the demurrer in favor of the defendants, the plaintiff declining to amend his bill.

Several important questions are raised by the record.

1. Had the Trustees of the town of Oakland power to grant to Carpentier the exclusive right and privilege of constructing wharfs, piers, and docks, at any point within the corporate limits of the town, with the right of collecting wharfage and dockage, at such rates as he might deem reasonable, for the period of thirty-seven years?

The charter of the town of Oakland is to be found in the Acts of 1852, page 180. By Section 3d of that Act it is provided: "The Board of Trustees shall have power to make such by-laws and ordinances as they may deem proper and necessary; to regulate, improve, sell, or otherwise dispose of, the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries, public places, and grounds, wharfs, docks, piers, slips, sewers, wells, and alleys, and to authorize the construction of the same, and, with a view to facilitate the construction of wharfs

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and other improvements, the lands lying within the limits aforesaid, between high tide and ship channel, are hereby granted and released to said town; *provided*, that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid; to regulate and collect wharfage and dockage; to secure the health, cleanliness, ornament, peace, and good order, of said town; to organize and support common schools; to license and suppress dram shops, horse-racing, gambling-houses, and houses of ill-fame, and all indecent or immoral practices, shows, and amusements; to regulate the location of slaughter-houses, stables, and places for the storage of gunpowder; and to pass such other laws and ordinances as, in their opinion, the order, good government, and general welfare, of the town may require."

The rules in relation to the construction of charters of corporations are familiar. They are special grants of power emanating from the paramount authority. The corporation, owing its existence to the law, is precisely what the law makes it. It has no powers except those expressly given, or which are necessary to the exercise of those expressly given. The general legislative power residing in the State Government may delegate to a municipal government some portion of its own powers; but these grants are held in subordination to the general power, and are not construed as taking from that government any other powers or rights than those clearly granted. These delegated powers, given for local objects, are regarded as trusts confided to the hands in which they are placed, and are not subject to be delegated by the repositories of them. To this Board of Trustees, as has been seen, was given power "to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries, public places, and grounds, wharfs, docks, piers, slips, sewers, and alleys, and to authorize the construction of the same." Under these general terms it is claimed that this Board had a right to authorize Carpentier to enjoy the exclusive privilege of laying out, establishing, and constructing, wharfs within the city at pleasure, and fix the charges, for a period of thirty-seven years. It is not difficult to see that such a construction is not warranted by the provisions of this Act. The charge in the bill is not that Carpentier agreed, or was allowed, to *construct* a

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wharf, or any number of wharfs; that, by contract, he was authorized, and bound himself, on certain terms and conditions, to do this; but that to him, in exclusion of the right of everybody else, and of the corporation itself, was imparted the sole privilege, not only of constructing all wharfs, but of laying out, establishing, and regulating, them, too. This amounts, not to the grant of a license or privilege to erect a wharf, or all the wharfs, laid out or ordered by the council, but the grant of an exclusive right to lay out and construct them at his own convenience, in his own way, and to hold and use them on his own terms; and, if he did not choose to exercise this privilege, the corporation is prevented from giving the privilege to any one else; and so of docks, piers, and the like. If, by a sweeping ordinance of this sort, an exclusive and comprehensive privilege like this could be given to Carpentier, it is hard to see why the opening, repairing, and regulating, of streets and roads should not be given to him exclusively, as a privilege, with a right to charge and collect what tolls or charges for using them he might please, since, as has been seen, the very same words apply to these public easements as to docks, and piers, and wharfs. We do not regard this ordinance as an exercise of a power under the charter, but as a transfer of the corporate powers intrusted to this Board to this favored grantee. What power of regulation is left after an unconditional grant of the exclusive privilege of all the wharfs, and docks, and piers, and a lease for thirty-seven years of all the lands, and a right to fix such tolls as the grantees please, and this without any obligation to build or construct any, it is not easy to see. If the grant had been to the city of San Francisco, in the same words, and the city authorities had granted the exclusive privilege to one man to construct all the wharfs along the line of the bay, and fix his own toll, we suppose no one would question that the grant exceeded the powers of the agents of the corporation.

The general power over the wharfs and docks is like the general power over the streets and highways. The corporation must exercise the general powers which the term "regular" implies. This general power involves the determination of the questions whether a wharf shall be constructed, when, how, in what places, on what terms, how kept, and what charges shall be exacted for

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the use? These police regulations are essential to the interest of the city, its commerce, its health, possibly, certainly its convenience and general prosperity. It might, as we have intimated, just as well be said that the Board could by ordinance delegate to Carpentier the power of opening all streets and alleys, anywhere in the town, when he chose, or widening them, where he chose; to run an alley through any one's lot, or to make a sewer near any man's door, at his pleasure; but it would be rather a startling proposition to say that he could hold — through an ordinance — the exclusive privilege to do all these things, and charge for them what he chose; and that no one else — nor the town itself — had a right to do any of them. And the same reason precisely which denies the power to make this grant, applies to the grant of the exclusive privilege of constructing all the wharfs he may choose, he determining, of course, where these wharfs shall be, the number, the dimensions, the kind, the toll, and every matter concerning them — comprehended within the term "regulation." The reason is that this power of regulation is a political power, and therefore, the transfer of it is the transfer of a power of municipal legislation; which authority is not in its nature alienable. It is not the transfer of so much property; it is the transfer of a power to create, and control, and regulate, a certain species of franchise, the creation, control, and regulation of which, are powers of the political department. It is no answer to say that after a wharf is constructed by the authority of the corporation, it might be sold as property; the reply to this is, that the establishment of it is of the province of the corporation; and that it can no more give a general privilege to one man to establish wharfs, when, where, and as, he chooses, than it could give the same right to open streets when, where, and as, he chose, within the limits of the city — the privilege being given for his own profits, use, and benefit.

The principle upon which these general views rest, has been fully supported by the United States Circuit Court for the Districts of California, in the case of *Minturn v. Larue*, (1 McAll. 370,) involving the construction of this charter.

The power is given the Board "to regulate and to collect wharfage and dockage"; but this power is not exercised, but ceded, by a grant allowing the grantee to regulate it as he pleases.

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It will not do to say that the lands lying between high tide and ship channel, are ceded to the city; this does not deprive the argument of its force, that the establishment of wharfs, docks, etc. is one of its corporate powers, and that no wharf can be so constructed, unless *such wharf* be so laid out by the order, or with the leave, of the corporation — which cannot be by the general cession of a privilege to another to establish, when, where, and how, he pleases. We understand the Supreme Court of Massachusetts, in *Fay, petitioner*, (15 Pick. 255,) to intimate this doctrine, when it is said — speaking of the right of the city of Boston to grant a ferry — “Even if the city, by their authorized agents, had made a grant of a ferry or other franchise, claiming to be owners thereof, with express or implied covenants for an exclusive enjoyment of such franchise, this would not prohibit or restrain the Mayor or Aldermen from exercising the powers vested in them by statute, to license a ferry required by public convenience and necessity. Such authority is vested in them as Trustees for the public, to be exercised for the public good, and cannot be restrained by the covenant of the city, though such covenant happens to be executed by the same agents.” But how much stronger would have been the statement of the venerable Judge, C. J. Shaw, if in that case a general grant had been made of the exclusive privilege of establishing all the ferries on a river, or between the shores of Boston and Chelsea, with the right to select the places at which to exercise the privilege, or, if exercised, to charge what ferriage they chose. This would be, not to make the grantee a licensee of a ferry right, but the assignee of the privilege of making and unmaking ferry franchises at pleasure; indeed, it would be transferring all the powers of government over the subject, to one individual.

We see no distinction in this charter between a wharf or dock, in or upon a navigable stream, and a ferry right or bridge. They are all of the same class of interests, and the same powers over all of them are given in the same words.

But if there was a difference, the charter giving this power and right of regulation to this corporation over the subject, it is held as a political power, and must be exercised by those to whom it is confided. The power to lay out and regulate wharfs being given to the council, cannot be exercised by Carpentier.

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We think, then, that this general grant of this exclusive privilege is wholly void, as exceeding the powers of this corporation; and that the plaintiff, the successor of the old town, has a right to come into equity to remove this impediment, constituted by these proceedings, from the free and beneficial exercise of its corporate functions and property. The plaintiff stands here as a Trustee, administering important trusts, and charged with responsible duties to the public, which cannot be safely discharged so long as doubts hang upon its title to property, and to the exercise of its control over its franchises; and, like any other Trustee, has the right to seek the aid of equity to remove obstructions to the performance of its duties. It is difficult to see how else the plaintiff could vindicate its right. The claim of the defendants in this respect is incorporeal. They assert that certain franchises have been ceded to them, and that the plaintiff has parted with them; the plaintiff, claiming only to hold these franchises and the administration of them in trust for the public, would be without any relief, if equity could not aid in removing this difficulty; for it could neither build wharfs nor authorize others to build them, as long as its powers and rights were denied. Nor do we perceive what form of legal action would give an adequate remedy.

This view disposes of the demurrer, for it is general — going to the whole bill; and if the bill contains, in any part, a complete cause of action, the general objection to it, for want of equity, fails.

What effect the invalidity of this grant of this general privilege has upon the grant of the land, the bill does not enable us to determine. Neither the ordinance nor the deed is set out, as they should have been, in the bill. It is charged in the complaint, it is true, that the land between high tide and ship channel, and this exclusive privilege, were conveyed in the same instrument; but in what relation the land stood to this privilege, or what were the particular considerations or inducements to the grant of the land, we are not distinctly informed. If the land were conveyed merely or mainly to give effect to this illegal purpose, probably the incident would fall with its principal.

The charter is, perhaps, the most defective upon the statute book, and this is saying a great deal. A perverse ingenuity

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seems to have been exercised to make it as lame and loose as possible. The joint labors of Malaprop and Partington could scarcely have made such a collocation or dislocation of words and sentences. Among other things, it gives the Board of Trustees power "*to license and suppress dram-shops, horse-racing, gambling-houses, and houses of ill-fame, and all indecent and immoral practices, shows, and amusements.*" However general the words of this charter, the received rules of construction require us to construe them in reference to the substantive purposes expressed. The act gives power "to regulate, improve, sell, or otherwise dispose of, the common property; to prevent and extinguish fires; to lay out, make, open, widen, regulate, and keep in repair, all streets, roads, bridges, ferries, public places, and grounds, wharfs, docks, piers, slips, sewers, wells, and alleys, and to authorize the construction of the same, and with a view to facilitate the construction of wharfs and other improvements, the lands lying within the limits aforesaid, between high tide and ship channel, are hereby granted and released to said town; *provided*, that said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid." Now, looking into this jumble of incoherent and contradictory verbiage, the questions arise: To what *other* improvements, besides wharfs, was it designed that this water-front should be applied? or what are "the purposes aforesaid," for which it might be disposed of and how disposed of? It may well be doubted whether, under this charter, the Town Council, being bound to lay out and regulate these wharfs, streets, and docks, an unconditional sale or lease of the land necessary to be retained to accomplish and give effect to this power could be made, especially if accompanied with this was a renunciation of all dominion or control over the land necessary for the site of these docks, streets, or wharfs. But, perhaps, it is not necessary to decide these points now, as they can be presented more satisfactorily when the facts are better developed.

2. It is contended by the Appellant that this ordinance and deed are void, for the reason that the Board of Trustees were not legally organized; that though five were elected, (Carpenter being one,) all did not qualify; and that, though a majority of the members of such a public body may act after the organization, it requires all the members to make the organization.

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Section 2d of the charter is in these words: "The corporate powers and duties of said town shall be vested in a Board of Trustees, to consist of five members, who shall be elected," etc. Nothing is said in this Act further, as to the number required or mode of corporate action. In the first section, the town is declared to be incorporated under the provisions of the Act of 1850, to provide for the incorporation of towns. (C. L. 114.) The third section of this last Act provides that the Board of Trustees shall assemble within ten days after their election, etc.; and, Section 4th: "At all meetings of the Board a majority of the Trustees shall constitute a quorum to do business."

We can see no reason for holding that a majority of the members elected to this Board should not as well be held empowered to act at the first, as at any subsequent, meeting of it.

3. The next question is as to the alleged fraud in procuring this grant by Carpentier. Some astute and forcible criticism is employed by the counsel for the Respondent upon the complaint. The facts are not as fully stated as is desirable in such cases. The complaint is defective in not averring fully the terms of the ordinance and the contract, and the particular injury resulting to the plaintiff from the alleged fraud; nor are the fraudulent practices of the defendant, Carpentier, in procuring the election of the first Board, or his procuring the election of the second, nor the circumstances attending the ratification of the first contract, nor the promises or agreements made by him on or as inducing the execution and delivery of the deed, fully set out. But as the bill may be amended, on the return of the cause, in these particulars, and as the general questions have been discussed, we proceed to consider them.

It is alleged that Carpentier procured men, who were his agents or conspirators with him, to be elected to this Board, for the purpose of getting them to defraud the town, for his benefit, of all this property and these franchises; and if he got himself elected to this place, in order to help the contrivance through, whether by this influence, or by keeping out some one else who might have opposed the scheme, then this was sufficient to brand the whole transaction with illegality. Nay, more, if Carpentier put himself in the position of a member elect of this Board, neither resigning nor qualifying, and took advantage of this po-

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sition to advance his personal interests, at the expense of those of the corporation, this was a fraud for which a Court of Equity would hold him responsible. He would occupy the position, really, of a Trustee dealing for his own profit with the subject of the trust, and his conduct would be scrutinized with the jealousy with which equity regards the interested dealings of an agent with the principal, in respect to the subject of the trust. Nor would a ratification by a subsequent Board, if the members were fraudulently elected, or procured to be elected, by Carpentier, have any effect in validating the transaction. Carpentier could not protect his fraud by the sanction of his own associates united to affect, together, an illegal enterprise.

If these facts be made to appear, the Statute of Limitations would not begin to run until after the corporation thus defrauded, got out of the hands of the confederates, and an opportunity were afforded innocent agents coming to the management of the affairs of the town, to look into and ascertain the true state of things. Knowledge on the part of the guilty agents of the corporation of the criminal fact is not notice to the corporation of such fraud, so as to give the advantage of this notice to the equally guilty associate of those agents. If this were the law, an agent could always protect himself by joining in a conspiracy to defraud his principal with a convenient friend, who received the principal's property, and who might claim against the principal that the agent had notice of the fraud.

4. The next and last point is that the Statute of Limitations of three years applies and bars the claim of the plaintiff to set aside this deed. By Art. 17th, Sec. 17, (Wood's Digest, 47,) is given the limitation of certain actions. The section is: "Actions other than those for the recovery of real property can be commenced as follows: * * * within three years. An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate when the effect of it is to restore the possession of the premises to the defrauded party. In such a case, the action is substantially an action for the recovery of the real estate; indeed it is literally.

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Express fraud, generally, as well avoids a deed at law as in equity, and it would be strange if, after three years, a party could set up the fraud in avoidance of the deed at law, and a different rule prevail in equity. This is really an action for the recovery of real estate, and the plaintiff is no worse off because fraud has been committed upon him, nor the defendant in any better situation, than if the latter had innocently bought and entered under an imperfect title.

For the reasons assigned, the judgment below must be reversed, and the cause remanded for further proceedings, in accordance with this opinion.

On petition for rehearing, BALDWIN, J. delivered the following opinion — FIELD, C. J. concurring:

Petition for rehearing denied. The opinion modified so as to leave open for future revision the question of the validity of the contract with Carpentier, under the ordinance referred to in the opinion.

PALMER *et al.* v. VANCE & MELVIN.

In a bond given to release property seized on attachment, the obligors undertook to pay, on demand, to plaintiffs in the action, the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiffs might recover. In the bond the action is recited as for one thousand six hundred dollars. Upon delivery of the bond the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond. *Held*, that recovery may be had on the bond to the extent of the penalty.

Such a bond is not a statutory undertaking, but is valid as a common law obligation.

The mistake in the recital, as to the amount for which attachment issued, may be explained and corrected by parol.

Execution against the judgment debtor, in such case, is not a condition precedent to suit on the bond.

A bond given voluntarily to the Sheriff, on delivery of the property, is valid at common law.

APPEAL from the Fourth District.

Demurrer to complaint.

The bond is as follows, to wit:

"In the Superior Court, City and County of San Francisco:

Chas. W. Crosby and Albert Dibblee v. A. T. Ladd and Frank D Richardson.

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Whereas, the above named plaintiffs have commenced an action in aforesaid Court against the above named defendants, for the recovery of one thousand nine hundred and seventy-six dollars and eight cents; and, *whereas*, an attachment was duly issued and served, as will more fully appear by the Sheriff's return on the process in said cause.

Now, therefore, the undersigned, residents of the city and county of San Francisco, in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned, do hereby jointly and severally undertake, in the sum of three thousand dollars, and promise to the effect that, if the plaintiff shall recover judgment in said action we will pay to the plaintiff, upon demand, the amount of said judgment, together with the costs, not exceeding in all the said sum of three thousand dollars.

Dated at San Francisco, this the 5th day of March, 1855.

(Signed)

A. T. MELVIN,

(Signed)

R. H. VANCE."

"City and County of San Francisco, ss.:

A. T. Melvin and R. H. Vance, whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each, for himself, deposes and says: That he is worth double the sum in said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

(Signed)

A. T. MELVIN, [L. s.]

(Signed)

R. H. VANCE. [L. s.]

Subscribed and sworn to before me this 5th day of February, A. D. 1855.

[L. s.] L. W. SLOAT, Notary Public."

John Reynolds, for Appellant.

1. The undertaking sued on is not good as a statutory undertaking, and the Sheriff had no authority, as Sheriff, to take the same, under the statute, after his levy had been made; and he acted as the agent of Crosby & Dibblee. (Prac. Act. Secs. 123, 125, 136, 137.)

2. The complaint shows that the only description of the action

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in the Superior Court, against Ladd & Richardson, is by reference to the amount for which that action was brought, and this description did not correspond to the record introduced.

3. No breach was shown of the undertaking upon which this suit was brought.

4. This undertaking is to pay the debt of another. (*Low v. Adams*, 6 Cal. 277; Prac. Act. Secs. 120, 134; *Grant v. Naylor*, 4 Cranch, 224.)

5. No mistake can be shown in such a written undertaking. (*Grant v. Naylor*, 4 Cranch, 224; *State v. McGouveny*, 20 Ohio, 93.)

6. No parol proof can be given to vary or explain a written contract. (*Osborn v. Hendrickson*, 7 Cal. 282.)

C. H. S. Williams, for Respondent.

1. The reference in the undertaking to the sum for which judgment was claimed in the prayer of the complaint in the attachment suit, was unnecessary and immaterial. The description of the suit was sufficient and complete without it. The undertaking promised to pay, on demand, whatever sum should be recovered, not exceeding three thousand dollars. (*Dodges v. Potter*, 18 Barb. 201; *Pierce v. Parker*, 4 Met. 20; *Jackson v. Clark*, 7 John. 217; *Lamb v. Reston & Wife*, 5 Taunt. 207.)

2. No execution against the judgment debtor was requisite, because the undertaking was a positive agreement on the part of defendants that they would pay on demand, and the release of the property was sufficient consideration. (*Aud v. Magruder*, 10 Cal. 282.)

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

This is an action upon a bond given to release property attached.

It appears that suit was instituted by Crosby & Dibblee against Ladd & Richardson, for the sum of two thousand nine hundred and seventy-six dollars and eight cents, and an attachment issued which was levied on property of the debtors, sufficient to satisfy the debt.

In order to procure the release of the property attached, the

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defendants executed the obligation sued on, by which they undertook to pay on demand to the plaintiffs in the action the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiffs might recover in such action; which is, by mistake, described in the undertaking as a suit to recover one thousand six hundred and seventy-six dollars and eight cents.

Upon the execution and delivery of the bond, the property attached was returned to the attachment debtor. Judgment was recovered in the action for an amount greater than the penalty of the bond, and this action is instituted by plaintiff, to whom the bond was assigned, to recover the amount of the penalty.

Judgment was rendered below for the plaintiff, and defendant, Vance, appealed.

We are not able to discover any error in the record. The paper sued on is not a statutory undertaking, but being founded upon a sufficient consideration, is valid as a common law obligation for the payment of money. A bond taken by the Sheriff is not void for want of conformity to the requirements of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property, is valid at common law. (*Whitsett v. Womack*, 8 Ala. 466.)

There was no error in permitting the mistake in the recital of the bond — as to the amount for which the attachment issued — to be explained and corrected by parol evidence.

In *Pierce v. Parker*, (4 Met. 84,) the Court say:

“It is a well settled principle of law, that where an instrument which is offered to prove the subject matter described differs in one or more particulars from the thing described, evidence is admissible to show their agreement or identity, notwithstanding such misdescription.”

(See, also, 18 Barb. 201; 2 Parsons on Con. 67, 76.)

In the case of *Meredith v. Richardson*, (10 Ala. 828,) the recital of the bond sued on was erroneous, both as to the amount of the execution and the names of the parties. Yet it was held that these errors might be explained by parol evidence. The Court said: “It is supposed, however, there is a variance between the

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obligation and the legal proceedings, which is incapable of aid from parol proof, and which prevents it from having any effect. The supposed variance is the omission of the names of some of the defendants, in the recital of the execution, and the omission to conform to the terms named in the condition with it. Although these were sufficient to destroy the effect of the bond, as a strict compliance with the statute, they do not render it invalid. It is a strained and forced conclusion to say that, because the execution issued against Lunsford, it will be concluded that it issued against him alone. This might be correct as a *prima facie* intendment; but certainly is open to explanation. If we look to the contract evidenced by the bond, it will be seen the description of the execution is no part of it. The levy, and the redelivery of the cotton to the debtor, is the consideration, or inducement, for him and his sureties to undertake it shall be forthcoming at a particular time and place. The sum due on the execution is of no sort of importance, except for the purpose of ascertaining the damage which may flow from a breach of the condition. It would be a monstrous absurdity, that engagements of the most solemn nature might be avoided because of the misrecital of the facts, or circumstances, which induced them. It is a general proposition, that meets us everywhere, that the consideration, even when set out in a deed, may be explained by parol evidence. (Cowan & Hill's Notes, 1441.) Nor are decisions lacking on the precise point we are now considering. In *Hewlett v. Chamberlayne*, (1 Wash. Va. 367,) the forthcoming bond omitted entirely to set out the amount of the execution, yet the court held this to be no objection in an action of debt, although a motion for a summary judgment had been refused, because of the non-conformity of the bond to the execution. In *Stockton v. Turner*, (7 J. J. M. 192,) an injunction bond recited the judgment enjoined, as for two hundred and eighty dollars and fifty cents, when the true sum was two hundred and eighty-eight dollars and fifty cents, yet the Court sustained the bond, on the ground of an *estoppel*. It is said the recital of a particular fact in the condition of the bond, will estop the obligor from denying it. (Willés, 9.)

On the other hand, when the recitals do not constitute a part of the contract, it is said by Chief Justice Kent to be a settled

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rule that even a mistake in the recital of a bond does not vitiate it, for it is no essential part of the bond. (*Talmadge v. Richmond*, 9 John. 85. See, also, *St. John v. Dagges*, Hob. 130; Coke Litt, 352, b; *Wessinger v. Crook*, 7 Ala. 710.) In accordance with these principles, a bail-bond was held to be good, although the Christian names of both the plaintiffs were misstated in the bond, (*Colburn v. Downs*, 10 Mass. 21,) and a bastardy bond was sustained when the condition was to answer a complaint made in 1816, instead of 1833, when it was really made. (18 Pick. 257.)”

There is no force in the objection that execution is not shown to have issued against the judgment debtors. The undertaking of the defendants is not that the attachment debtor should pay the judgment, but a distinct and positive agreement that these defendants would pay the amount on demand. This agreement is shown to have been supported by a sufficient consideration, and there is no reason why they should not be held to a strict compliance with its terms.

Judgment affirmed.

CHESTER v. MILLER *et al.*

Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process, and not originally included in the judgment.

No objection to this jurisdiction, that the judgment was on its face void; because the plaintiff was liable to be harassed by it, and defendants were in the act of enforcing it.

When the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process.

If there be any rule requiring the payment of a debt, in judgment, or a denial of its justice, before a party, complaining of judgment without notice to him, can ask equity to vacate it, that rule cannot apply to the case of judgment rendered for a penalty under a penal statute.

An alteration by the Court, of a judgment, without notice, so as to include a party not served with process, if not void, is voidable at the election of the party.

APPEAL from the Third District.

For case see opinion. The complaint, in addition to the statement in the opinion, charges conspiracy on the part of defendants to defraud plaintiff out of his property; that Miller is irresponsible.

Chester v. Miller.

A. T. Wilson, for Appellants.

1. The demurrer was well taken. The allegations of the bill make out no case under any head of chancery jurisdiction. (*E. L. White v. S. B. Harris*, Oct. Term, 1856; Story's Eq. Jurisp. Sec. 894, p. 898; *Addington v. Allen*, 11 Wend. 375; 1st head note and opinion of Mr. Senator Tracy, 408; *Kinder v. Macy*, 7 Cal. 206; *Porter v. Herman*, 8 Id. 619; *Snow v. Halstead*, 1 Id.; *Hardwick v. Forbes' Adm's*, 1 Bibb, 212.)

2. Both Clark & Brocklebank, Attorneys-at-Law, appeared and put in an original and amended answer for Chester, in the Justice's Court. It is immaterial whether they were authorized by Chester or not to do so, until he shows that they are not solvent. (*Denton v. Noyes*, 6 Johns.; *Suydam v. Pitcher*, 4 Cal. 280; *Welton v. Garibaldi*, 6 Id.)

Again, the defendants in the suit, in the Justice's Court, had appealed to the County Court, and if the judgment was wrong in the Justice's Court, Chester had ample opportunity to correct it in the County Court.

Latham & Sunderland, for Respondent.

I. There was no service on Chester, in the suit of *Müller v. McDonald et als.* and no appearance by him. The Court, in that case, therefore, acquired no jurisdiction over his person, and the judgment, if any was rendered against him, was void. The original answer filed was for McDonald only. When the record recites in general terms the appearance of the parties, such appearance will be confined to those parties served with process. (*Edwards v. Traner*, 14 S. & M. 76.)

II. The execution having been levied, could not thereafter be amended. (*Toof v. Bently & Harris*, 5 Wend. 276.)

Equity will relieve in cases like this. Chester had no notice of the amendment until it was too late to appeal. The judgment, then, upon its face was valid, and a Court of law could give him no adequate, if any, relief. Other executions could issue. They would be regular upon their face, and protect the officer who might serve them. (2 Story's Eq. Jurisp. Sec. 887.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

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Bill filed to vacate and set aside a judgment in an action of forcible entry and detainer. The bill states that judgment was rendered by a Justice of the Peace, 3d September, 1856; that no process was served on the plaintiff, who was one of the defendants in that action; that execution issued on 5th of September, 1856, against the other defendants who had appeared, and that the defendants, finding that they could not make the money of those defendants, "some how" got possession of the Justice's docket, and interlined the name of the plaintiff in the judgment, and also altered the execution by a like insertion, and are proceeding now to make the money on such process. The defendant, Wilson, demurred to this complaint. The Court below overruled the demurrer.

Afterwards the defendants answered the bill, and, on the trial, a decree was rendered for the plaintiff.

The evidence, on the trial, was conflicting as to whether Chester did or did not appear by Attorney.

1. The judgment, as originally entered, and the execution, as originally issued, were entered and issued as if he had not appeared, and seem subsequently, and without notice, to have been altered. The Judge below having found that there was no appearance for Chester, on this conflicting proof, we do not feel disposed to review his judgment.

2. The only other question is, as to the remedy. Has equity jurisdiction of this case? Though not very explicitly stated, the charges in the bill amount to a charge of fraud—the fraudulent alteration of records. The remedy by appeal might suffice in ordinary cases, if the record showed a want of service as to Chester; but it seems that Chester inquired if judgment had been rendered against him, and was informed that it had not—at least, there is proof to that effect. It was not until after execution of the writ of possession, that the alteration in the writ was made. Nor is there any proof that there was notice of this alteration to Chester until it was too late to appeal from this summary judgment. It will not do to say that the judgment on the face of it was void; the plaintiff was liable to be harassed by it, and the defendants were in the act of enforcing it against him. (2 Story's Eq. Sec. 887.)

3. It is said that the Attorney, Brocklebank, appeared for all

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the parties, Chester included, and that this is evidenced by an answer to which his name is signed. But it is held that the recital of an appearance is never conclusive, and where the expression is general, it is confined to those parties who have been served with process. (*Miller v. Ewing*, 8 S. & M. 421; *Turney v. Jordan*, 4 How. Miss. 401; *Dean v. McKinstry*, 2 S. & M. 213; *Edwards v. Tooner*, 14 S. & M. 76.)

But Brocklebank does not profess in this answer — which seems to be only an amendment to an answer of Powell McDonald, signed by Clark as Attorney — to appear for the plaintiff here.

Nor does it anywhere more distinctly appear that Chester appealed from the judgment. Indeed, the evidence, if it is to be believed, shows that he neither considered himself, nor did the Justice consider him, a party affected by the judgment; for the appeal was taken by the parties for whom Clark, Blake, and Brocklebank, appeared, on the 4th of September, 1856, which was before the alteration was made in the execution.

It must be remembered that this is a highly penal statute under which judgment was obtained, and that the rule of equity, that a party must do equity before he can ask it, has no application, if that rule requires the payment of the debt in judgment, or a denial of its justice, before the party complaining of judgment, without notice to him, could go into equity to set it aside. If there be any such rule as the Appellant insists, it has no application to the case of a judgment rendered for a penalty against a party so amerced without notice.

This is not a bill in equity for a new trial, but a bill filed to set aside a judgment which was properly entered at first, in effect, for the defendant, Chester, and subsequently, without any authority, altered so as to appear as a judgment against him. The Justice of the Peace, after having entered the judgment according to law, had no right to alter it without notice to defendant, Chester, so as to make it an illegal and improper judgment. The entry of the judgment after the return of the verdict was a final act, and the alteration subsequently, at least without notice to Chester, was, if not void, such an abuse of the authority of the Justice, (Chester never having been served with process, and, therefore, not being within the power of the Court,) as

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to render the whole proceeding voidable at his election. The Justice might as well, six months after the first entry, have amended the judgment so as to include any other stranger to the proceeding.

We think the judgment should be affirmed.

GREGORY v. McPHERSON.

No forfeiture accrues of a title otherwise good, by failure to present it to the Board of Land Commissioners. *BALDWIN, J.*
Possession of land at the death of a party gives *prima facie* title to his heirs, or representatives. *Id.*

The *expediente*, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc. filed in the archives of the Mexican Government is, as much an original document as the grant delivered to the grantee. *Id.*

A sworn copy or exemplification of such originals is evidence, and the originals ought not to be removed from the governmental offices. *Id.*

Wherever the acts of public officers are authenticated by their records, the records are evidence of the acts. *Id.*

The decrees of the Board of Land Commissioners, and of the District Court are not indispensable to a recovery in ejectment on a grant, but are admissible, and conclusive against the government, and against those holding by its license or permission. *Id.*

The petition by an executor for the sale of real estate, must set forth the amount of the personal estate that has come to his hands. This petition, with this averment, are jurisdictional facts, without which, the order of sale is void. *Id.*

The petition for the sale of land, and the subsequent proceedings must be conducted by all the executors who qualify, or the sale is void. *TAMM, C. J.*

APPEAL from the Seventh District.

The case is stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

I. If the copy of the grant, signed by the Governor and countersigned by the Secretary of the State, annexed to, and forming part of, the *expediente* in the archives of the government, is not to be regarded as primary evidence, it was admissible, as the next best evidence. (*Minor v. Tillotson*, 7 Pet. 99, 100; *vide* also, *Proprietors of Braintree v. Battles*, 6 Vt. 399; *Renner v. Bank of Columbia*, 9 Wheat. 596; *The King v. Inhabitants*, etc. 4 Maule & Sel. 48.)

II. 1st. The *expediente* was properly admissible as primary evidence — as evidence of the highest character known to the law.

It is a public record of public official acts, performed by public

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agents of the government, whilst performing public duties, in disposing of portions of the public domain, preserved in a public office, under the charge and in the custody of duly constituted officials.

Records and public documents of that kind constitute the highest character of evidence, both under the rules of the civil and of the common law. (1 Starkie's Ev. 160-173; B. N. P. 229; *Patterson v. Winn*, 5 Pet. 241; *U. S. v. Arredondo*, 6 Id. 728.)

2d. If the original *expediente* in the public archives is to be regarded in the light of a record or public official document, a sworn copy or exemplification was properly admissible in evidence. (1 Stark. Ev. 181-185; B. N. P. 294; 1 Starkie's Rep. 183; 4 Campb. 372; 6 Cow. 751.) Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. (1 Stark. Ev. 155; *Hedden v. Overton*, 4 Bibb Rep. 406; *Commonwealth v. Alburger*, 1 Whart. 472; *Kingston v. Lesley*, 10 Serg. & R. 387.)

3d. It is not indispensable to the introduction of such proof, that the official signatures or seals appearing to the originals on file, should be first proved, provided they are found in the proper repository. (*Ross' Lessee v. Cutshall*, 1 Binn. 399; *Williams v. Sheldon*, 10 Wend. 659.)

4th. It was suggested in the Court below that the exemplification offered in evidence was certified to be the copy of a copy. It was certified to be a copy of the record returned into the office of the Surveyor-General of the Secretary of the Board as directed by law. In point of fact, however, it was traced from the original — the mistake is in the form of the certificate.

It has, sometimes, been held that the copy of a copy is inadmissible, solely on the ground, however, that it was not compared with the original, and, therefore, by necessity not proved to be a true copy of the original. (*Winn v. Patterson*, 9 Pet. 663-677.)

In this case, however, the copy offered in evidence was carefully compared with the original. As a sworn copy, therefore, there is no pretended foundation for the objection. Besides, when transcripts are made out and lodged in public officers by authority of the government, a copy therefrom cannot be objected

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to as being the copy of a copy. (*Videll's Heirs v. Duplantier*, 9 La. 525; *Hedden v. Overton*, 4 Bibb, 406.)

III. The principal objection made to the decisions of the Board of Land Commissioners and the District Court, was that they were *res inter alios*.

Another objection has been suggested, to the effect that the Board of Commissioners did not properly constitute a Court:

"It is not essential to the reception of evidence of this nature that the inquiry should have been made by virtue of some judicial authority, and by means of witnesses examined on oath; it is sufficient if made by virtue of competent authority on behalf of the public, and on sufficient matter of public interest." (1 Stark. Ev. 168, 169; F. N. 228; *Vicar of Kellington v. Trinity College*, 1 Wils. 170; 4 Camp. 126; *Tooker v. Duke of Beaufort*, 1 Burr. 146; 4 Dow. 297, 320.)

But the proceedings before the Board are judicial. Evidence is heard, and the title to real estate tried and decided.

IV. The deed of conveyance by one of the executors to the plaintiff of the premises was sufficient to pass the estate.

It is a rule of the common law, that where a mere naked power is conferred upon two or more, as a matter of personal trust and confidence, without any provision to the effect that a less number may execute it, such power must be executed by all jointly; and there is no survivorship. (Co. Litt. 112 b; 10 Pet. 564; 2 Humph. 379.)

This was cured by the Statute of Henry 8, Chap. 4, which provided that, when part of the executors refused to take upon himself or themselves the administration, etc. then a sale by those who do act should be good.

Under the Statute of Henry 8, a mere neglect to act has been held to be a refusal. (4 Munf. 345; 4 Yerger, 16; 1 Bat. & Dev. 389; 2 Green, N. J. 383.)

Our statute goes further still. (Comp. Laws, 382, Sec. 47.)

The doctrine, however, in regard to the execution of powers of sale contained in wills has no application to the case at bar.

The sale was not made under power given by the will of Juana Sanchez de Pacheco. It was made pursuant to the decree of the Probate Court.

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John Currey, for Respondent.

I. The papers offered in evidence by plaintiff, purporting to be a copy of an *expediente* were properly excluded.

It is questionable whether an *expediente* is a public record in any legal sense. If it be a public record it is of a mixed nature, partaking both of a public and private character. (1 Stark. Ev. 100; 1 Greenl. Ev. Sec. 474.) In which case it cannot be adduced by a party in support of his claim against a stranger. (1 Greenl. Ev. Sec. 493; *Highland Turnpike Co. v. McKean*, 10 John. 154; *Res. v. Mothersall*, 1 Stra. 93.)

The word "record" imports something of more permanence than the deposit of papers in the form of an *expediente* in a public office.

Books of public offices, journals of legislative bodies, and official registers, are of the character of public records which, by the common law, are admissible as competent evidence of the facts they contain. (1 Greenl. Ev. 493.) But they must be accompanied by proof, that they come from the proper repository. (Id. Sec. 485; 1 Stark. Ev. 158, 183.)

Where the nature of the case admits, some proof must be given of some act done in reference to the documents offered in evidence, as a further proof of their genuineness. (1 Greenl. Ev. Sec. 143.)

The *expediente*, a copy of which was offered by defendant as primary evidence, was not preserved in the form of a record, but merely in the form of a deposited manuscript without even an indorsement thereon or an entry thereof to indicate when the same was deposited.

The document purporting to be a grant made by Governor Figueroa to Juana Sanchez de Pacheco, a copy of which the plaintiff alleges he offered in evidence, falls under the rule by which the competency of the *expediente*, as evidence *per se*, shall be adjudged; because such grant or copy thereof, attached to the *expediente* was not preserved in any book of record.

The copy of the grant offered on the part of the plaintiff requires that it should be noted or registered in the corresponding or proper book; yet it was not pretended on the trial, nor did it appear by the certificate of the Surveyor-General, that the copy

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produced was from any book or register. (*United States v. Cambuston*, 20 How. 61.)

The copy of the pretended grant was a copy of the copy annexed to the *expediente*. A grant when made by the Governor was delivered to the grantee, and sometimes a copy thereof was annexed to the *expediente*, but this was not invariably the practice; and such copy did not properly constitute a part of the *expediente*.

The originals, of which the papers offered in evidence purported to be copies, would not, if produced, have been evidence *per se* of the matters therein contained; but proof of the genuineness of such originals would have been required. (1 Stark. Ev. 151, 152.)

The rule of evidence established by the authorities cited on behalf of Appellant in relation to the proof of exemplifications of the class of documents and records mentioned in those authorities, is not controverted. The answer is that an *expediente* and Mexican grant do not, nor do either of them, fall within any rule there mentioned. There is no great seal, or seal of a Court of record, importing verity of the document or record sought to be given in evidence.

II. The evidence of the existence of a grant, delivered, on behalf of the Mexican nation, to Juana Sanchez de Pacheco, embracing the land in controversy, was slight and unsatisfactory; and the evidence of the loss of such grant was insufficient. (1 Greenl. Ev. Sec. 558.) But before any evidence can be given of the loss of a written instrument it must appear that such instrument existed. (1 Greenl. Ev. Sec. 549.)

III. The evidence of the genuineness of the alleged existing *expediente*, and copy of the grant thereto annexed, by the production of a traced copy thereof, with the testimony of a witness that he had on a former occasion, at the Surveyor-General's office, examined the signatures of the various persons signed to the several documents composing such *expediente*, and that such signatures were genuine, was insufficient and incompetent.

Before secondary evidence can be given of a deed or other instrument of writing, a proper cause therefor should be assigned; no such cause was assigned on the trial. For aught that ap-

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peared, the custodian of the originals could have been compelled by *subpœna duces tecum* to have produced them. If the originals could not have been removed from their repository, still, they could have been proven by the depositions of witnesses at, or convenient to, the office of the Surveyor-General. Defendant had a right to inspect the originals.

1st. In order that he might be enabled to cross-examine the witness understandingly in relation thereto, and especially as to the question of their genuineness.

2d. In order that he might impeach them by showing that they were fraudulent and void. (1 Greenleaf's Ev. Sec. 446; Stark. Ev. 96.) The defendant insists that he had the right to see the paper, and also the writing and stamps constituting the original documents; from all, or from some portion of which, it might have appeared that the originals were fabrications for unlawful and sinister ends.

The Appellant's counsel not only relies upon the ground that the copies offered in evidence were exemplifications of a record, but that they should have been admitted as sworn copies.

The law requires the best evidence of which the nature of the thing to be proved is capable. If the best evidence cannot be obtained, the next best in degree should be produced. "Exemplifications," says Ch. Baron Gilbert, "are of better credit than any sworn copy." (Gilbert's Ev. 14; 10 Mod. 126.) If the original, or the record thereof, itself, would not be evidence, a sworn or certified copy would not. (*Kerns v. Swope*, 2 Watts, 75; *Winn v. Patterson*, 9 Peters, 676, 677.)

Before a copy can be given in evidence, it should appear that the witness by whom it is to be proved such, had compared it with the original, in the mode prescribed by law. (1 Greenl. Ev. Secs. 506, 264, 565, 566.)

The copy of the alleged grant sought to be proved by Salvio Pacheco, was but a copy of a copy. A copy of a copy is not admissible, whatever be the mode of its authentication. (*Whitacre v. McIlhany*, 4 Munf. 310; *Morris v. Venderen*, 1 Dall. 65; Gilbert's Ev. 9.)

IV. The exemplifications of the decrees of the Board of Land Commissioners, and of the United States District Court, were properly rejected.

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No objection was made to the proof of these decrees by exemplifications thereof, but only as to their competency or effect.

The objection to such decrees as evidence, was not so much because they were *res inter alios acta*, as for the reason that they were incompetent evidence for the purpose of which they were offered, to wit: to establish the genuineness of the alleged title of Juana Sanchez. It had appeared, before the decrees were so offered in evidence, that an appeal from the decree of the District Court had been granted. (20 How. 261; see, also, 6 Id. 106; 13 Id. 150, 151.)

Were it admitted that the proceeding in cases of California land claims before the Board of Land Commissioners, or before the Federal Courts, is a proceeding, as it is technically termed, *in rem*, and that therefore the final decree in such a case is binding against all persons, even then such decrees were not only incompetent for the purpose of establishing the usual necessary legal consequences of such a decree, but were still more objectionable as proofs of the supposed genuineness of the alleged *expediente* and grant in question. (1 Stark. Ev. 228.)

The objection of the competency of these decrees as evidence was two-fold:

1. It appeared that the decree of the Commissioners was reversed, and that the decree of the District Court was not final. (See *Sanders v. Whitesides*, 10 Cal. 89, 90.) An appeal suspends the judgment, and no action will lie on it. (*Marshall v. Lester*, 1 N. Car. Law Rep. 100.) The order granting the appeal was sufficient, and by it the cause was removed to the Appellate Court. (*Buckingham v. McLean*, 13 How. 151.)

2. The whole proceedings upon which the decrees were founded were not produced.

This was necessary, if the design was to prove anything more than the fact that such decrees were made. (1 Greenl. Ev. 511: *Jones v. Randall*, 1 Cow. 17.) In no case is a decree, standing alone, receivable to prove the facts upon the supposed existence of which it was rendered. (*Stevens v. Jack*, 3 Yerg R. 403; *Lovell v. Arnold*, 2 Munt. 267; *Hollingsworth v. Barbour*, 4 Pet. 466; Gilb. Ev. 7 Ed. 17.)

V. The plaintiff failed on the trial to establish, by competent

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evidence, title in himself to the land in controversy, as successor in interest of Juana Sanchez de Pacheco.

The proceedings, in the Probate Court, were unauthorized and void. (*Jones v. Reed*, 1 John. Cas. 20.) No intendment is made in favor of the regularity of proceedings of Courts or officers of inferior or special jurisdiction. (*Bloom v. Burdick*, 1 Hill, 130; *Denning v. Corwin*, 11 Wend. 651; *Van Etten v. Jilson*, 6 Cal. 19; *Small v. Gwinn*, 6 Id. 449; *Whitwell v. Barbier*, 7 Id. 64; *Feillett v. Engles*, 8 Id. 76; *Foot v. Stevens*, 17 Wend. 483; *Hart v. Seizas*, 21 Id. 40; *Haynes v. Meeks*, 10 Cal. 110.)

The petition for the sale of the land did not set forth the amount of personal estate that had come to the hands of the executors, nor the condition or value of the respective portions or lots of the real estate of which the testatrix died seized, nor the ages of the heirs or devisees. (Comp. Laws 399, Secs. 154, 155.)

No officer can acquire jurisdiction by deciding that he has it. (*Sibley v. Waffle*, 16 N. Y. Rep. 190; *Schneider v. McFarland*, 2 Com. 462; *Prosser v. Secor*, 5 Bart. 611, 612; *Harrington v. The People*, 6 Barb. 610; see, also, *Becket v. Selover*, 7 Cal. 215; *Pond v. Pond*, 10 Id. 120; *Schneider v. McFarland*, 2 Com. 462, 463; Comp. Laws, 399, 400, Secs. 154-163.)

The requirements of the statute are not directory. The petition, setting forth the facts as required by Section 155, is necessary to give jurisdiction to the Probate Court. (*Davison v. Gill*, 1 East, 64; see, also, *Atkins v. Kinan*, 20 Wend. 249; *Sheldon v. Wright*, 1 Selden, 523, 624; *Ford v. Wadsworth*, 15 Wend. 449; *Harrington v. The People*, 6 Barb. 610.)

The plaintiff, as the purchaser at the sale made by the executor, was bound to show affirmatively the existence of the facts on which the right to sell was made to depend. (*Sharp v. Spier*, 4 Hill, 86; *Striker v. Kelly*, 7 Id. 29.)

Another objection to the evidence of title offered by plaintiff is, that the whole proceeding had in the Probate Court was had by one of the executors only. (Toller's Law of Executors, 30: 4 Kent's Com. 325.) Executors are but one person in law, and the acts done by one of several, relating to the delivery, sale, or release, of the testator's goods, are deemed the acts of all, for they have a joint and entire authority. (*Murray v. Blatchford*,

Chester v. Miller.

Bill filed to vacate and set aside a judgment in an action of forcible entry and detainer. The bill states that judgment was rendered by a Justice of the Peace, 3d September, 1856; that no process was served on the plaintiff, who was one of the defendants in that action; that execution issued on 5th of September, 1856, against the other defendants who had appeared, and that the defendants, finding that they could not make the money of those defendants, "some how" got possession of the Justice's docket, and interlined the name of the plaintiff in the judgment, and also altered the execution by a like insertion, and are proceeding now to make the money on such process. The defendant, Wilson, demurred to this complaint. The Court below overruled the demurrer.

Afterwards the defendants answered the bill, and, on the trial, a decree was rendered for the plaintiff.

The evidence, on the trial, was conflicting as to whether Chester did or did not appear by Attorney.

1. The judgment, as originally entered, and the execution, as originally issued, were entered and issued as if he had not appeared, and seem subsequently, and without notice, to have been altered. The Judge below having found that there was no appearance for Chester, on this conflicting proof, we do not feel disposed to review his judgment.

2. The only other question is, as to the remedy. Has equity jurisdiction of this case? Though not very explicitly stated, the charges in the bill amount to a charge of fraud — the fraudulent alteration of records. The remedy by appeal might suffice in ordinary cases, if the record showed a want of service as to Chester; but it seems that Chester inquired if judgment had been rendered against him, and was informed that it had not — at least, there is proof to that effect. It was not until after execution of the writ of possession, that the alteration in the writ was made. Nor is there any proof that there was notice of this alteration to Chester until it was too late to appeal from this summary judgment. It will not do to say that the judgment on the face of it was void; the plaintiff was liable to be harrassed by it, and the defendants were in the act of enforcing it against him. (2 Story's Eq. Sec. 887.)

3. It is said that the Attorney, Brocklebank, appeared for all

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the parties, Chester included, and that this is evidenced by an answer to which his name is signed. But it is held that the recital of an appearance is never conclusive, and where the expression is general, it is confined to those parties who have been served with process. (*Miller v. Ewing*, 8 S. & M. 421; *Turney v. Jordan*, 4 How. Miss. 401; *Dean v. McKinstry*, 2 S. & M. 213; *Edwards v. Tooner*, 14 S. & M. 76.)

But Brocklebank does not profess in this answer — which seems to be only an amendment to an answer of Powell McDonald, signed by Clark as Attorney — to appear for the plaintiff here.

Nor does it anywhere more distinctly appear that Chester appealed from the judgment. Indeed, the evidence, if it is to be believed, shows that he neither considered himself, nor did the Justice consider him, a party affected by the judgment; for the appeal was taken by the parties for whom Clark, Blake, and Brocklebank, appeared, on the 4th of September, 1856, which was before the alteration was made in the execution.

It must be remembered that this is a highly penal statute under which judgment was obtained, and that the rule of equity, that a party must do equity before he can ask it, has no application, if that rule requires the payment of the debt in judgment, or a denial of its justice, before the party complaining of judgment, without notice to him, could go into equity to set it aside. If there be any such rule as the Appellant insists, it has no application to the case of a judgment rendered for a penalty against a party so amerced without notice.

This is not a bill in equity for a new trial, but a bill filed to set aside a judgment which was properly entered at first, in effect, for the defendant, Chester, and subsequently, without any authority, altered so as to appear as a judgment against him. The Justice of the Peace, after having entered the judgment according to law, had no right to alter it without notice to defendant, Chester, so as to make it an illegal and improper judgment. The entry of the judgment after the return of the verdict was a final act, and the alteration subsequently, at least without notice to Chester, was, if not void, such an abuse of the authority of the Justice. (Chester never having been served with process, and, therefore, not being within the power of the Court,) as

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to render the whole proceeding voidable at his election. The Justice might as well, six months after the first entry, have amended the judgment so as to include any other stranger to the proceeding.

We think the judgment should be affirmed.

GREGORY v. MCPHERSON.

No forfeiture accrues of a title otherwise good, by failure to present it to the Board of Land Commissioners. *BALDWIN, J.*

Possession of land at the death of a party gives *prima facie* title to his heirs, or representatives. *Id.*

The *expediente*, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc. filed in the archives of the Mexican Government is as much an original document as the grant delivered to the grantee. *Id.*

A sworn copy or exemplification of such originals is evidence, and the originals ought not to be removed from the governmental offices. *Id.*

Wherever the acts of public officers are authenticated by their records, the records are evidence of the acts. *Id.*

The decrees of the Board of Land Commissioners, and of the District Court are not indispensable to a recovery in ejectment on a grant, but are admissible, and conclusive against the government, and against those holding by its license or permission. *Id.*

The petition by an executor for the sale of real estate, must set forth the amount of the personal estate that has come to his hands. This petition, with this averment, are jurisdictional facts, without which, the order of sale is void. *Id.*

The petition for the sale of land, and the subsequent proceedings must be conducted by all the executors who qualify, or the sale is void. *TAMM, C. J.*

APPEAL from the Seventh District.

The case is stated in the opinion of the Court.

E. W. F. Sloan, for Appellant.

I. If the copy of the grant, signed by the Governor and countersigned by the Secretary of the State, annexed to, and forming part of, the *expediente* in the archives of the government, is not to be regarded as primary evidence, it was admissible, as the next best evidence. (*Minor v. Tillotson*, 7 Pet. 99, 100; *vide* also, *Proprietors of Braintree v. Battles*, 6 Vt. 399; *Renner v. Bank of Columbia*, 9 Wheat. 596; *The King v. Inhabitants*, etc. 4 Maule & Sel. 48.)

II. 1st. The *expediente* was properly admissible as primary evidence—as evidence of the highest character known to the law.

It is a public record of public official acts, performed by public

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agents of the government, whilst performing public duties, in disposing of portions of the public domain, preserved in a public office, under the charge and in the custody of duly constituted officials.

Records and public documents of that kind constitute the highest character of evidence, both under the rules of the civil and of the common law. (1 Starkie's Ev. 160-173; B. N. P. 229; *Patterson v. Winn*, 5 Pet. 241; *U. S. v. Arredondo*, 6 Id. 728.)

2d. If the original *expediente* in the public archives is to be regarded in the light of a record or public official document, a sworn copy or exemplification was properly admissible in evidence. (1 Stark. Ev. 181-185; B. N. P. 294; 1 Starkie's Rep. 183; 4 Campb. 372; 6 Cow. 751.) Not only records, but all public documents which cannot be removed from one place to another, may be proved by means of a copy proved on oath to have been examined with the original. (1 Stark. Ev. 155; *Hedden v. Overton*, 4 Bibb Rep. 406; *Commonwealth v. Alburger*, 1 Whart. 472; *Kingston v. Lesley*, 10 Serg. & R. 387.)

3d. It is not indispensable to the introduction of such proof, that the official signatures or seals appearing to the originals on file, should be first proved, provided they are found in the proper repository. (*Ross' Lessee v. Cutshall*, 1 Binn. 399; *Williams v. Sheldon*, 10 Wend. 659.)

4th. It was suggested in the Court below that the exemplification offered in evidence was certified to be the copy of a copy. It was certified to be a copy of the record returned into the office of the Surveyor-General of the Secretary of the Board as directed by law. In point of fact, however, it was traced from the original — the mistake is in the form of the certificate.

It has, sometimes, been held that the copy of a copy is inadmissible, solely on the ground, however, that it was not compared with the original, and, therefore, by necessity not proved to be a true copy of the original. (*Winn v. Patterson*, 9 Pet. 663-677.)

In this case, however, the copy offered in evidence was carefully compared with the original. As a sworn copy, therefore, there is no pretended foundation for the objection. Besides, when transcripts are made out and lodged in public officers by authority of the government, a copy therefrom cannot be objected

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to as being the copy of a copy. (*Videll's Heirs v. Duplantier*, 9 La. 525; *Hedden v. Overton*, 4 Bibb, 406.)

III. The principal objection made to the decisions of the Board of Land Commissioners and the District Court, was that they were *res inter alios*.

Another objection has been suggested, to the effect that the Board of Commissioners did not properly constitute a Court:

"It is not essential to the reception of evidence of this nature that the inquiry should have been made by virtue of some judicial authority, and by means of witnesses examined on oath; it is sufficient if made by virtue of competent authority on behalf of the public, and on sufficient matter of public interest." (1 Stark. Ev. 168, 169; F. N. 228; *Vicar of Kellington v. Trinity College*, 1 Wils. 170; 4 Camp. 126; *Tooker v. Duke of Beaufort*, 1 Burr. 146; 4 Dow. 297, 320.)

But the proceedings before the Board are judicial. Evidence is heard, and the title to real estate tried and decided.

IV. The deed of conveyance by one of the executors to the plaintiff of the premises was sufficient to pass the estate.

It is a rule of the common law, that where a mere naked power is conferred upon two or more, as a matter of personal trust and confidence, without any provision to the effect that a less number may execute it, such power must be executed by all jointly; and there is no survivorship. (Co. Litt. 112 b; 10 Pet. 564; 2 Humph. 379.)

This was cured by the Statute of Henry 8, Chap. 4, which provided that, when part of the executors refused to take upon himself or themselves the administration, etc. then a sale by those who do act should be good.

Under the Statute of Henry 8, a mere neglect to act has been held to be a refusal. (4 Munf. 345; 4 Yerger, 16; 1 Bat. & Dev. 389; 2 Green, N. J. 383.)

Our statute goes further still. (Comp. Laws, 382, Sec. 47.)

The doctrine, however, in regard to the execution of powers of sale contained in wills has no application to the case at bar.

The sale was not made under power given by the will of Juana Sanchez de Pacheco. It was made pursuant to the decree of the Probate Court.

Gregory v. McPherson.

John Currey, for Respondent.

I. The papers offered in evidence by plaintiff, purporting to be a copy of an *expediente* were properly excluded.

It is questionable whether an *expediente* is a public record in any legal sense. If it be a public record it is of a mixed nature, partaking both of a public and private character. (1 Stark. Ev. 100; 1 Greenl. Ev. Sec. 474.) In which case it cannot be adduced by a party in support of his claim against a stranger. (1 Greenl. Ev. Sec. 493; *Highland Turnpike Co. v. McKean*, 10 John. 154; *Rez. v. Mothersall*, 1 Stra. 93.)

The word "record" imports something of more permanence than the deposit of papers in the form of an *expediente* in a public office.

Books of public offices, journals of legislative bodies, and official registers, are of the character of public records which, by the common law, are admissible as competent evidence of the facts they contain. (1 Greenl. Ev. 493.) But they must be accompanied by proof, that they come from the proper repository. (Id. Sec. 485; 1 Stark. Ev. 158, 183.)

Where the nature of the case admits, some proof must be given of some act done in reference to the documents offered in evidence, as a further proof of their genuineness. (1 Greenl. Ev. Sec. 143.)

The *expediente*, a copy of which was offered by defendant as primary evidence, was not preserved in the form of a record, but merely in the form of a deposited manuscript without even an indorsement thereon or an entry thereof to indicate when the same was deposited.

The document purporting to be a grant made by Governor Figueroa to Juana Sanchez de Pacheco, a copy of which the plaintiff alleges he offered in evidence, falls under the rule by which the competency of the *expediente*, as evidence *per se*, shall be adjudged; because such grant or copy thereof, attached to the *expediente* was not preserved in any book of record.

The copy of the grant offered on the part of the plaintiff requires that it should be noted or registered in the corresponding or proper book; yet it was not pretended on the trial, nor did it appear by the certificate of the Surveyor-General, that the copy

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produced was from any book or register. (*United States v. Cambuston*, 20 How. 61.)

The copy of the pretended grant was a copy of the copy annexed to the *expediente*. A grant when made by the Governor was delivered to the grantee, and sometimes a copy thereof was annexed to the *expediente*, but this was not invariably the practice; and such copy did not properly constitute a part of the *expediente*.

The originals, of which the papers offered in evidence purported to be copies, would not, if produced, have been evidence *per se* of the matters therein contained; but proof of the genuineness of such originals would have been required. (1 Stark. Ev. 151, 152.)

The rule of evidence established by the authorities cited on behalf of Appellant in relation to the proof of exemplifications of the class of documents and records mentioned in those authorities, is not controverted. The answer is that an *expediente* and Mexican grant do not, nor do either of them, fall within any rule there mentioned. There is no great seal, or seal of a Court of record, importing verity of the document or record sought to be given in evidence.

II. The evidence of the existence of a grant, delivered, on behalf of the Mexican nation, to Juana Sanchez de Pacheco, embracing the land in controversy, was slight and unsatisfactory; and the evidence of the loss of such grant was insufficient. (1 Greenl. Ev. Sec. 558.) But before any evidence can be given of the loss of a written instrument it must appear that such instrument existed. (1 Greenl. Ev. Sec. 549.)

III. The evidence of the genuineness of the alleged existing *expediente*, and copy of the grant thereto annexed, by the production of a traced copy thereof, with the testimony of a witness that he had on a former occasion, at the Surveyor-General's office, examined the signatures of the various persons signed to the several documents composing such *expediente*, and that such signatures were genuine, was insufficient and incompetent.

Before secondary evidence can be given of a deed or other instrument of writing, a proper cause therefor should be assigned; no such cause was assigned on the trial. For aught that ap-

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peared, the custodian of the originals could have been compelled by *subpoena duces tecum* to have produced them. If the originals could not have been removed from their repository, still, they could have been proven by the depositions of witnesses at, or convenient to, the office of the Surveyor-General. Defendant had a right to inspect the originals.

1st. In order that he might be enabled to cross-examine the witness understandingly in relation thereto, and especially as to the question of their genuineness.

2d. In order that he might impeach them by showing that they were fraudulent and void. (1 Greenleaf's Ev. Sec. 446; Stark. Ev. 96.) The defendant insists that he had the right to see the paper, and also the writing and stamps constituting the original documents; from all, or from some portion of which, it might have appeared that the originals were fabrications for unlawful and sinister ends.

The Appellant's counsel not only relies upon the ground that the copies offered in evidence were exemplifications of a record, but that they should have been admitted as sworn copies.

The law requires the best evidence of which the nature of the thing to be proved is capable. If the best evidence cannot be obtained, the next best in degree should be produced. "Exemplifications," says Ch. Baron Gilbert, "are of better credit than any sworn copy." (Gilbert's Ev. 14; 10 Mod. 126.) If the original, or the record thereof, itself, would not be evidence, a sworn or certified copy would not. (*Kerns v. Swops*, 2 Watts, 75; *Winn v. Patterson*, 9 Peters, 676, 677.)

Before a copy can be given in evidence, it should appear that the witness by whom it is to be proved such, had compared it with the original, in the mode prescribed by law. (1 Greenl. Ev. Secs. 506, 264, 565, 566.)

The copy of the alleged grant sought to be proved by Salvio Pacheco, was but a copy of a copy. A copy of a copy is not admissible, whatever be the mode of its authentication. (*Whitacre v. McIlhany*, 4 Munt. 310; *Morris v. Venderen*, 1 Dall. 65; Gilbert's Ev. 9.)

IV. The exemplifications of the decrees of the Board of Land Commissioners, and of the United States District Court, were properly rejected.

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all cases to make and exhibit an inventory of the personal estate, within six months after the grant of administration. And without any reference to that provision, he must accompany his petition for a sale of land by an account of the personal estate and debts, as far as he can discover the same. If the general inventory had been previously filed, and there was no account beyond a reference to that document, it would not, I think, be sufficient, and the order to sell could not be supported. I have already remarked that the requirement of an account is wholly independent of that relating to the inventory; the one must be furnished, although the other may be on file. There is good reason for such a rule. The administrator, before the application for a sale, may have discovered personal estate of the intestate, of which he had no knowledge at the time the inventory was filed; debts due the intestate, which were deemed bad at the time of making the inventory, may have proved available, either in whole or in part, and property which was appraised, may have advanced in value. It is, therefore, proper, as well as a plain requirement of the statute, that there should, in all cases, be an account at the time of the application for a sale of real estate."

This case, and the principles on which it rests, seem to be well supported by a long list of authorities, cited from the highest Courts of judicature.

This view is decisive of this case upon the merits. The plaintiff, upon his own showing, having no title or right to recover, the Court did not err in directing a nonsuit; nor did it err to the injury of the plaintiff in ruling out his proof; for, admitting the testimony excluded, it gave no right of action.

Several other questions have been well argued in the briefs, but it is not necessary to decide them.

Judgment affirmed.

TERRY, C. J. delivered the following opinion:

I concur in the judgment upon the ground that the proceeding to procure the sale of the property was taken, the sale conducted and the deed executed by only one of the executors of the deceased, Juana Sanchez de Pacheco, when it appears that letters testamentary were issued to two, both of whom qualified. With the last ground taken in the opinion of my associate I am in-

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clined to agree, but as the question is one of much interest, and not necessarily involved in the decision of this case, I think it should be left open for further discussion.

GEIGER v. CLARK *et al.*

The guarantor is entitled to notice of nonpayment.

Riggs v. Waldo, 2 Cal. 486; *Pierce v. Kennedy*, 5 Cal. 138, affirmed.

APPEAL from the Twelfth District.

The note sued on was made by Taylor, one of the defendants, to the order of plaintiff. The guaranty, as stated in the opinion, was made by defendants, Clark & Beckh, on the face of the note, at the time of its execution by Taylor.

Plaintiff appeals.

John Satterlee, for Appellant.

The obligation of defendants is unconditional. (1 Hill, 256; 3 Id. 584; 24 Wend. 35; 2 Comst. 225; 3 Kent's Com. 124.)

Campbell & Turk, for Respondents, cited: *Riggs v. Waldo*, 2 Cal. 416; *Pierce v. Kennedy*, 5 Id. 138; *Oxford Bank v. Haynes*, 8 Pick. 423; *Talbot v. Gay*, 18 Id. 534; 9 Serg. & R. 198; 2 Watts, 128; Story on Promissory Notes, Sec. 472; 2 McLean, 21, 369, 557; 7 Pet. 113; 5 Id. 624; 23 Me. 565; 2 Taun. 206; 8 East, 242.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Suit brought on a guaranty of a promissory note. "For value received, we guaranty the payment of the within note." No averment of demand or notice is made in the complaint; the defendants demurred. The Court sustained the demurrer, and the question is, whether this guaranty is an unconditional obligation to pay the amount of the note.

The authorities are conflicting in other States, and the ablest jurists are divided in opinion upon the question. Probably, in number, the preponderance is in favor of the rule of conditional

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liability, though it may well be questioned if the weight of argument be not on the other side. But early in the history of our jurisprudence, it has been held that notice is necessary in such cases, as in cases of indorsement, (*Briggs v. Waldo*, 2 Cal. 486,) and this after full discussion. Subsequently, in *Pierce v. Kennedy*, (5 Cal. 138,) the same doctrine was reaffirmed. Unless in cases of a manifest departure from what we esteem the true and well settled line of decision, we are not disposed to overrule the solemn decisions of the Court, for a long time acquiesced in, and which, probably, have furnished standards by which the contracts and business of the State have been regulated.

Judgment affirmed.

CASES DETERMINED

THE SUPREME COURT

JULY TERM, 1859.

THE PEOPLE v. KEENAN.

In a criminal case, if the Court below impose upon counsel, against their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel, that the prisoner was deprived, by the limitation, of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted.

Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances.

APPEAL from the Fifteenth District.

For facts see opinion.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The defendant was convicted of the crime of murder in the first degree, and now appeals from the judgment.

Without noticing other errors, it is sufficient for the disposition of this case to consider a single point made by the prisoner's counsel.

The bill of exceptions states:

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"And be it further remembered that, on the trial of said cause the Court, before the counsel commenced their argument and after the evidence was closed, ruled that each counsel in the case should be restricted to an hour and a half in making his argument to the jury, to which ruling of the Court, defendant, by his counsel, then and there duly excepted, on the ground that there was no rule of the Court, nor ever had been any rule of the Court, established, restricting counsel to any particular length of time in the argument of a criminal case before a jury; and on the ground that the evidence, so far as proving the charge against defendant laid in indictment was concerned, was altogether circumstantial and presumptive, and very voluminous, being the evidence of some fourteen different witnesses, many of whom were examined at great length, so that that length of time would be quite insufficient for counsel for defendant to do their client full and ample justice in the argument of said cause. The Court overruled the objection, and the defendant, by his counsel, then and there excepted.

And be it further remembered that, on the trial of said cause, when C. F. Lott, one of defendant's counsel, had argued said cause to the jury an hour and a half, (the time allowed by the ruling of the Court,) and was stopped by the Court, that he, said C. F. Lott, one of defendant's counsel, moved for further time in which to finish his argument to the jury, stating as a reason therefor that he had not had sufficient time to answer all the arguments of the counsel for the people, who opened the argument to the jury, and had not had time to do justice to his client in the argument of the cause by noticing all the circumstances and evidence connected with the case — which motion the Court then and there overruled, and to which ruling of the Court the defendant, by his counsel, then and there duly excepted."

Afterwards, on motion for a new trial, the counsel for the prisoner filed affidavits as follows:

"State of California, County of Butte — District Court, Fifteenth Judicial District:

The People v. Keenan, charged with murder. Charles F. Lott, being duly sworn says, that he is one of the counsel for defendant in this cause, that in the argument of said cause to

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the jury, he was limited to one hour and a half; that at the expiration of said time he wished to proceed with the argument further to the jury, and that the Court would not allow him to do so unless the further time should be taken from the allotted time of this colleague, which affiant refused to do.

That it was utterly impossible to present a full and fair argument of the cause of defendant to the jury in that time, there being fourteen witnesses examined, and the testimony being voluminous and all circumstantial, and that he believes the case of defendant was prejudiced by said rule of the Court, made after the evidence was closed to the jury.

CHAS. F. LOTT.

Subscribed and sworn to before me this 31st December, 1858.

M. H. DARRACH,

Clerk District Court, Butte County, California."

"State of California, County of Butte — Fifteenth Judicial District Court, November Term, 1858:

The People of the State of California v. H. Keenan. Thomas Wells, being duly sworn, says, that at the recent trial of defendant in the above entitled cause, he was one of said defendant, Keenan's, counsel; that by the ruling of the Court, restricting counsel of defendant to one hour and a half, he, affiant, was deprived of noticing several important points of the evidence, and many of the material facts and circumstances in the case, that the same were evidence, facts, and circumstances, which affiant verily believes that it was his duty to have noticed in the argument of said cause, if he had had an opportunity of so doing; and affiant further states that many points — material ones — were presented to the jury in said cause by the evidence and arguments of the Prosecuting Attorney, which, in the limited time allowed by the ruling of the Court, he could not notice, review, answer, or explain, to the jury, and that affiant verily believes that thereby the rights of his client, Hubert Keenan, were prejudiced.

THOMAS WELLS.

Sworn and subscribed to before me, this Dec. 31st, 1858.

M. H. DARRACH,

Clerk," etc.

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Nothing appears upon the record contradicting the facts recited in these affidavits.

We do not dispute the right of the District Judge to control and direct the proceedings of the Court, so that the time be not wasted in arguments, disputes, and contentions, having no tendency to bring about a fair and legal disposition of judicial business. An enlarged discretion must necessarily be given him over this subject; and we should certainly with great reluctance disturb the exercise of that discretion in any given case. Nor do we here question the right of a District Judge to limit counsel to a reasonable time in their arguments to the jury, though from the danger to which this power is exposed, it is, perhaps, better, if ever done at all in capital cases, that it should only be done in very extraordinary and peculiar instances. It is, unquestionably, a constitutional privilege of the accused to be fully heard by his counsel. An opportunity must be afforded him for full and complete defense; and it is very difficult for a Judge to determine what effect a given line of argument may have upon a jury, of some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client. The minds of men are so differently constituted, that one advocate may require much more time for the statement and elaboration of his views than another. These observations apply with particular force to cases depending upon circumstantial testimony, where law and fact are so intimately blended that it is frequently necessary to argue the law to the jury in connection with matters of proof. It is impossible to deny that, if the constitutional privilege of being heard by counsel, be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced by the case. In this instance, the Court limited the time for the argument against the prisoner's consent: at the expiration of that time, the counsel applied for an extension of it; and the affidavits of counsel of respectability and standing show that they were prevented by this restriction from a full and fair defense of their client; and this showing is fortified by the nature of the case, and the large mass of testimony before the jury.

The Court below erred in refusing to grant the new trial. If

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it imposes a limitation of time upon counsel against their consent, this must be done at the risk of a new trial, if it be shown by uncontradicted affidavits that the prisoner was deprived by the limitation of the opportunity of a full defense: for this is his constitutional right, without which, he cannot be lawfully convicted.

Judgment reversed, and cause remanded for a new trial.

PRADER v. GRIM & COOPER.

THE usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, "in the meantime," was issued. The case was continued until Oct. 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond. *Held*, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond Aug. 29th.

Counsel fees for dissolving this order are recoverable on the bond. And this, though the fee was paid after August 29th, provided the retainer were before.

APPEAL from the Sixth District.

The case is stated by the Court. The Court below, having ruled out all evidence of damage after August 29th, nonsuited plaintiff. The rulings will be understood by reference to the brief of Appellant. Plaintiff appeals.

Smith & Hardy, for Appellant.

1st. The restraining order was continued from time to time in the Court below, and the sureties were responsible during its continuance.

2d. The Court below erred in excluding evidence of the payment of counsel fees for the dissolving of the injunction. (*Alb Thais v. Quan Wan et al.* 3 Cal. 217.)

3d. The Court below erred in ruling as matter of law that the restraining order terminated on the 29th day of August, 1856, and was not in force after that time. The order to show cause at that time was to bring the restrained party into Court, and the party was in Court, and under control of the restraining order until discharged or relieved by order of the Court.

E. Cook, for Respondent, Grim.

Prader & Grim.

The defendants were sureties. The only question is, what did the sureties undertake? Simply to be responsible for any damages that might accrue up to the day to show cause why an injunction should not issue. A surety is only liable according to the strict letter of his undertaking. (*McGovern et al. v. State of Ohio*, 20 Ohio, 93, and cases cited.)

Again: The statute does not provide for an undertaking upon an order to show cause. (Pr. Act, Sec. 116.) And this cannot be enforced as a common law agreement. Besides, unless authorized by statute, it being an undertaking to pay the debt or obligation of another, should express the consideration.

The plaintiff was not entitled to counsel fees for dissolving injunction. There was nothing to be dissolved. The temporary order granted, expired by its own limitation. The order staying, etc. until that time, was not a question after it was granted.

Again: Another undertaking was required and given before the motion for an injunction was argued, and by different sureties.

It is not alleged that any counsel fees were paid to procure the dissolution of an injunction, but merely to defend the suit upon its merits.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The defendants are sureties on an undertaking, executed to procure for one White a temporary injunction restraining the plaintiff from transferring or disposing of certain property, etc.

The Judge made an order in this form: "On filing the complaint in this cause, and bond in the sum of one thousand dollars, let the defendants show cause before this Court on Friday next, the 29th August, 1856, at the opening of the Court on that day, why an injunction should not issue in accordance with the prayer of the complaint; and in the meantime let an order issue restraining the defendants, as prayed for in said complaint." The order issued, after reciting these matters, and the citation to appear on the 29th August, proceeds: "*In the meantime* you, the said Prader, are enjoined," etc.

The undertaking was made by defendants to Joseph Prader,

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William A. Prader, and Prescott Robinson (Receiver), and after reciting the facts, is conditioned generally to pay damages.

The case was continued, nothing having been done by the Court in reference to this preliminary order of injunction until the 20th September, when, upon a showing by the plaintiff here, the Court required a new bond of White, in the penalty of two thousand five hundred dollars, which was given, with new sureties.

On the 10th October, afterward, the Court dissolved the restraining order, and the motion of White for injunction was denied. On the 27th of the same month White's suit was dismissed.

The damages complained of are for injury sustained by the plaintiff between the giving of the first and second bond; and plaintiff insisted that he was entitled to recover damages after the day set for the hearing of the motion for this preliminary injunction, viz.: 29th August, 1856, and also for an Attorney's fee for procuring the injunction to be dissolved.

The first question turns on the meaning of the order, for the undertaking is broad enough to cover these damages, unless restrained by the order. The order did not spend its force on the day set for the hearing. The restraint was not designed to be limited by a date, but by an event. The order was made to give the Court an opportunity of acting on the application, and to keep the property in litigation within the power of the Court until it did so act.

The language of the order is not that the defendant be restrained *in the meantime*, but in the meantime let an order issue restraining, etc. If, however, this were the language, the proper meaning, probably, would be, that the interim spoken of was designed to embrace the period intervening between the date of the mandate and the hearing of the application. If, from any cause, the Judge took no order on the 29th August, the defendant could not have removed the property. If this be the true construction of this order, as we think it is, the Court erred in refusing to permit the plaintiff to prove damages beyond the 29th August.

If the counsel fee were for procuring the dissolution of, and defending against, this order, that is a ground of "recovery"

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within the meaning of the undertaking; and this though the actual payment of the money were beyond the time limited, if the retainer were before. (3 Cal. 217.)

But, for the first error assigned, the judgment must be reversed and cause remanded.

PRADER v. PURKETT et al.

Even if a Chancellor has no power, under the 116th Section of the Practice Act, to require an undertaking upon the issuance of the restraining order, still, having taken jurisdiction of the general subject of litigation, he has power, aside from the statute, to order such undertaking, or to make any other order in the progress of the case, for the furtherance of the objects of the litigation, and the protection of its subject matter.

An undertaking in such case, reciting, that it is made in pursuance of the order of Court requiring a bond in the suit in which a restraining order was already in force, sufficiently expresses a consideration. The order for the bond and the undertaking must be taken together.

The pendency of a suit between parties at the time of issuing a restraining order, is sufficient to give the Court jurisdiction to issue the order. And the regularity of its exercise cannot be collaterally impeached.

Where there are several obligees in such an undertaking promising to pay "said parties enjoined," etc. suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery.

Summers v. Farish, (10 Cal. 350,) affirmed.

APPEAL from the Sixth District.

August, 1856, Ami M. White obtained a restraining order from the Sixth District Court, in a suit by her against plaintiff, Joseph Prader and Prescott Robinson. This order was issued by the Judge, before complaint filed, in a usual form, thus: "On filing the complaint in this cause, and bond in the sum of, etc. let defendant show cause, etc. why an injunction should not issue, and in the meantime let an order issue restraining," etc. Upon the hearing of the rule against defendants, made at the same time, to show cause why an injunction should not issue, the District Court made an order requiring said Ami White to file a new bond in the sum of twenty-five hundred dollars in said cause. The complaint in this suit then avers, that, "in pursuance of which order, and in consideration of the continuance of the restraining order aforesaid, the defendants, J. H. Purkett and Mark Sheldon, on the part of said Ami M. White in the suit aforesaid, executed a bond in words and figures as follows, to wit:

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“ District Court of the Sixth Judicial District:

Ami M. White v. Joseph Prader et al.

Whereas, by an order of Court, made on the 20th day of September, 1856, the plaintiff was required to file a bond in the sum of twenty-five hundred dollars in this suit, wherein was granted an injunction order restraining and enjoining, Wm. A. Prader and P. Robinson, Rec. etc. now therefore, we the undersigned, residents of the county of San Francisco, in consideration of the premises and of the issuing of the said injunction orders, do jointly and severally undertake, in the sum of twenty-five hundred dollars, that the said plaintiff will pay to the said parties enjoined such damages, not exceeding the said sum of twenty-five hundred dollars as said party may sustain by reason of said order of injunction, if the said District Court finally decide that the said plaintiff was not entitled thereto. Dated this 29th of September, 1856.

(Signed)

J. H. PURKETT,
MARK SHELDON.”

The complaint further avers, that Joseph Prader and Robinson, two of the obligees in the bond, were nominal parties to the suit, the entire interest being in the plaintiff herein.

Defendants demurred for defect of parties, and want of facts to constitute cause of action. Demurrer sustained, and final judgment for defendants. Plaintiff appeals.

Hoge & Wilson, for Respondents.

1. This action is not on the usual undertaking executed on procuring an injunction in pursuance of Sec. 115 of the Practice Act.

2. No injunction was ever issued, but only an order to show cause why an injunction should not issue, and in the meantime, there was a restraining order under Sec. 116 of the Practice Act. The statute makes no provision for any undertaking under this section.

3. The instrument sued on has no seal — is no bond at all — it is a mere common law simple contract, and must be tested by the law applicable to such contracts. It has no legal consideration on its face. That form, if under seal, might be good, the seal imparting a consideration. If, in pursuance of the statute,

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it might draw force and validity from it, as it stands it is a mere *nude pact* on its face. The complaint shows no consideration sufficient to bind these defendants outside of the face of the instrument.

4. The defendants being sureties, "have a right to stand upon the very terms of their contract." (*Miller v. Stewart*, 9 Wheat. 680; *Chitty on Cont.* 527.) The terms of the undertaking and its plain meaning as a common law simple contract (if a contract at all,) are to pay all the defendants in the original suit such damages — that is, joint damages — as they might sustain by reason of that restraining order. There were three obligees. This action is only brought by one of the obligees, and it is alleged that the other two suffered no damage.

On this instrument, no individual damage to one is recoverable. There is then no breach of the instrument. It is not the case of a proper breach, and the right to recover for that breach vested in one by assignment or operation of law. There never was any joint damage, and none other is embraced in the plain language of the instrument.

This (if anything,) is a "contract for the payment of one sum to three parties," and all three should be "properly joined as plaintiffs." (*Wallis et al. v. Dilley et al.* 7 Md. 237; see, also, *Armstrong v. Robinson*, 5 Gill & J. 413; *Elbe v. Purdy*, 6 Wend. 630-632, and cases cited; *Clover v. Painter*, 2 Barr, 47.)

5. The restraining order was made by the Judge before the complaint was filed, and consequently he had no jurisdiction or power to make it. It was a nullity.

If the original restraining order was a nullity, there was nothing upon which a continuance could operate, and plaintiff was never enjoined or restrained at all.

Smith & Hardy, for Appellants, cited: *Summers v. Parish*, (10 Cal. 347.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This is an action on an undertaking executed in a chancery case, pursuant to the order of the Judge for a temporary injunction. It is objected that the statute does not provide for an undertaking in such a case. But whether this point be sustained

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by a right interpretation of the statute or not, we think that as the Chancellor had taken jurisdiction of the general subject, he had power to make this order as any other order in the progress of the case, for the furtherance of the objects of the litigation, and the protection of the subject matter of it.

2. It is next objected that the paper is void because expressing no consideration. But taking the order and the undertaking together, we think it does sufficiently express the consideration.

3. The order under which this undertaking was executed was made on the 29th of September, 1856, and we understand that at that time there was a suit pending between the parties mentioned in the complaint. This was enough to give the Court jurisdiction and the regularity of the exercise of it cannot be collaterally impeached.

4. The suit was properly brought in the name of the party beneficially entitled to the fruits of recovery, though there were several obligees, as we held in the case of *Summers v. Farish*, (10 Cal. 350.)

We think the demurrer was improperly sustained.

Judgment reversed, and cause remanded.

On rehearing, BALDWIN, J. at the July Term, 1860, delivered the opinion of the Court — FIELD, C. J. and CORN, J. concurring.

We passed on this case at a former term. We have since reviewed the opinion, at the instance of the Respondent's counsel. We see nothing to change the judgment before directed; and nothing in the points, which are purely technical, requiring further elaboration. The former opinion is adopted as explanatory of the grounds of our decision.

Judgment reversed, and cause remanded.

See *Browner v. Davis Martin et al.* 14 Cal.; *Pruder v. Grim & Cooper, ants.*

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A DECREE reciting that "this action having been continued, in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered," etc. clearly shows the suggestion of the death of the original plaintiff, and a continuance of the cause or a revival of it, in the name of the executor. At all events, any irregularity in this respect cannot be attacked collaterally.

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A purchaser of land subsequent to a suit brought against his vendors to quiet title, and to a notice of *Ms pendens* filed in the County Recorder's office, is a mere volunteer, who takes subject to any decree in the suit.

This decree is conclusive as to plaintiff, who was the executor of deceased, with general power under the will to sell the real estate of his testator, and conclusive as to the defendants and their vendee, the purchaser here.

A defendant in ejectment, entering under a deed executed by order of a Court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person.

Mere prior possession of land, cannot prevail against the present possession of defendant, taken under claim of title derived, regularly or not, from the rightful owner.

Defendant had been let into possession under judgment in ejectment by him against C. This judgment is afterwards reversed. C sells to G. *Held*, that defendant's possession was sufficient, until restored by due course of law, to break the force of the claim of G, based upon the prior possession of C.

If an executor, claiming power under a will to sell, and in possession under judgment against C as above, execute a deed to defendant, who takes possession thereunder, then defendant can set up outstanding title in the executor or his testator, as against C, even though he could not, from defects in his deed, or want of power in the executor, assert title against the estate of deceased.

Quere, whether, under our statute, an executor with power in the will to sell real estate, may not sell without the preliminary proceedings required for the sale of real estate of deceased persons to pay debts; and, whether such sale would be a nullity, if approved by the Probate Court?

APPEAL from the Fourth District.

The facts appear in the opinion.

John Gregory, Appellant, in person.

The positions taken by Appellant appear in the opinion of the Court. And, as authorities were not cited, it is not deemed necessary to give the argument.

Robert C. & Daniel Rogers, for Respondent, as to the effect of the decree in the suit of *Wenborne v. Barton & Wife*, cited: 1 Gr. Ev. Sec. 528; *Harvey v. Richards*, 2 Gall. 229; *Hibshman v. Dulleshan*, 5 Watts, 183; 1 Salk. 276; 3 Id. 151; 3 East, 346; *Emburg v. Connor*, 3 Com. 522; *Marsh v. Pier*, 4 Rawle, 288, 289; 17 Serg. & R. 319-324; and argued, as to the point, that the death of Wenborne was not properly suggested; that the decree cannot be for this attacked collaterally; and, further, that there was no irregularity. (*Stearns v. Aguirre*, 7 Cal. 443.)

The principle that a defendant must connect himself with the outstanding title has never been adopted, except where the action is brought solely upon prior actual possession, and where the defendant is a mere trespasser. (*Bird v. Lisbros*, 9 Cal. 1.)

Appellant relies upon strict title alone.

The title to the premises was in Wenborne before the alleged

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second conveyance was made by Boston and wife to Calderwood, as was conclusively shown by the judgment in the suit of *Wenborne v. Boston & Wife*. (*Littleton v. Cross*, 3 B. & C. 317.)

Webb having been put in possession by decree of Court in the ejectment against Calderwood, had both title and possession. The decree was conclusive. (*McPherson v. Cunliff*, 11 Serg. & R. 422; *Snyder v. Sugden*, 6 Binn. 429.) So with the order of the Probate Court directing the executor to make a deed to C. C. Webb.

BALDWIN, J. delivered the opinion of the Court — TERRY, J. J. concurring.

Ejectment for a lot in San Francisco. The complaint sets forth a deraignment of title from Hyde, Alcalde of San Francisco, in 1847, through a number of mesne conveyances to the plaintiff. The answer admits the original source of title; but denies that, on the 3d day of June, 1854, when one Sarah Boston, and William Boston, her husband, conveyed the lot to one David Calderwood, they had title to the same, as complaint charges. and defendants therefore deny that the said Sarah and William conveyed the property to David Calderwood. The plaintiff claims in his complaint, title by or through this conveyance.

The answer sets up, further, that on the 13th of February, 1854, William Boston and Sarah Boston, by their Attorney in fact, specially constituted, conveyed to a certain John A. Wenborne the premises in question; that Wenborne died on the 4th June, 1854, leaving a will, wherein Samuel Webb was left his executor, with power to sell his estate without order of sale: that on the 25th September, afterwards, Samuel Webb sold this property to C. C. Webb, which sale was confirmed by the Probate Court, and on the 29th February, 1856, C. C. Webb sold and conveyed to defendant, Haynes.

The answer sets up a further defense: that on the 18th May, 1854, Wenborne, then being in life, filed a bill to quiet title to the premises, in the Superior Court of San Francisco. The bill was filed against William Boston and wife—a notice of *lis pendens* was filed at the same time in the office of the County Recorder. The suit was tried on the——day of October, 1854, and a verdict rendered for the plaintiffs, and a decree rendered in accordance with this finding.

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The present case was tried by a jury, and a verdict for the defendants rendered, and judgment accordingly.

On the trial, divers exceptions were taken by the plaintiff, and these constitute the matters for revision on appeal.

It will be observed that the plaintiff, in deraigning his title, shows that on the 3d of June, 1854, Boston and wife conveyed to Calderwood. This was by quitclaim deed. To break this chain of title, the defendants aver that before this time, viz: on the 13th of February, 1854, Boston and wife conveyed, by their Attorney in fact, to Wenborne, from whom the defendants deduce title, and the defendants further assert that in May, 1854, Wenborne brought suit to quiet title, a notice of *lis pendens* being filed. A decree was rendered in this suit in October, 1854.

Several objections are made to this decree: 1. It is said that it was rendered after the death of Wenborne, and is therefore void. We do not understand the record as showing this fact. The decree is: "This action having been continued, in consequence of the death of the plaintiff, by his executor, Samuel Webb, and the jury having found a verdict for the plaintiff, it is now ordered," etc. We think this recital clearly shows, whether with formality or not, the suggestion of the death of the original plaintiff, and a continuance of the cause, or a revival of it, in the name of the executor. If there was any irregularity in all this, it cannot be corrected in this collateral way.

The effect of the *lis pendens* was to make a subsequent purchaser from Boston and wife a mere volunteer, affected by the judgment rendered, or which might be rendered in the suit, of the pendency of which notice was given.

The next suggestion is as to the effect of this decree. This suit embraced the precise matter in controversy here, that is to say, the title to this property. The plaintiff, Wenborne, claimed the title as against Boston and wife, and Webb was the executor of Wenborne, with general power to sell the real estate of his testator. He had qualified and taken upon himself the executorial office. The decree was, therefore, conclusive as to the plaintiff, Webb, and Boston and wife, and equally so as to the vendee of Boston and wife becoming such subsequently to the suit, and the filing of the *lis pendens*. It is argued, however, that there was some proof of prior possession by Calderwood.

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and the plaintiff, or his predecessors, and that no connection was shown between the defendants and the title of Webb or Wenborne; and it is argued that the defendants could not, therefore, shelter themselves under the outstanding title of Webb or Wenborne, and that they had none in themselves.

For the purpose of showing a connection between the claim of defendants and the title of the executor, a paper purporting to be an order of confirmation of sale of the premises to C. C. Webb by the executor, was produced. This order was made by the Probate Court, and recited the will, the appointment and qualification of the executor, and his report of a sale of the property of the testator under the directions of the will, and a sale of the lot to C. C. Webb; and it confirms the sale and orders a deed to be made to the purchaser. The deed from the executor to C. C. Webb, and from the latter to the defendant, was shown. The will was offered by the defendants, but, for some reason, excluded by the Court.

It is very true that this Court has held that a mere trespasser cannot set up an outstanding title in a third person. (*Bequette v. Caulfield*, 4 Cal. 278.) But this rule does not cover the case at bar. The defendants entering under a deed executed under order of a Court of competent jurisdiction, entered under color of title. They do not stand in the condition of a naked trespasser. Whether the title was good or not, there was an entry shown under claim of title. But as in the action of *Webb, Executor, v. Boston & Wife*, the effect of the decree was to declare the title in the executor, additional force is given to this view. We do not see how the mere fact of a prior possession by Calderwood or Gregory, could prevail against the present possession of defendant, taken under claim of title derived, whether regularly or not, from the rightful owner. (*Jackson v. Morse*, 16 Johns. 197.)

But, in addition to this, there was evidence tending to show that the executor, Webb, had been let into possession under judgment in ejectment by him against Calderwood, before Calderwood's sale to Gregory, and though this judgment was afterwards reversed, yet this possession was sufficient, until restored by due course of law, to break the force of the claim derived from the mere fact of prior possession. If the executor of Wen-

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borne, claiming power to sell and the right of possession, executed a deed to C. C. Webb, who sold and conveyed to the plaintiff, and the latter took possession accordingly; and, especially, if Webb had before recovered and taken the actual possession, we think, even if the defendants could assert no title as against the estate of Wenborne, there would be enough in these facts to justify the defendants in setting up this outstanding title, under which they assumed to enter.

It is not necessary to pass upon the title of the defendants, as the facts are not fully before us. But, it is not shown, that, under our statute, an executor, with power in the will to sell the real estate, is forbidden to sell without taking the preliminary proceedings prescribed by the general law for the sale of real estate of deceased persons, when necessary for paying debts, and especially, that such sale would be a nullity if approved by the Probate Court. But it is not necessary for us to decide this.

Various other points are made in the briefs, but it is not necessary to notice them, the view we have taken of the case being decisive of it on the merits.

Judgment affirmed.

SMITH v. SPARROW.

Levitt v. Tobias, 10 Cal. 577, and *King v. Huggins*, 5 Cal. 82, affirmed. Where suit is pending in one Court on a note of defendant, though no summons has been served and no appearance made, he cannot bring a bill in equity, in another Court, to enjoin the collection of the note, or to cancel it, the averment being, simply, that he has a good defense to the note.

APPEAL from the Thirteenth District.

The complaint avers in substance that, in settlement of a transaction between the parties, plaintiff gave defendant a note. That, afterwards, discovering the amount was too much, in consequence of deceit practised by defendant, plaintiff induced defendant to make a new computation of interest, etc. and to agree to surrender the note upon payment by plaintiff of twenty-six hundred and fifty dollars, about one-half the note. That he paid the money, defendant took it, and then refused to surrender the note. Prayer for an injunction against suit on the note, and for surrender, etc. etc.

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Defendant demurred, and the demurrer was overruled; but the Court sustained a plea in abatement, that defendant, before the commencement of this suit, had brought suit on the note in the Twelfth District Court, which suit was there pending, although defendant therein (plaintiff here) had not been served with process.

Plaintiff appeals from a judgment dismissing his bill.

D. W. Perley, for Appellant, argued: that filing a complaint, and issuing a summons in one District Court, there being neither service nor appearance, do not give that Court exclusive jurisdiction, so that no other suit between the same parties, touching the same subject matter, can be entertained by another District Court, until the final disposition of the first suit. When the Respondent, on the 14th day of March, filed his complaint in the Twelfth District Court, that Court obtained jurisdiction of the subject matter of that suit; but it did not then obtain, nor has it yet obtained jurisdiction of the person of the defendant in that suit. (*Johnson v. Comstock*, 6 Hill, 10; *Brown v. Ferguson*, 2 Denio, 196.)

The Practice Act, providing that suits shall be commenced by filing the complaint, and issuing summons, does not prescribe the time when the Court shall obtain exclusive jurisdiction. Jurisdiction, to be exclusive, must be both of the person and subject matter, and the Court which first obtains jurisdiction of both, must try the whole case. The District Court for the county of Stanislaus, first obtained this jurisdiction over both, and erred, therefore, in sustaining the plea in abatement.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

We think the Court below did not err to the prejudice of the Appellant in dismissing his bill. The bill alleges merely that the plaintiff has a legal defense to a promissory note held by the defendant. In *Lewis v. Tobias*, (10 Cal. 577,) we held that equity will not interfere in such cases, unless under peculiar circumstances. We do not understand this to be a proceeding under the 527th Section of the Practice Act. If it were, it comes within the principle of *Kiny v. Hall & Huggins*, (5 Cal. 82.)

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Sparrow having taken his proceedings in the Twelfth District Court, the plaintiff has a full opportunity of terminating the controversy by having the case tried.

Judgment affirmed.

LIENING, PUBLIC ADMINISTRATOR v. GOULD.

PLEADINGS in Justices' Courts are not held to much strictness. Where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. Paying part of a note when all is due is no consideration for an agreement to extend the time of payment. If, after verdict, no motion be made for new trial, the Supreme Court will not review the testimony.

APPEAL from the County Court, Colusa County.

Suit in a Justice's Court by plaintiff, as Public Administrator, on a note of defendant to one Kurtz, deceased.

The complaint sets out the note, avers plaintiff to be administrator in fact of the estate of John Kurtz, deceased, and that defendant has promised to pay, etc.

Defendant answered by claiming that deceased had made him a gift of the note, had agreed to extend the time of payment to the fall of 1858, this suit having been brought in May, and plead a set-off of thirty-five dollars.

The Justice gave plaintiff judgment for the amount of the note and interest, less the thirty-five dollars. Defendant appealed to the County Court, where plaintiff had verdict and judgment for the whole note.

Defendant asked the Court to instruct the jury "as in case of nonsuit," because plaintiff had failed to make profert of his letters of administration. The Court refused, and defendant excepted. Defendant appeals.

L. Sanders, Jr. for Appellant, relied mainly on the want of profert of letters of administration, citing: 2 Chit. Pl. 24-36; 1 Chit. 358.

No motion for new trial is necessary to enable this Court to correct errors of law. (*Brown v. Tolles*, 7 Cal.)

N. Greene Curtis & George Cadwalader, for Respondent.

Fairchild v. The California Stage Company.

There being no motion for new trial, this Court will not review the testimony. (*Ingraham v. Gildermeister*, 2 Cal. R. 483.) Nor will it interfere with a verdict on conflicting testimony.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The points of Appellant are not well taken. Pleadings in Justices' Courts are not held to much strictness. The complaint is substantially good. The plaintiff alleges that he is administrator in fact of the intestate. This is not denied in the answer. The failure to make the proof of the plaintiff's title to sue, therefore, was no ground for a nonsuit.

There was no consideration for the alleged agreement of extension; paying a part of a note was not enough when all was due.

The only matter in controversy really was as to the credit of thirty-five dollars claimed by defendant, as to which the proof was somewhat conflicting.

We do not see that any statement appears so authenticated as to enable us to review the testimony; for there was no motion for a new trial; but we should not, under the circumstances, be disposed to interfere if a motion had been made for a new trial, and a proper statement settled.

Judgment affirmed.

FAIRCHILD v. THE CALIFORNIA STAGE COMPANY.

IN suits against common carriers, damages for pain of mind are recoverable. Proprietors of stage coaches are not insurers or warrantors of the safety of passengers, to the same extent with common carriers of goods.

But they are liable for the slightest neglect. They are held to extraordinary diligence and care. And, in case of injury, the presumption, *prima facie*, is, that it occurred by the negligence of the coachman. The *onus probandi* is on the proprietors to show no negligence, and, that the injury was occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.

It is not error for a Court to refuse an instruction asked, stating an abstract or general proposition of law, when it has already so charged the jury as to embrace such proposition, or so much of it as is applicable to the case.

If the ends of justice require, it is both the right and the duty of the Court to permit a witness to be recalled, after a party has closed his case.

APPEAL from the Tenth District.

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In addition to the instructions set forth in the opinion, the others referred to are as follows:

Second Instruction. — “That if the jury believe that a want of proper skill or care of the driver, placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe, from the position in which the stage was placed by the negligence and recklessness of the driver, that the movement of a portion of the passengers may have increased the peril, and even caused the stage to upset. In such a case the fault is first with the driver, and the defendants are liable.”

Seventh Instruction. — “If the jury find that the defendants were carriers of passengers, then the law requires that they should employ drivers having competent skill, well acquainted with the road they undertake to drive over, and they must provide them with steady horses, a coach, and harness, of sufficient strength and properly made, and the coach must be properly loaded. If there is the least failure in any of those things the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens on the account thereof.”

On the trial, the defendant asked the following “instruction,” which was refused:

“That if the jury believe from the evidence, the driver of defendant’s stage coach used all due and necessary diligence, and that the upsetting of the stage-coach was the result of accident or misfortune, then they should find for the defendants.”

Reardan & Smith, for Appellant, to the point that carriers of passengers are responsible only for want of due care and skill, cited: *Burke v. C. & O. R. R.* 13 Wend. 626; *Boyce v. Audum*, 2 Pet. 156; *Mauzy v. Talmy*, 2 McLean, 161, 162; 9 Met. 13 — 15; 21 Conn. 253; 2 Greenl. Ev. Sec. 253 and note, and Sec. 267, and note; 21 Wend. 618; 2 Kent, 769.

Mesick & Swezy, for Respondent, cited: Angell on Com. Carriers, Secs. 568, 569; Edwards on Bailment, 585, 586; Story on Bailment, 594; 22 Conn. 298; 2 McLean, 166; 1 Id. 552; 13 Pet. 185.

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The admission of new evidence, if any was offered after close by defendant, was matter of discretion in the District Court. (6 Barb. 132.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This action was brought to recover damages for certain injuries sustained by the plaintiff by the careless overturning of a stage-coach in which she was a passenger. A verdict was rendered for the plaintiff for two thousand two hundred and fifty dollars damages. A motion for a new trial was made and overruled.

The main questions arise on certain instructions given and refused. It is not deemed necessary to notice at large the points — that the evidence did not warrant the verdict, and that the damages are excessive. We have read the body of proofs in the case, and think that they make a proper subject of inquiry for a jury, whose verdict either way we would not disturb. Nor, if the injury to the plaintiff be anything like as great as some of the medical witnesses suppose, is there any pretense for the interposition of this Court, on the ground of a gross mistake, or palpable abuse of discretion of the jury in assessing damages.

We proceed to consider the instructions: "It is objected that the second instruction asked by the plaintiff should not have been given, because it assumes the fact of recklessness of the driver," etc. But this is a misapprehension on the part of the counsel. We understand the charge to be hypothetical.

2. The third instruction is objected to, but it seems that instruction was refused.

3. The fourth instruction is objected to, because it asserts that the plaintiff, if entitled to recover, may recover damages for "mental anguish." We cannot see why compensation should not as well be given for pain of mind as pain of body.

4. The seventh instruction is objected to, because it assumes deficiencies which did not exist. We think there is nothing in the objection.

It is next objected that the Court erred in not giving the first and fifth instruction asked for by the defendant.

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The first is in these words: "That the proprietors of a stage-coach do not warrant the safety of passengers in the character of common carriers."

This was refused. It is evident that this refusal was not based upon the denial of the proposition asserted, for the Court had already, in a variety of forms, given clear indications of a different opinion, and afterward, in several distinct instructions, gave, in effect, and in clearer and more concrete form, the proposition asked, to the jury.

The converse of the principle embodied in the instruction cannot be maintained. It is true that proprietors of stage-coaches are common carriers, and that common carriers are insurers or warrantors (with two or three exceptions) of the goods they undertake to carry; but the difference in the character of the subjects of the conveyance, between men and things, creates this difference in the rule applying to them respectively. Mr. Story's work on Bailment, (Art. 9, Sec. 590,) discusses this whole subject with his usual learning and ability. He says: "Having considered the rights, duties, and obligations, of carriers of goods for hire, we may now pass to the consideration of those of carriers of passengers. It has been already stated that carriers of passengers merely for hire, are subject to the same responsibility as carriers of goods for hire, at the common law, so far as respects the baggage of the passengers. But, as to the persons of the passengers, a different rule prevails. Attempts have been made to extend their responsibility as to the persons of passengers, to all losses and injuries, excepting those arising from the act of God, or from public enemies. But the support of this doctrine has been uniformly resisted by the Courts, although a strict responsibility as to the carriage of the persons of passengers is imposed upon such carriers."

Speaking further of the responsibility and duties of this class of carriers, he says, Section 592: "In the next place, they are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to each journey. In other terms, they are bound to provide road-worthy vehicles, suitable for the safe transportation of the passengers. If they fail in any of these particulars, and any damage or in-

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jury occurs to the passengers, they will be responsible to the full extent thereof. Hence, it has been held, that if there is any defect in the original construction of a stage-coach, as for example, in an axletree, although the defect be out of sight, and not discernible upon a mere ordinary examination, yet, if the defect might be discovered by a more minute examination, and any damage is occasioned thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by more minute examination and more exact diligence, whereby the work is not road-worthy, and a damage thereby occurs to any passenger. In this respect there does not seem to be any difference between the case of a coach which is not road-worthy, and of a ship which is not seaworthy, as to the implied obligations of the owner.

SEC. 593. In the next place, they are bound to provide careful drivers, of reasonable skill and good habits, for the journey, and to employ horses which are steady, and not vicious, or likely to endanger the safety of the passengers. In the pithy language of an eminent Judge, it may be said that, 'The coachman must have competent skill, he must be well acquainted with the road he undertakes to drive, he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also lights by night. If there is the least failure in any of these things, the duty of the coach proprietors is not fulfilled, and they are responsible for any injury or damage that happens.'

SEC. 594. In the next place, they are bound not to overload the coach, either with passengers or luggage, and they are to take care that the weight is suitably adjusted, so that the coach is not top-heavy, and made liable to upset."

Many cases are cited by the author in support of these propositions — but it is unnecessary to cite them, as it is believed the authorities are uniform to this leading doctrine, unless the case of *Boyce v. Anderson*, (2 Peters, 150,) be an exception; and if it be, it is, in effect, overruled by the later case of *Stokes v. Saltonstall*, (13 Id. 181.)

In *Farish & Co. v. Reigle*, (11 Grattan Va. R. 711,) the question was directly raised, whether a stage-coach proprietor was responsible for more than ordinary diligence. But the Court, Mr. Justice Daniel delivering the opinion, unanimously held that

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he was. The Court approve of the doctrines of Mr. Justice Story quoted herein. We extract from the opinion, as it states the law as we understand it fully and distinctly.

"The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries, except by the act of God, or by public enemies, the inquiry is naturally presented—what is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers, at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner, (the author asks,) are we to measure this due care and diligence? Is it ordinary care and diligence, which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence, which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives, and limbs, and health, are of great importance, as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem, (he says,) to furnish the true analogy and rule. It has been accordingly held that passenger-carriers bind themselves to carry safely those whom they [admit] into their coaches, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest, neglect." (Section 601.)

In Sec. 601 a—the further proposition is stated, that "when injury or damage happens to the passengers, by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is, that it occurred in the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors

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liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof."

Notwithstanding what we have said, we do not feel disposed to reverse this judgment because of the refusal of the Judge below to give this instruction. The Court had already given full and explicit instructions to the jury, placing the law of the case before them, in accordance with the views we have taken of it. The effect of these instructions was clearly to ignore the idea that the defendant was responsible according to the stringent rules governing the contracts of common carriers for the conveyance of goods. The jury, after the responsibility of the defendant was placed on different and nearly contrary grounds, could scarcely have required the instruction asked in order to understand that the defendant was not bound as insurer of the safety of the passengers. But not laying too much stress on this, we think that the charge itself is too indefinite, and was calculated to mislead the jury. While it is true that the proprietors of a stage-coach do not warrant the safety of passengers in the same sense that they warrant the safe carriage of goods, yet they do warrant that safety so far as to covenant for the exercise of extraordinary diligence and care to insure it; and they do this as common carriers. The proposition asked was merely abstract, and the Court fully and more explicitly gave the same charge in the second, third, and fourth, instructions, asked by defendant. We do not understand that a Judge is bound to repeat over and over again a proposition of law already announced in different forms; especially is it not bound to give an abstract proposition, or even a general proposition, when it has already charged, or at the time gives distinctly the law upon the particular facts, and when its charges necessarily embrace the general proposition, or all of it at all applicable to the case before the jury.

The same observations are applicable to the fifth instruction refused.

There is no merit in the last point taken, that the Court permitted a witness to be recalled after the plaintiff had closed his case. This was a matter of discretion, and it was not only the right, but, if the ends of justice required it, the duty of the Court to recall him.

Judgment affirmed.

Canfield v. Bates.

CANFIELD v. BATES.

UNDER our statutes, undertakings are on the same footing with bonds. Where an instrument, purporting to be a bond on appeal, contains words of obligation, and has a scroll opposite the name of one of the two signers, who contemporaneously verify the instrument as their bond, it is the bond of both.

A refusal by the County Court, on appeal from a Justice, to permit an amendment of the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of the importance of the amendment, this Court will not interfere.

APPEAL from the County Court, Contra Costa County.

Forcible entry and detainer. The Justice rendered judgment for plaintiff. Defendant appealed to the County Court, filing with the Justice an instrument, in the following words, to wit:

“Know all men by these presents, that we, John Zellers and José Silva, are held and firmly bound, unto John Canfield, in the penal sum of three hundred dollars, well and truly to be paid, firmly by these presents.

The condition of this undertaking is such that, *whereas*, John Canfield has recovered judgment against Philip Betz, in an action of forcible entry and detainer, before E. P. Weld, Esq. Justice of the Peace, in and for Township No. 1, Contra Costa County, on the 24th day of June, 1858, and the said Betz has taken an appeal to the County Court of Contra Costa County. Now we, John Zellers and José Silva, agree and bind ourselves to pay all costs of such appeal, and abide the order the Court may make therein, and pay all rent, and other damages justly accruing during the pendency of such appeal; provided, the County Court affirms said judgment, or by the judgment of the County Court, said defendant is made liable to costs, rents, or damages.

JOHN ZELLERS,

JOSE SILVA. [L. S.]

State of California, County of Contra Costa, ss:

We, John Zellers and José Silva, sureties in the foregoing bond, being duly sworn, each for himself, depose and say: that he is a resident and householder in this county, and that he is worth the amount specified in the within bond, in property in this State, unincumbered and liable to execution, and not subject to the homestead law.

JOHN ZELLERS,

JOSE SILVA. [L. S.]

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Sworn and subscribed to before me, this 24th day of June, 1858.

E. F. WELD, Justice of the Peace.

Approved June 27th, 1858.

E. F. WELD,
Justice of the Peace."

The defendant did not file an affidavit under the 16th Section of the Act of 1858, p. 90. Plaintiff served notice on defendant to have his sureties justify, which notice was disregarded. At the trial the counsel of plaintiff moved to dismiss the appeal, because of the insufficiency of the bond, assigning as reasons: 1st. That the bond had not a sufficient seal. 2d. That the sureties failed to justify after notice, excepting to them, had been served upon defendant. 3d. That no affidavit was made under the statute of 1858. The Court overruled the motion, and plaintiff excepted.

Plaintiff also, just before the trial, asked to amend his complaint, by inserting an unlawful detainer, no affidavit being offered. The Court refused leave, and plaintiff excepted.

The cause having been tried before the Court, judgment was rendered for defendant. Plaintiff appeals.

John Wilson, for Appellant, to the point that the paper filed as a bond on appeal to the County Court, is no bond, cited: 1 Blackf. 240; *Herman v. Herman*, 1 Bald. C. C. R.; *Grimsby v. Riley*, 5 Mo. 280; *Glascock v. Glascock*, 8 Id. 577; 7 Gill & John, 285; 1 Munf. 487; *Taylor v. Glasser*, 2 Sergt. & Rawle, 502.

J. Franklin Williams, for Respondent.

1. The terms "bond" and "undertaking," are synonymous in our statutes as to appeals. (Wood's Dig. 211, Art. 1082, Sec. 348; p. 469, Sec. 16.) 2. A scroll with letters [L. a.] is a good seal. 3. The statute did not require the sureties to justify; an approval by the Justice is sufficient. (Sec. 16, last cited.) 4. Plaintiff could not amend by substituting a new cause of action, to wit: unlawful detainer. (9 Cal. 46.)

Sam. Bell McKee, also, for Respondent, argued: that the bond on appeal was properly conditioned, had two sufficient sureties, and was approved by the Justice; and that the affidavit, required by the Act of 1858, is only necessary when a stay of res-

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titution is demanded; that even if the term "bond," as used in the statute, *ex vi termini*, imports a sealed instrument, still, the instrument in question is a sealed instrument. It purports to have been made under the hands and seals of the parties. There is a scroll to the name of one of the signers. A scroll is a seal. (*Hastings v. Vaughan et al.* 5 Cal.)

Where there is a seal to the signature of one of the parties to an instrument signed by two or more persons, and the instrument recites that it was sealed by the parties thereto, it is a manifest adoption by each one of the seal. (*Flood v. Vanus*, 1 Black, 102; *Davis v. Burton*, 3 Scam. 41; *McLean v. Wilson*, Id. 50; *Bohannon v. Lewis*, 3 Monroe, 376; *State Bank v. Bailey*, 4 Pike; *Carter v. Chandron*, 21 Ala. 72; *Bowman v. Robb*, 6 Barr.)

The motion to amend the complaint as proposed, was properly denied, because, in actions of this kind, "amendments to a complaint in matters of form only can be allowed." (Sec. 20, Act concerning Forcible Entry, etc. Wood's Dig. 470.)

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

We think the judgment should be affirmed.

1. The bond, if not technically such, was substantially, a compliance with the statute. Taking all of our statutes together, the obvious design was to put an undertaking on the same footing as a bond. This instrument contains words of obligation, and has a scroll, [L. s.] opposite the name of one of the signers. This is enough when the paper is executed by both, who, contemporaneously, verify the instrument by affidavit, as their bond, to make it the deed of both.

2. The refusal to grant the amendment, was matter of discretion, which we do not think proper to interfere with. There was no affidavit of the materiality of the amendment, nor any other showing that it was important.

3. The bond seems to have been approved by the Justice, and this is sufficient.

We do not think this a case in which we can review the evidence.

Judgment affirmed.

Kelsey v. Abbott.

KELSEY, RESPONDENT, v. ABBOTT & EDWARDS AND J. G.
CLARK, APPELLANTS.

WHEREAS a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object, afterward, that equity has no jurisdiction over tax titles.

An assessment for taxes must be made against the owner, when known. The individual, not the property, pays the tax. The property shows the amount of the tax with which to charge the owner, and is security for payment. The assessment must be as certain, as to the person taxed, as it is to the amount of the tax, and to the property.

Proceedings on tax sales are *strictissimi juris*. *Ferris v. Ooover*, (10 Cal. 632,) affirmed in this.

The fact that a tax deed is *prima facie* evidence of certain facts makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof.

An assessment stating: "House and lot north side of Commercial Street, formerly owned by Belle Creole, also brick store north side of Commercial Street and second from the corner of Pine and Commercial, including a lot and all the appurtenances, seven thousand dollars," there being at the top of the page containing this description the words, "Nevada County, Nevada Township, Nevada City," is fatally defective in omitting "to give the metes and bounds, or describing the premises by lots or fractions of lots," according to the 4th Section of the Revenue Act of 1857.

A party in possession of premises under Sheriff's sale, and receiving rents and profits during the time for redemption, should, in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay.

It, in such case, such party fails to pay the tax, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession, under the Sheriff's sale, was by both partners. The duty to pay the tax was several, as well as joint.

APPEAL from the Fourteenth District.

The facts sufficiently appear in the opinion. Plaintiff had judgment of foreclosure, and defendant, Clark, appeals.

C. Wilson Hill, for Abbott & Edwards, and E. B. Mastick, for Appellant, Clark.

* 1. Equity has no jurisdiction over tax titles. (2 Cal. 290-463.)

2. A mortgagor cannot make a person claiming title to the premises a party to the foreclosure suit for the purpose of trying the title. That is a contest between mortgagor and mortgagee alone. (2 Seld. 82; 4 Paige, 206; 2 Barb. 22, 23; 3 Id. 438.) By our statute, tax deeds are *prima facie*, if not conclusive, evidence of all the matters stated therein, and cannot be contested, except by one showing title in himself. (12 Ill. 409, 416.) And plaintiff does not claim title.

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3. Is the title by purchase under tax sale adverse to mortgagor and mortgagee? The mortgagee holds his interest under the mortgagor. If the latter has no title, the former can acquire none. The mortgagor has possession and the right of redemption. The purchaser on foreclosure takes subject to this right. The legal title remains in the mortgagor until a deed is made, and a purchaser of the mortgagor's interest at a tax sale acquires also the interest of all persons claiming through, or under, his title.

4. The power of taxation is one of sovereignty, and the lien of the sovereign for taxes, unless specially granted by the sovereign, takes precedence of all other liens, whether these liens be subsequent or prior in point of time; whether they are mortgages or judgments. (15 Ill. 7, 477; 2 Bay. 244; 2 Cow. 118.) In Hilliard on Mortgages, the rule is laid down that the mortgagee must pay taxes on mortgaged premises, if the mortgagor fails so to do. (1 Hill. on Mort. 305 n.)

The rule is that the State looks primarily to the property for the payment of taxes, and not to the owners of the property. The lien of the State, by virtue of its sovereignty, attaches upon the thing, and not upon the person, and this lien takes precedence of all others, *ex necessitate rei* — the mere looking to the person would avoid the payment of the taxes due to the State.

McConnell & Niles and J. Anderson, for Respondent.

I. The principal position urged to sustain this appeal, we understand to be substantially this, viz: A sale for taxes by the State, passes a title to the property sold, discharged of all prior liens and incumbrances.

A tax lien has no necessary or natural preference over the prior liens of individuals.

The only reasons why a tax lien and title should be regarded as paramount to other liens and titles, are: 1st. A tax lien is a charge exclusively *in rem*. 2d. The character of the State as sovereign, necessarily gives to her liens for taxes precedence of all others. 3d. The right of "priority of payment" which belongs to the State, involves also priority of lien to secure payment. 4th. By our revenue law, a tax lien is to be preferred to others.

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A tax, though usually made by law, a lien upon property, is really a personal charge. It is defined to be "a contribution imposed by government upon individuals for the use of the State." (Burrill's Law Dict. *verb* Tax.)

A B owns a tract of land, upon which he pays a tax. Now the tax is not owing by the land, nor does it, like rent, issue out of it. But it is owing by A B, personally, and the amount of it is determined by the value of the land. In some cases, as where property is assessed to unknown owners, it would appear at first glance, that the tax was exclusively a charge *in rem*. But even in such cases, it is, in theory, a charge upon the unknown owner, though the State is necessarily restricted to its proceeding *in rem* to recover it. The fact that a personal action is rarely resorted to for the collection of taxes, proves nothing. The right to resort to such an action is undoubted. But the State has a right to select its remedy, and it usually selects the proceeding *in rem* as more expeditious and efficacious than any other. Tax sales, in principle, differ very little from judicial sales. The State (the creditor,) sells the property of the citizen (the debtor,) because he has failed to pay the tax (debt,) assessed against him, and our law has increased the natural similarity, by providing that an assessment shall have the force and operation of a judgment and execution. (Wood's Dig. Sec. 32, Rev. Act, 623.)

It would be as proper to say that the property of a debtor, sold under execution, owed the debt, as to say that property sold for taxes, and not the owner, owed the tax.

The principle of personal amenability is daily recognized by the legislative, as well as the judicial, action of the government. An example of this sort of recognition may be seen in the fact that though property is often taxed when the owner is unknown, it is never taxed where there is no owner. Upon precisely the same principle, the State never taxes its own property; for that would involve the absurdity of a State being debtor to itself. Upon no other principle can these two exceptions to general taxation be sustained. (*Rex v. St. Luke's Hospital*, 2 Burr. 1053 — 1065.)

The word "tax" is the modern synonym of the feudal term, "talliage," which Lord Coke, after giving its etymology, defines thus: "tallagium is a general word and doth include all subsi-

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dies, taxes, tenths, fifteenth, impositions or other burdens, or charge put or set upon any man, and so is expounded in our books." (Coke's 2d Inst. fol. 533; *Pierce v. The City of Boston*, 3 Met. 521; *Burd v. Ramsey*, 9 Serg. & Rawle, 109; *Johnson v. McIntyre*, 1 Bibb, 295.)

II. As to the preliminary objection made by the Appellant at the trial, viz.: that Appellant's rights could not be determined in a foreclosure suit, it embodies in another form the question we have been discussing. For the only reason why Appellant's rights cannot be determined in this suit, is that he claims by title paramount; and he can only claim by title paramount, because a tax lien is exclusively a charge on the property, independent of its owner.

A party is said to claim in privity with another, when he de-rains title from that other. This is called privity of estate. (Coke on Litt. 271; 8 Coke, 42 b, and Secs. 460, 461, Littleton's Tenures.)

A party not claiming by, through, or under, another, has no privity of estate or title; but if he has the superior title, he is said to be in by title paramount.

Now, *quere*, must not the purchaser at a tax sale deduce title from the person to whom the property was assessed? If our argument, that the tax is a personal charge primarily, and not a mere lien on the property, irrespective of the ownership, be sound, it is evident that he must. The fact that a sale for taxes is an adversary sale, does not affect the privity of title. Sales under execution, foreclosure sales—in a word, all judicial sales, are adversary sales. Yet the purchaser at such sales claims in privity with him whose property is sold.

There is nothing in the assumption that the lien of a sovereign State should be preferred to the prior liens of individuals. The error arises from confounding the attributes of the State as sovereign with her rights as creditor.

Undoubtedly, the general right of a State to tax here citizens is anterior and paramount to the rights of property of particular citizens. But the actual imposition of taxes, (taxes on property, we mean,) and the remedy for their collection, are directly dependent upon the rights of private property; for it is evident that no such tax can be imposed or collected in a country where

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the institution of private property does not exist. In other words, although the tax pertains to the State as sovereign, she collects it in her character of creditor.

There is no natural distinction between a debt due a sovereign, and a debt due a citizen. The quality of sovereignty affects the mode of contracting the debt, but not the manner of payment. True, artificial preferences have been introduced in most countries in favor of sovereign creditors; but the fact that they owe their origin to positive law, proves that they are not inherent qualities.

The right to take private property for the benefit of the public, differs greatly from the right to impose taxes, and in a still greater degree from the right to sell property for the payment of taxes. In no respect is this difference more apparent, than in the fact that the former may be exercised irrespective of who is the owner of the property, while the exercise of the latter depends directly upon the ownership.

One other class of considerations occurs to us in connection with this branch of the argument.

In case of a mortgage, our law makes it the special duty of the mortgagor or his grantee in possession to pay off the taxes on the mortgaged property. In other words, he or his grantee is deemed owner of the property for purposes of taxation. The mortgagee is assessed and pays a full tax upon his mortgage. (Rev. Law, Secs. 3-5, Wood's Dig. 615, 616.)

The law has apparently recognized the existence of the two separate estates or interests of the mortgagor and mortgagee, and taxed each independent of the other. The mortgagor is in no wise responsible for the taxes on the mortgage; nor, as it seems to us, is the mortgagee any more responsible for the taxes on the mortgagor. The mortgagee is under no obligation to pay taxes on the mortgaged premises, nor is he possessed of the means to compel the mortgagor to perform that duty.

Our view of this question is fortified by the language of Sections 22, 23, and 32, of the Revenue Act. (Wood's Dig. 620-623.)

Section 32 declares that the assessment shall be a lien on the property of the "delinquent." Again, Section 23 provides that a "deed made in conformity with the requirements of Section

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22, shall convey to the grantee all the right, title, interest, claim, possession, and right of possession, legal and equitable, or otherwise, of each and every delinquent," etc.

Now, who was the delinquent here? Not Kelsey — for he had no possession or control of the property at the time. Besides, he was assessed for taxes on his mortgage; and our law separates the estate of the mortgagee from that of the mortgagor for the purposes of taxation.

As the mortgagee cannot be termed a "delinquent," who can? We answer, the mortgagor — to whom the property was assessed — or a party in possession claiming under him. In this case, the assessment was in the name of Abbott, but as he lost his possession in May, 1857, by a sale to Clark & Co. it may be that the latter thereby assumed in law the payment of the tax, and were therefore the real delinquents. Such at least seems to be settled by the case cited from 3 Harris, (*Gormley's Appeal*). The effect of the tax sale, (granting it to have been regular,) was to transfer to the purchaser the estate of the delinquents, Clark & Co. of which firm he was a member.

Now, their estate was the estate of Abbott & Edwards, and no more. It was subject to all subsisting liens and incumbrances created by them, and particularly to this mortgage. It follows that the purchaser took subject to the mortgage.

If we suppose Abbott & Edwards to have been the delinquents, the result is the same.

The provisions of Section 23 above directly sustain the position that a purchaser at a tax sale claims in privity with the owner to whom the property was assessed. The purchaser acquires the title of the delinquent, whatever it may be. This is the declaration of the Act. And a subsequent portion of the same section declares that the "tax deed shall be evidence that all the right, title, interest, etc. of the delinquent, has been subrogated to the grantee," etc. (Wood's Dig. 621.)

III. The assessment in this case is insufficient and void.

1st. It is not dated. 2d. It neither states the extent of the lot, nor furnishes data whence the extent may be ascertained. 3d. It does not contain the name of the "township, city, or incorporated town," where the premises are situated. 4th. It is too vague and uncertain in other respects.

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The omission of the extent of the lot, or of data from which the extent may be ascertained, is fatal. By Section 17 of the Act, it is provided that the property assessed must be sold to the bidder who will take the "smallest part of the property for the tax." (*Ferris v. Coover*, 10 Cal. 632; *Tallman v. White*, 2 Com. 69; *Doughty v. Hope*, 3 Denio, 594; S. C. 1 Com. 79; *Strykes v. Kelly*, 2 Denio, 323; *Anderson v. The State*, 1 Cushman, 23 Miss. 472; *Wister v. Kammerer*, 2 Yeates, Pa. 100; *Young v. Martin*, 2 Yeates, 312; *Watt v. Gilmore*, Id. 330; *Sneeverly v. Dickey*, Id. 331; 3 Id. 186.) A sale of unseated land, describing it merely as so many acres is void for uncertainty." (13 Serg. & Rawle, 151; 7 Id. 394; *Hubley v. Keyser*, 2 Penn. Penrose & Watts, 496; *Libby v. Burnham*, 15 Mass. 144; *Thayer v. Stearns*, 1 Pick. 482; *Blossom v. Cannon*, 14 Mass. 177; *Johnson v. McIntyre*, 1 Bibb. 295.)

IV. Granting all that can be asked in favor of a lien for taxes—granting that it will divest a lien created before the first of March of each year—yet no Court will permit the party whose duty it is to pay the tax to take advantage of his failure to perform his duty, and buy in the property at a tax sale so as to cut out the prior mortgage. Clark & Co. being in possession under a claim of title, ought, by law, to have paid the tax. Selling property for taxes, is merely one way of paying the tax; a more expensive way, but still a way of payment. Clark & Co. neglected to pay in the usual manner—but one of the firm took it upon himself to pay in another manner. Shall the latter payment have a different operation from the former? But it will be said that the Appellant, Clark, is only one member of the firm—and he bought for himself and not for the firm. Then, he was guilty of fraud on his firm—a fraud which the law will not allow to succeed. A partner buying in partnership property is deemed in equity a Trustee for the firm; and here the purchase by Clark must inure for the benefit of Clark & Co.

Grant, however, that such a result would not follow—still Clark, being a member of the firm, and cognizant of all the facts connected with the property, was guilty in equity of a positive fraud in allowing the property to be sold and becoming the purchaser. What a firm cannot legally do, no member of the firm can do.

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BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

Several questions of extraordinary interest and importance arise in this case, and they have been argued with much force and learning.

The facts are few and simple.

The Respondent filed his bill in equity to foreclose a mortgage executed to him by Abbott & Edwards, on a certain lot in the city of Nevada. To this bill the mortgagors alone were made defendants, but afterward the plaintiff amended his bill and made Clark a party; the bill charging that Clark claimed some interest in the property acquired after the execution of the mortgage. Abbott & Edwards made default. Clark answered and set up a tax title and deed in himself, executed on the 14th of December, 1857, after the date of the mortgage, which is dated 1st January, 1857. The plaintiffs demurred to this answer, but no action was taken on the demurrer, the consideration of it being deferred until the trial on the merits. On the trial, Clark produced his tax deed, and also a Sheriff's deed to himself and his partner, Wilbur, dated September 6th, 1858, which last deed was founded on a judicial sale by the Sheriff of Nevada County, made on the 5th June, 1857. The plaintiff, in answer, produced the assessment of the property for the year 1857. He also proved that Clark & Co. (Wilbur & Clark) had been in the actual possession of the premises since May, 1857. They purchased the building 5th June, 1857, at Sheriff's sale, as said before.

The assessment is as follows: "House and lot north side of Commercial Street, formerly owned by Belle Creole; also brick store north side of Commercial Street, and second from the corner of Pine and Commercial, including lot and all the appurtenances, seven thousand dollars." At the top of the page are the following words: "Nevada County, Nevada Township, Nevada City." There is no date to the assessment. The view which we have taken of this case renders it unnecessary to go into an examination of many of the propositions which have been elaborately argued at the bar.

The Appellant insists that the Court of Chancery has no jurisdiction over the tax title. Probably a sufficient reply to this is

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found in the fact that he himself sets it up as a defense. He does not object to having been made unnecessarily or improperly a party, nor does he set up this matter as so far denying the power of the Court to pass upon his interest or claim; but seems to urge it as a full and sufficient defense to the decree of foreclosure.

We proceed to consider the defense on the merits.

The case of *Green v. Craft*, (6 Cush. 28 Miss. 70,) is in point on the question of the validity of the assessment. The Mississippi Statute, (Hutch. Code, 200, Sec. 5,) contains the same clause in substance as ours in respect to the effect of the tax deed. The same point there was taken and pressed. But the Court said: "The term 'taxes,' it is said, includes all contributions imposed by government upon individuals for the service of the State. The *individual*, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment when the owner shall be legally in default in paying at the time *stipulated* by law. No person is a tax-payer until he has been so declared by the proper officer. The assessment must be as certain in designating the person chargeable with the tax at the commencement of the fiscal year; as it must be in designating the amount of the charge, and the property to which reference is made for the purpose of ascertaining such amount.

An assessment *must be made*, in order to create a liability on the part of the individual to pay the tax. If no such assessment be made, no liability is created, and; of course, there can be no default in discharging that which has no existence. To authorize the Collector to sell property to enforce the payment of taxes there must be both a legal liability on the part of the owner to pay the tax, and a legal default in making payment."

The Revenue Act of 1854, (Acts, 104,) provides, by the 64th Section, that lands occupied by any person not the owner thereof, shall be listed in the name of the owner, if known; if not, in the name of the occupant; and by Section 65, unoccupied lands shall be listed in the name of the owner, if known; otherwise, as lands of persons unknown; lots or real property within the limits of any incorporated city shall be listed separately, as the same may be owned or held; or when this is unknown, in

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accordance with the survey or plan. By Section 67, in case of a mortgage of real estate, the mortgagor shall pay the taxes on the value of the property. By Section 74, mortgages are taxed. By Section 89, *every assessment made in conformity with the spirit and intention* of the provisions of this act, shall remain as a judgment and lien, and have the force and effect of an execution against *the party and property* liable for the taxes thereon. By Section 99, the lien of the State for all taxes for State and county purposes, shall attach on all real and personal property on the first day of March, annually, and such lien, to the absolute exclusion of other liens, shall continue till all taxes thereon shall be paid, etc.

In 1857, (29th April,) another Revenue Act was passed. By Section 4 of this Act, it is made the duty of the Assessor to prepare a tax list or assessment roll, in which shall be listed or assessed all the real estate, etc. and which shall contain the names of all taxable inhabitants.

2. All real estate and improvements on public lands *taxable to each*, giving the metes and bounds, etc.

By Section 22, it is provided that, upon the delivery to the County Recorder of the duplicate certificates required in a previous section, the lien of the State shall become, and is, vested in the purchaser at the tax sale, and when not redeemed by payment, etc. the title of every *assessed delinquent* to the land purchased shall vest, etc.

By Section 32, every tax levied under the provisions or authority of this act, is hereby made *a judgment against the person*, and a lien against the property assessed, which lien shall attach and judgment date as of the first Monday in March of each year, and shall have the full force and effect of an execution against all property of *the delinquent*, which judgment shall not be satisfied nor the lien removed until the taxes are all paid, or the property has absolutely vested in the purchaser under a sale for taxes.

This provision seems to be in substitution of Sections 89 and 99, of the Act of 1854.

These citations from the statute show that the assessment must be made against the owner, when known.

2. These proceedings on tax sales are *strictissimi juris*. They are cases of a naked statutory power, and all the steps directed

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by the statute must be strictly pursued. (*Ferris v. Coover*, 10 Cal. 632,) and the numerous cases there cited.

We do not understand that the statute making the certificate and deed, *prima facie* evidence of certain facts, does away with the obligation to follow the directions of the law. If within the power of the Legislature to do this, it has not attempted it. It has only shifted the burden of proof, leaving the effect of the facts when proven, as it was before.

The assessment was not in the name of the owner, nor is it shown that the owner was unknown. It seems to be conceded that the name of "J. C. Abbott" appeared in the paper, but the finding does not so state. It seems that this was the property of Abbott & Edwards, who mortgaged it; and the statute contemplates that the mortgagors are the proper persons to whom the property should be assessed — the mortgagees are assessed on the mortgage. But the assessment was fatally defective in omitting "to give the metes and bounds, or describing the premises by lots or fractions of lots." (Wood's Dig. 615, Sec. 4.) It is obvious that it was designed that some definite account of the extent of the lot should be required; for it is provided by Section 17, that the property must be sold to the bidder who will take the smallest part of the property for the tax. It seems that this assessment roll has no date, and that it does not give the township, city, or incorporated town, as required. But it is not necessary to pass on these latter objections.

3. Even if these objections failed, it is very hard to see how the last point taken by the Appellant can be avoided. Clark & Co. went into possession of these premises; they were in possession at the time of this tax; they had bought at Sheriff's sale, which gave them a right to the profits until redemption — these they were enjoying. Between them and defendants in execution, they should in equity have paid the taxes; and the statute casts this duty of paying the taxes on the party in possession, if the owner does not. They can derive no benefit from a failure to pay them, and thus suffering the lot to be sold and buying it. In equity, the purchase would seem to be merely an advance, and this, whether made by one or both of the partners, for the duty was several as well as joint.

We think the judgment should be affirmed.

Knowles v. Joost.

KNOWLES v. JOOST *et al.*

FINDING of a referee conclusive as to the facts, on conflicting evidences. Under the Mechanics' Lien Act of 1856, the owner of a building may contract to pay for it as soon as completed; and he is not liable to material men, until notice served on him, and then only to the extent of the sum due the contractor, at the date of the notice.

Quere, whether the Act of 1856 establishes a different rule?

APPEAL from the Twelfth District.

Upon publication of notice under the Mechanics' Lien Act, a reference was made to report as to the various liens. The referee found for defendants — the owners and the contractor. Judgment was entered accordingly, a motion to set aside the report having been overruled. Plaintiff appeals.

W. W. Chipman, for Appellant.

I. This proceeding is in the nature of a foreclosure of a mortgage; the Supreme Court can review the facts found by the referee.

II. The referee was authorized generally to report the facts and a judgment. His whole report is therefore subject to a review. (*Phelps v. Peabody*, 9 Cal. 213; *Brock v. Bruce*, 5 Id. 270; *Cahoon v. Levy*, 6 Id. 295; *Tuttle v. Montford*, 7 Id. 358; *McGeary v. Osborne*, 9 Id. 119; Stat. 1850, 211; Stat. 1855, 156; Stat. 1856, Wood's Digest, 537; Stat. 225; N. Y. Stat. 1830, 412; N. Y. Stat. 1832, 181; 4th Ed. Vol. 2, N. Y. R. Stat. 740-742; Parson's Laws of Business, etc. 446; 12 Wend. 376; 4 Hill, 193.)

There is no provision, that the building shall be liable, only when the owner is indebted to the contractor. *Cahoon v. Levy*, (6 Cal. 295,) was decided under the Statute of 1856; and *Brennan & Batchelder v. Marsh et al.* (10 Cal.) was decided before the Act of 1856 took effect. (See *Brock v. Bruce*, 5 Cal. 279; *Tuttle v. Montford*, 7 Id. 358; *McGeary v. Osborne*, 9 Id. 119; 12 Wend. 376; 4 Hill, 193.)

Pizley & Smith, for Respondents, cited: *Cahoon v. Levy*, (6 Cal. 295,) as conclusive of the case, which comes under the law of 1856.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

Turner v. Melony.

This is an action to enforce a lien on a building for materials furnished the contractor, and used in the construction of the building.

The finding of the referee, which, as the evidence is conflicting, is conclusive as to the facts, shows that before notice of the lien was filed, or notice given to the owner of the building, he had fully paid to the contractor all that was due him upon the contract.

The Statute of 1856 intended that the liens of sub-contractors and material men, should be satisfied by the owner of the building, out of moneys due from him to the contractor, and the 3d Section authorizes him, upon being served with proper notice, "to withhold from the contractor, out of the first money due, or to become due, to him, under the contract, a sufficient sum to cover the lien claimed by such sub-contractor, journeyman, or other person, performing labor or furnishing materials, until the validity of the lien shall be determined by the proper tribunals, if it be contested." It was not the design of the Legislature to make him responsible, except upon notice, or to a greater extent, than the sum due to the contractor at the date of the notice. The statute furnishes to material men and sub-contractors, cheap, easy, and expeditious, means, of attaching in the hands of the builder any money due from him to the contractor, but does not prevent him from agreeing to pay for the work as soon as it is completed, or from complying with such agreement when made.

Whether a different rule was established by the Act of 1858, it is not necessary to inquire, as the construction of that Act was not involved in this case.

Judgment affirmed.

In Re TURNER v. MELONY, CONTROLLER.

▲ DISTRICT Judge, inducted into office with a commission from the Governor showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date.
The question of his eligibility cannot be tried on *mandamus*.

APPEAL from the Sixth District.

Mandamus. In the fall of 1858, at a general election, Turner

Turner v. Melony.

was elected District Judge of the Eighth District for six years. He demanded his commission before January 1st, 1859. The commission was refused by the Governor, who issued a commission for the same office to one Haynes. The title of Haynes to the office was then tested by a *quo warranto*, in the suit of "*The People ex rel. Saunders v. Haynes, (ante,)*" and resulted in a decision by this Court adversely to Haynes. The Governor then issued a commission to Turner, dated May 13th, 1859, as having been elected to the office at said general election, and he took the oath of office according to law.

At the time of his election, Turner was an Inspector of Customs under the United States.

Petitioner applies for *mandamus* to compel defendant, Controller of State, to draw his warrant on the State Treasurer, for the salary of petitioner, as Judge from January 1st, 1859. Defendant, for answer, sets up the ineligibility of Turner, because holding the office of Inspector of the Customs, as aforesaid, averring it to be a lucrative office under the United States.

The answer was demurred to, and the Court below awarded the *mandamus*. Defendant appeals.

Carr, for Appellant, argued: that if Turner was ineligible, then, although the title to the office could not be tried by *mandamus*, yet the defendant cannot be compelled to do an illegal act by drawing a warrant. He is not forced to test the eligibility of Turner.

H. Toler Booraem, for Respondent.

1. The title to an office cannot be tried in a proceeding to obtain a *mandamus*. (*People v. Olds*, 3 Cal. 167.) *A fortiori*, a third person, cannot set up want of title, as a defense to a proceeding by an incumbent of an office, to obtain his salary. (*People v. Collins*, 7 Johns. 549.)

2. The incumbent elected to the office is entitled to the whole term and its emoluments. The failure to get his commission was not his fault.

3. The salary commences with the term. The commission is only evidence of the title derived from the election. (*Mages v. Supervisors*, 10 Cal. 376; *Wammach v. Holloway*, 2 Ala. 31; *Jeter v. The State*, 1 McCord, 233; Const. Art. 6, Sec. 5; Wood's Dig. 558.)

Klink v. Cohen.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

The Respondent having been inducted into office, and his commission showing him entitled to it from the first day of January last, as Judge of the District Court, is entitled to the salary annexed to the office from that time.

The question of his eligibility cannot be tried on *mandamus*.
Judgment affirmed.

KLINK & WIFE v. COHEN & SILVERSTEIN.

In ejectment, suit must be brought against the terre-tenant, or party in possession.

If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases, by demurrer. And, if no objection be taken to the answer on this ground, defendant, on the trial, may rely on any of his defenses, as under the old system.

APPEAL from the Ninth District.

For case, see opinion.

J. A. Fletcher, for Appellant.

Heydenfeldt, for Respondent.

BALDWIN, J. delivered the opinion of the Court — TERRY, C. J. concurring.

This was ejectment, to recover a house and lot in Yreka, claimed by the plaintiff to be homestead property. The Court rendered a judgment for the defendants, upon a special finding of facts by the jury. The facts so found were these: That the premises are situated in the town of Yreka, on a public street in a business portion of the town, the town containing a population of some two thousand souls, and the site of the town being mineral land; that the defendants bought the lot at Sheriff's sale, in February, 1855, and have been in possession since; that one Alexander was in actual possession of the property at the time of the bringing of the suit, and for twenty-nine days before; that the property was used by Klink and wife, whilst they owned it, for family and business purposes, and equally for each; that they had another and different place of residence before the fire in 1854, which consumed the first building, and this other resi-

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dence was in Yreka, and was before the bringing of this suit; that Klink claimed another homestead before or at the time of the purchase of defendants; but that at the sale the Sheriff made a proclamation that Klink claimed this lot as a homestead, and the defendants heard it, and that defendants, at the time of sale, had no knowledge that Klink claimed other property as his homestead. The monthly value of this property is one hundred and twenty-five dollars. As a residence the value is one hundred dollars per month. Defendants have made no valuable improvements. At the date of defendants' purchase there was a mechanics' lien on the premises for four hundred and eighty-eight dollars and fifty cents, which was afterwards paid by defendants. Mrs. Klink never claimed any other property as homestead, nor lived with her husband on any other property—he and she claiming the same as a homestead. The property was worth one hundred and thirty-five dollars a month to the plaintiffs as used by them. The plaintiffs resided upon the premises between the 15th of June, 1854, and the 21st of February, 1855, and Mrs. Klink claimed the premises as a homestead while so residing. Plaintiffs were husband and wife from 1849 to 1858. Mrs. Klink claimed the premises a short time before leaving them. She claimed no other property as her homestead. Defendants purchased the premises on execution sale against Klink, 21st February, 1855, for two thousand three hundred dollars. Plaintiff resided in the back part of the building; no communication between the front rooms and back. Plaintiffs were owners of the premises and built a dwelling-house on the premises; the house was built as a place of business or trade, and a dwelling-house. The premises were not the only family residence of plaintiffs in the year 1854 and 1855.

We have taken these facts from the findings in the order in which they are found.

Upon this case thus made, the judgment of the Court rests:

1. The jury found that the defendants were not in the actual possession or occupancy of the premises at the time of the suit. In ejectment, suit must be brought against the terre-tenant or party in possession. This we have held in several cases. (See *Adams on Ejectment*, 512, to the same effect.)

2. The complaint was not verified. The answer sets up two

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or three separate defenses, separately stated. In one of them the actual possession is admitted; in another it is denied. But the admission in the first defense, the Statute of Limitations, whether necessarily inconsistent or not with the denial of occupancy in the last, we think was not an admission of which the plaintiff could avail himself on the trial. It has been held in several cases in New York, that a party cannot set up inconsistent defenses. (See 4 Sandf. S. C. 680.) But it is said: "When inconsistent defenses are set up, the defect is properly to be reached by motion to strike out one of the defenses—in which case, as under the old practice, the Court will either strike out the defense, or compel the defendant to elect by which he will abide. If a motion to strike out the objectionable matter cannot reach or cure the defect, the objection, it is presumed, may be taken by demurrer, as in the case of *Sayles v. Wooden*, *Lewis v. Kendall*, and others. Such an answer would be insufficient within the meaning of the code, and may be objected to by demurrer, for it is held that an answer is insufficient in the sense of the code, not only where it sets up a defense which is groundless in law, but where in the mode of stating a defense, otherwise valid, it violates those primary and essential rules of pleading which the code has retained. And the rule is, no doubt, correctly laid down in the case of *Nichols v. Jones*, that "where the objection is to the whole of a separate answer or defense, it should be taken by demurrer, unless palpably insufficient," etc. (Van Santvoord's Pleadings, 287, and cases there cited.)

No objection having been taken to the answer, on the score of this inconsistency, we think the defendant might, as under the old system of pleading, rely on the matter of his last defense, unaffected by the statements in a prior separate and distinct plea or defense.

This view renders it unnecessary to consider the other questions, elaborately argued, on the embarrassing and perplexing subject of homestead property.

Judgment affirmed.

 Conroy v. Woods.

CONROY & O'CONNOR v. WOODS *et al.*

THE lien of firm creditors is paramount to the lien of individual creditors. And, where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching, must be preferred to the lien of an individual creditor of the remaining partner, attaching first. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. Partners may make a *bono fide* sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or indirectly to one of the partners, with a stipulation, that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment. In such case of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the Sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property.

APPEAL from the Twelfth District.

The facts are substantially stated by the Court. At the time of filing this suit, the Sheriff was about to sell the property in question, under the execution issued on the judgment of Woods against Bonny alone. The bill prays that plaintiffs have precedence over Woods and all others, on the ground that the property is partnership property; and also prays that the claim of Allison, as owner of a portion of said property, and the judgment of Woods, be declared fraudulent and void. Upon affidavit of the insolvency of the Sheriff and his bondsmen, the Court below ordered the proceeds of the sale to be deposited in Court, subject to the further order of the Court.

Woods demurred to the interventions filed, on the ground, that the intervenors had no interest in the success of either party, and did not state facts sufficient. Demurrer overruled.

The intervenors had attachment liens at the date of their interventions, and, before trial, had obtained judgment.

The case was tried before the Court, and a decree rendered, that the property was partnership property, and subject first to the judgments of plaintiffs and intervenors. Woods alone appeals.

Geo. F. & W. H. Sharp, for Appellant.

I. The Court below erred in overruling the demurrer of

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Woods. (*Mody v. Payne*, 2 Hill, 47, and note a; *Phillips v. Cook*, 2 John. Ch. 548; *Walsh v. Adams*, 24 Wend. 389; 3 Denio, 125-128; Prac. Act, Sec. 217-220; *Meyer v. Larkin*, 3 Cal. 403; *Nugent v. Locke*, 4 Id. 318; *Mason v. Tipton*, 4 Id. 276.)

II. The pleadings and proofs do not show a case of equitable cognizance. (Cases cited above.)

III. Conceding that this action is one of equitable cognizance, when Woods' attachment was levied, this property, by the sale and delivery of the property itself, became the individual property of the debtor in that suit. (*Ex parte Ruffin*, 6 Vesey, 127; *Marguand v. The N. Y. M. Co.* 17 John. 525; *Mody v. Payne*, 2 Id. 548; 3 Kent's Com. 65.)

IV. If these plaintiffs had any lien whatever, it must be by force of the clause in the bill of sale; and they had none under it. (Prac. Act, Sec. 120; Stat. 1850, 267, Sec. 15.)

V. Woods advanced his money upon the strength of the property in question being the individual property of George Bonny, his debtor, and much of the money went to pay debts of the firm.

VI. The claim of Alison to this identical property was good against the property, because they could not have invoked the want of a change of possession; and with full knowledge on this point, they allowed Woods to justify his taking under his attachment against E. B. Bonny, individually; hence, they are estopped from asserting the contrary, especially, after Woods had been put to the expense of defending this identical property, and after a return thereof is made to answer his debt alone.

VII. The intervenors are interlopers in this action, without right or authority of law; at any rate, they are in no better position than the plaintiff.

VIII. Their claims were included in the mortgage to Alison; consequently, the doctrine of election and *res adjudicata* apply, so far as Woods is concerned.

Cyril V. Grey and Joseph Simpson, for Respondents.

This is a case of equitable cognizance.

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The answers do not deny any of the material allegations of the complaint and interventions, which must, therefore be taken as true. (*Davy v. Bowman*, 8 Cal. 149; *Osborn v. Hendrickson*, 8 Id. 32; *Thompson v. Lee*, 8 Id. 275; *Humphreys v. McCall*, 9 Id. 59; *Curtis v. Richards*, Id.; *Gerke v. Cal. St. Nav. Co.* Id. 215; *San Francisco Gas Co. v. The City*, Id. 453.)

The complaint and proofs show that the property in question was the partnership property of Bonny, Brooks & Moore, for the sale by Brooks and Moore operated only as a dissolution of the partnership as between the parties, leaving the property, as before, subject to the partnership debts. Bell became a tenant in common with E. B. Bonny, and could do nothing inconsistent with the primary duty of winding up the concern. (Kent's Com. 7th Ed. Side, 8, 59, 60, 63; Story on Part. Secs. 307, 308, 261, and Note; Collyer on Part. Sec. 110 and Note, 121, 125, 127, 166; *Marguand v. N. Y. Manuf'g Co.* 17 Johns. 525; *Necoll et al. v. Munford*, 4 Johns. Ch. 5, 22; *Rodriguez v. Hefferman*, 5 Id. 417, 428; *Crawsbrey v. Maule*, 1 Swanston, 507.)

Bell could not, and did not, transfer to E. B. Bonny (who knew all the facts) any higher or other right than he, Bell, possessed.

The partnership property could only become the individual property of one of the partners, and subject to his individual debts, after a notice of the dissolution of the partnership, and subsequent open and notorious possession of the goods by the surviving partner, and his carrying on the business in his own name and being trusted on the strength thereof. (*Ex parte Ruffin*, 6 Ves. 119; *Ex parte Till*, 10 Id. 347; *Ex parte Williams*, 11 Id. 3; La Collyer on Part. Sec. 884; Story on Part. Secs. 159-163, 308; Bissel on Part. 71; Gow. on Part. 2d Ed. 261; 3 Kent's Com. 7th Ed. Side, 8, 66, 7; *Johnson v. Totten et al.* 3 Cal. 347.)

The complaint and interventions set out and the proof, sustains two distinct grounds for the relief sought; either of which is sufficient, and will entitle plaintiff and intervenors to relief in a Court of Equity.

I. That the plaintiff and intervenors are partnership creditors of Bonny, Brooks & Moore, and having established a lien by attachment, followed by judgment and execution upon the partnership assets, they claim a preference over defendant, Woods,

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who is an individual creditor of one of the partners, E. B. Bonny.

II. That the judgment of Woods is fraudulent and intended to hinder, delay, and defraud, creditors.

Either of the grounds is sufficient to authorize the interference of a Court of Equity. (1 Sto. Eq. Jur. Secs. 678, 1253, and cases cited; *Washburn v. Bank Bellows Falls*, 19 Vt. 278; *Place v. Sweetzer*, 16 Ohio, 132; *Snodgrass Appeal*, 13 Penn. 471; *Jackson v. Cornell*, 1 Sandf. Ch. 348; *Robb v. Steans*, 1 Clark's Ch. 191; *Chase v. Steele et al.* 1 Sandf. Ch. 348.) A Court of Equity will also interfere in cases of fraud, even if founded on the express provisions of statutes, and especially to guard against the fraudulent acts of a debtor. (Sto. Eq. Jur. Secs. 349, 377; *Heyneman v. Dannenberg*, 6 Cal. 376; *Adams v. Woods*, 8 Id. 156.) And also interfere where the plaintiff has a remedy at law. (*People v. Houghtaling*, 7 Cal. 348; *Heyneman v. Dannenberg*, 6 Id. 376.) And especially to enjoin the fraudulent disposition of partnership property in favor of individual creditors of the separate partners. (*Jackson v. Cornell*, 1 Sandf. Ch. 348; *Deveau v. Fowler*, 2 Paige's Ch. 400; *Topliff v. Vail*, Harrington's Ch. 340; *Candler v. Pettit*, 1 Paige's Ch. 168; *Heath v. Hand*, 1 Id. 329; *Eager et al. v. Price et al.* 2 Id. 333; Story on Part. Sec. 264.) And, in this case, E. B. Bonny was only a Trustee, holding the property for the payment of the partnership debts, and a Court of Equity will interfere to enforce the trust in favor of the creditors. (Sto. Eq. Jur. Sec. 1244; *Sedam v. Williams*, 4 McLean, 51; *Gray v. Thompson*, 1 Johns. Ch. 82; *Page v. Naglee*, 6 Cal. 241.)

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

Bill states that on the 22d of April, 1857, plaintiffs sued out attachment against Bonny, Brooks & Moore, a mercantile firm in San Francisco, and had it levied on certain goods; that shortly afterwards, plaintiffs got judgment in their suit, which has not been paid, and execution issued with directions to the Sheriff to levy on the property attached; that the debt of plaintiffs was for goods, due by this firm at and before the 9th of April, 1857, and this property attached had belonged to and been in possession of said firm; that about this last date, these defendants dissolved

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partnership, by Brooks and Moore selling out to the defendant Bell, who bought subject to the payment of the debts of the firm; that no notice was given of this dissolution to plaintiffs until the 16th of May, 1857; that Bell bought for Bonny, and afterwards transferred his rights to Bonny; that at the time of this sale, all these parties knew of this indebtedness to plaintiffs; that on the 10th of April, 1857, defendant, F. H. Woods, commenced a suit in this Court against E. Bonny, and attached the property as his individual property, and afterwards obtained judgment. Execution issued and levied upon the property and it was advertised for sale as Bonny's. The bill then charges various matters of fraud in the sale to Bonny, and in the note and suit of Woods and Bonny.

Several parties appeared as intervenors, claiming to be entitled to come in as judgment creditors of this firm, and alleging substantially the same facts as the plaintiffs. Woods demurred on several grounds, which will be noticed hereafter, and, the demurrer having been overruled, answered. The answer denies that the plaintiffs attached the property or any part of it, or took it in execution; also denies that on the 9th of April, 1857, the partnership of Bonny, Brooks & Moore existed, says it was dissolved on the 4th of April, 1857, the dissolution was notorious and plaintiffs had notice of it. On the 10th April, 1857, defendant commenced suit against Bonny, and attached property, recovered judgment, and caused property to be taken in execution. At this time defendant had no knowledge of the claim of the plaintiff; the property was that of Bonny, and in his possession, and defendant, by his attachment, acquired a lien on it. Defendant was, at the time of his suit, the sole owner of the note sued on by him, and that it was all justly due and owing to defendant by Bonny; of the amount, eleven hundred and thirty dollars, was a debt due from Bonny, Brooks & Moore; denies that he aided in bringing about the dissolution of the firm; and also all fraud or connection with any; or all knowledge of any trust or lien, or condition for benefit of creditors, in the sale to Bonny by the parties; and denies it to be the fact that it was so transferred; that one Alison brought suit for the property; that this defendant pleaded that the property was the individual property of Bonny and his attachment a lien on it; that the suit

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was decided in favor of defendants; and that the plaintiffs had notice of these facts, and made no claim to the property; denies that Bonny, Brooks & Moore have not property sufficient to satisfy claim of plaintiffs.

A great deal of proof was taken, oral and documentary. The Court below found that the material allegations of the complaint were proven.

The ground upon which the learned Judge places his decree, in favor of the plaintiffs and intervenors, is, that the lien of the firm creditors of Bonny, Brooks & Moore is paramount to that of the individual creditor of Bonny. It has been seen that Bonny bought out the other two partners and agreed to pay the firm debts. We say he agreed to buy them out; for the mere disguise of this process — by means of the sale to Bell, and his transfer, a few days afterwards, to Bonny — is, when taken with the facts and the answer, too thin to permit us to doubt that Bell acted merely as the agent of Bonny in this transaction. Bonny then held the firm assets; and the question is, having got the title to them in this way, whether they stood anywise differently as respects the firm creditors than if the firm had continued? If the firm had continued, it is not disputed that the rights of the firm creditors would have been prior and paramount to those of an individual creditor; and it is not easy to see any substantial difference in respect to the principle we are considering, between one partner's buying out his associate's share, on agreement to pay the debts of the firm, and suffering the firm name to continue. This was partnership property bound for partnership debts when the firm was in existence, and it continued to be bound for those debts after the sale to this partner, especially when he assumed, as a part of the transaction, of purchase, the payment of those debts. Story on Partnership, Section 97, thus lays down the rule: "In short, as between the partners themselves, the debts and liabilities of the firm to creditors and third persons are a fund appropriated, in the first instance, to the discharge and payment of such debts, and liabilities, and there is, properly speaking, as between them, a lien thereon, or at least an equity, which may be worked out through the partners in favor of the creditors, although it may not directly attach in the creditors by virtue of their original claims,

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in all cases. Each partner also has a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but also for his amount or share of the capital, stock, and funds, and for all moneys, advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any other partner from such stock and funds beyond his share. It follows from this principle, that if any partner takes the whole or a part of his share out of the partnership stock, the stock so taken, if identified, is applicable to the payment of what shall, upon an account taken, be found due from him to the partnership, before any of it can be applied to the payment of his debts, due to his own separate creditors; for such partner has an interest in the stock only to the amount of the ultimate balance due to him, as his share of the stock. The same rule will apply to any other property, into which the partnership property may have been converted, so far and so long as its original character and identity can be distinctly traced. Hence it may be stated, as a general corollary from the foregoing considerations, that no separate creditor of any partner can acquire any right, title, or interest, in the partnership stock, funds, or effects, by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied." (See, also, Story's Eq. Juris. Sec. 1253.)

In *Greenwood v. Brodhead*, (8 Barb. 594,) the rights of creditors in such a case are discussed. The Court say, there is no doubt that joint creditors can, under certain circumstances, have a right of priority of payment out of partnership property, in preference to the private creditors of any separate partner, and *Wilder v. Keeler*, 3 Paige, 167; *Hall v. Hall*, 2 McCord, Ch. 302; Story's Eq. Sec. 1253; 1 Sand. Ch. 348, are cited.

The section of Story's Equity referred to holds: "The creditors, indeed, have no lien, but they have something approaching to a lien; that is, they have a right to sue at law, and by judgment and execution to obtain possession of the property, and in equity to follow it as a trust." So it is said in 8 Barbour: "The creditor must proceed to obtain a lien on the property before he can interfere to control it. If it be real estate, he obtains the

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lien by judgment; if personal property, liable to execution, by levy under process; and if choses in action, by the return of an execution unsatisfied after filing a complaint."

In this case, the plaintiff had, before the filing of his bill, a lien by attachment and a judgment. We see no necessity for the levy of an execution. It would have answered no beneficial purpose; it was not necessary to give a lien; that had already accrued from the levy of the attachment; and it was not necessary for a sale, for a sale was not desired. The intervenors also had attachments levied; that gave them a lien; and if they had waited for the filing of their bill until judgment was obtained, it might have been too late. At the time of the trial, they had obtained and produced their judgments. The authorities do not place the right to go into equity upon the ground that the plaintiffs must show themselves to be creditors by judgment; but they go on the ground that they must show a lien on the property; and this lien exists as well by the levy of an attachment as by execution.

It is true, it is said in 8 Barbour, "that until such lien is obtained, the partners have power to make any *bona fide* sale of the property they think proper. But when such lien exists, the creditor may claim the aid of the Court to restrain the disposition of the property by injunction, to have it placed in charge of a receiver, and to compel its equitable application." But we do not understand by the *bona fide* sale here spoken of, a sale, directly or indirectly, to one of the partners, accompanied with a stipulation that he shall pay the firm debts.

Indeed, this very question was decided in *Sedam v. Williams*, (4 McLean, C. C. R. 51.) But it scarcely needs authority to prove that if this equity existed against the three partners, or the firm property, when owned by the three, that it lost none of its force from the *mere fact* that the sole title to the property became lodged in the hands of one of them, no credit having been given by individual creditors on the strength of an apparent sole ownership in the vendee.

Woods seems to have had notice of these facts; and if he had not, the mere fact of his getting his separate judgment and issuing execution, and making a levy, gave him no title to this property as against the superior equity of these firm creditors.

Woodbury v. Bowman.

2. We think that a Court of Equity has jurisdiction of this case. No action against the Sheriff would lie for a levy, and the property would, perhaps, be lost by a sale of it to different purchasers. (*Place v. Sweetzer*, 16 Ohio, 142; 19 Vermont, 286.)

The other points are not well taken.

Woods is the only Appellant here, and he can complain of no error not to his prejudice.

Decree affirmed.

See Hayneman et al. v. Dannenberg et al. 6 Cal. 376; *Scates v. Scott*, ante.

WOODBURY v. BOWMAN et al.

In a suit on an injunction bond, defendant, to show that the injunction suit was still pending, offered in evidence, an order from the Supreme Court, directing the Court below to fix the amount of a suspensive appeal bond, that Court having dissolved the injunction. *Held*, that the order was properly rejected, the defendant not offering to show that the bond and notice of appeal were given, and the transcript filed in the Appellate Court. Where a suit is pending in the Supreme Court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue, even between the parties.

APPEAL from the Fifth District.

For case see opinion.

Heydenfeldt, for Appellant.

Robinson, Beatty & Heacock, for Respondent.

TERRY, C. J. delivered the opinion of the Court—BALDWIN, J. concurring.

This was an action upon an injunction bond; plaintiff recovered judgment below, and defendants appeal.

The first point taken by Appellant is, that the Court below rejected evidence offered by defendants to prove that the right to the injunction was not finally decided at the commencement of this action. This point would be decisive of the case, if the evidence offered was sufficient to establish the pendency of the injunction at the time this suit was instituted; but upon examining the evidence offered, it is clear that it is not sufficient for this purpose.

The paper offered in evidence, which is set out in the record,

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and which is called a *supersedeas*, is simply an order directing the Court below to fix the amount of a suspensive appeal bond. There was no offer to show any other steps—such as giving the bond after the amount was fixed, giving notice of appeal, and filing the transcript in the Appellate Court—all of which were necessary to show that the question was still pending and undecided.

The Appellant is also incorrect in his statement that “a stipulation between the parties to show that the appeal from the dissolution was still pending under the *supersedeas*,” was offered and rejected. The record shows that the stipulation offered was admitted by the Court against the exception of plaintiff; the stipulation itself seems to have been admitted; at least there is no reference to it either in the index or briefs of counsel, and we have been unable to find it, and, in the absence of direct evidence to the contrary, we must presume in favor of the judgment, that it did not establish the pendency of the case.

The second point is, that the Court rejected evidence offered to prove that the water of which plaintiffs were deprived, during the twenty-five days while the injunction was observed, was not the property of plaintiff, but of the Mokelumne Hill Canal Company, who were plaintiffs in the injunction suit, and the party in whose behalf the bond sued on in this action was executed by defendants.

The evidence offered on this point seems to have been the judgment roll in the suit of *The Mokelumne Hill Company v. Woodbury*, 10 Cal. 185, which cause was then pending in this Court upon an appeal, which was taken from the judgment by the present plaintiff, who was defendant in the suit.

We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue, even between the parties to it.

Judgment affirmed.

Levy v. Supervisors Yuba County.

LEVY v. SUPERVISORS YUBA COUNTY.

WHEREAS a county is already in possession of a set of weights and measures according to law, it cannot be held liable for a new set purchased by the Deputy Sealer of Weights and Measures.
The fact that the County Clerk refused to deliver the set to plaintiff on demand, is immaterial. He should have enforced his right.

APPEAL from the Tenth District.

Case made under the 337th Section of the Practice Act.

Plaintiff presented his account to defendants, and they rejected it. The Court below entered judgment for plaintiff. Defendants appealed.

For facts, see opinion.

F. L. Hatch, District Attorney, for Appellant.

Gordon N. Mott, for Respondent.

TERRY, C. J. delivered the opinion of the Court — BALDWIN, J. concurring.

Plaintiff, who is Deputy Sealer of Weights and Measures for Yuba County, seeks to recover the sum of three hundred and twenty-five dollars, as the price of a set of weights and measures purchased by him for the use of his office.

The 3d Section of the Act of April 12th, 1858, authorizes "every Deputy Sealer of Weights and Measures to procure, at the expense of his county, a complete set of weights," etc. and Levy, after his appointment, proceeded to make such purchase, although he knew that there was a complete set of such weights and measures belonging to the county, in the possession of the County Clerk.

We think defendants properly refused to audit the account.

The county of Yuba was already in possession of the weights, etc. necessary for the office, and it was not contemplated that every change in the incumbent of the office should entail upon the county the expense of a new purchase of articles already on hand. It is not material that the County Clerk refused to deliver the weights, etc. to plaintiff on his demand; if he was entitled to their possession by virtue of his appointment, he should have taken proper steps to enforce this right.

Judgment reversed,

Hancock Ditch Co. v. Bradford.

HANCOCK DITCH CO. v. BRADFORD *et al.*

PLAINTIFF has a right to take a nonsuit at any time before the jury retires, there being no counter claim. Nor, under the 14th Section of the Practice Act, is he bound to tender costs before the nonsuit. The provision as to costs is simply, that, by the nonsuit, plaintiff becomes subject to costs.

APPEAL from the Fifth District.

Bill in equity to restrain defendants from diverting the waters of Wood's Creek from plaintiff's ditch.

H. P. Barber, for Appellant, cited 2 Wend. 295; Prac. Act, Sec. 148, Sub. 4; 3 Chitty's Genl. Pr. 910; 1 Graham on New Trials, 281; 3 Id. 896, Note; 3 Blac. 376.

L. Quint, for Respondent, cited Prac. Act, Sec. 148; *Locke v. Wood*, 16 Mass. 316; 12 Id. 47, 48.

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

The error assigned here is, that the Court refused to permit the plaintiff to take a nonsuit after the testimony for plaintiff and defendants was closed. No counter claim seems to have been made in this case by defendants. By the 148th Section of the Practice Act, it is provided "that the plaintiff may, at any time before trial, upon the payment of costs, if a counter claim has not been made," take a nonsuit. By *trial* here, is meant the determination or finding in the case. We do not understand that the plaintiff is bound to tender the costs before being entitled to be nonsuited; for the costs cannot be at the moment known or computed. But this proviso was only meant to declare that the effect of the nonsuit is to subject him to costs. At common law, the right of the plaintiff was to take a nonsuit at any time before the jury retired, and we do not construe the statute as altering the rule. (3 Ch. Genl. Pr. 910.)

The judgment on the verdict is reversed, and the cause remanded, with directions to the Court below to enter judgment of nonsuit as of the 8th November, 1858.

Skinker v. Flohr.

SKINKER v. FLOHR.

An affidavit by a party to the suit, that the original deed "is not in his possession or under his control," is sufficient to admit in evidence a certified copy from the Recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person.

APPEAL from the Sixth District.

Ejectment. Plaintiff had judgment, defendant appeals.

For case see opinion.

C. A. Johnson, for Appellant, cited: *Beach v. McCann*, 2 Cal. 25; *Folsom's Executors v. Scott et al.* 6 Id. 460; *Macy v. Goodwin et al.* Id. 579; *Fallon v. Dougherty*.

Latham & Sunderland, for Respondent, cited: the Act of 1857, 317, arguing that where a party is in no way connected with a deed as grantee, he is not presumed to have its custody, and hence it not bound to account for the absence of the original, before he can introduce a certified copy, and that his affidavit, that the original "is not in his possession, or under his control," meets the statute.

BALDWIN, J. delivered the opinion of the Court — TERREY, C. J. concurring.

There is no merit in this appeal.

The only error assigned is, the ruling of the Court admitting in evidence certified copies of certain deeds to third persons as grantees, which deeds had been regularly acknowledged and recorded. The plaintiff below laid the foundation for their introduction by his affidavit that the originals were not under his control. By this affidavit he brought himself within the words of the Act of April 29th, 1857, (Acts, 317,) the second section of which provides, that "duly certified copies of deeds regularly recorded upon the acknowledgment or proof of execution by the party or parties thereto, subject, however, to all legal exceptions that might be taken to the original if produced, shall be received in evidence in all the Courts of the State, without further or other proof of the execution thereof, in the same manner and with like effect, as if the originals were produced and

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proven; *provided*, it be shown that the said originals are not under the control of the party offering the said copies, or are lost," and this showing is properly made by the affidavit of the party.

Judgment affirmed.

RUTHRAUFF *et al.* v. KRESZ *et als.*

UNDER the statute, the County Judge may grant an injunction in cases in the District Court, but he cannot appoint a Receiver; at least, not as a thing distinct from the injunction.

APPEAL from the Fifth District.

Suit to recover a portion of a "Tunnel Gold Mining Claim," alleged to be wrongfully seized and worked by defendants, for damages and an injunction pending the suit.

J. P. Vaughan, for Petitioner.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

The plaintiff, at the time of filing his complaint, obtained from the Judge of the County Court an order of injunction to restrain the defendants from working the premises in dispute, and requiring them to appear before him at chambers, to show cause why the injunction should not be made "perpetual pending the action." The County Judge dissolved the injunction, but appointed a Receiver; to which the defendant excepted, and now, by *certiorari*, brings the case here on appeal from this order.

By Section 9 of Article 6 of the Constitution, it is provided that "the County Courts shall have such jurisdiction in cases arising in Justices' Courts, and in special cases, as the Legislature may prescribe, but shall have no original civil jurisdiction except in such special cases."

The Legislature has given (Wood's Digest, 181,) to the County Judge power to grant an injunction; but it seems that no power is given him to appoint a Receiver; certainly not as a distinct proceeding from the injunction. This would be an order, like any other in the course of a cause which the District Court or

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Judge might make. The statute (Wood's Digest, 185,) provides "that a Receiver may be appointed by the Court in which the action is pending, or by a Judge thereof." We do not see where the authority for this power in the County Judge is to be found; nor that he could make an order of this sort any more than any other order, in a cause pending in the District Court, deemed necessary to the progress of the case.

Order reversed.

BRIDGES & HALL v. PAIGE.

Suit by an Attorney on a *quantum valebant*, for professional services. Answer denies the value of the services. *Held*, that the rule requiring new matter to be set up in the answer does not apply.

Anything which shows plaintiff has no right of recovery at all, or to the extent claimed on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer.

New matter is, where defendant seeks to introduce into the case a defense not disclosed by the pleadings — something relied on by him, but not put in issue by the plaintiff.

Skillful, or unskillful and negligent conduct of a case, is an important inquiry in such a suit by Attorneys. Anything which shows the services were not of the value claimed, as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, the absence of skill and the like, is competent, under the issue of value.

A trial may result successfully and yet the Attorney be guilty of negligence. His want of skill, or neglect, may put the client to great expense to redeem his blunders. And, on a *quantum meruit*, the value of services would be reduced.

APPEAL from the Fifth District.

For case see opinion. The pleadings were verified. Plaintiffs had judgment, and defendant appeals.

D. W. Perley, for Appellant.

B. C. Whiting, for Respondent, cited: 46th Section of the Practice Act; *Green v. Covillaud*, 10 Cal. 317; *Piercy v. Sabin et al.* Id. 22; *Walton v. Minturn*, 1 Id. 362; 4 Id. 117; *Kendall v. Vallejo*, 1 Id. 371.

BALDWIN, J., delivered the opinion of the Court — TERRY, C. J., concurring.

This suit was brought as on a *quantum valebant*, for professional services as Attorneys. The complaint claimed, among other charges, a sum of money due for the conduct of a suit of *Paige v. O'Neill*, 12 Cal. 483. The answer denied the value of the

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services as charged. The defendant proposed to show by a witness—one of the plaintiffs—that they did not perform the legal services rendered by them in the case of *Paige v. O'Neill* with ordinary care, diligence, or reasonable skill, but that they performed said services negligently and unskillfully, and that, by reason of such unskillfulness and negligence, the case, which is now on appeal in the Supreme Court, is in great danger of being reversed. The defendant's counsel proposed to show the above facts by an examination of the witness in connection with the judgment roll in said case, the statement on appeal, and by all the papers on file in the said action; and the said defendant's counsel further proposed to show, after the said examination was concluded, touching the unskillfulness and negligence on their part in managing and conducting said cause, that their services were not reasonably worth the amount claimed in the complaint. But the Court refused to permit or allow the defendant's counsel to go into said examination, and refused to permit the defendant's counsel, either by an examination of the witness or by an examination of the judgment roll, to show that plaintiffs had been guilty of any unskillfulness or negligence whatever.

One of the reasons given for this ruling is, that this matter is not set up in the answer. It seems to be supposed that this was new matter, which should have been affirmatively pleaded. The rule invoked, however, does not apply to this case. Anything which shows that the plaintiff has not the right of recovery at all, or to the extent he claims, on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. Where, however, something is relied on by the defendant which is not put in issue by the plaintiff, then the defendant must set it up. That is new matter—that is, the defendant seeks to introduce into the case, a defense which is not disclosed by the pleadings. This case is a good illustration: the plaintiffs aver that the defendant is indebted to them in the sum of, say fifteen hundred dollars, for services rendered; that he is indebted to this amount because this was the value of these services. The defendant denies that he is indebted at all, and denies, further, that the services were of the value charged. He proposes to show that they were not of this value. He can do this by any legal proof, and he is not

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bound to set out his proofs in his pleading. Facts, and not the evidence of facts, are required to be pleaded. Whatever, therefore, had a legal tendency to prove that these services were worth the sum, was competent for plaintiffs, as the nature of the suit, its difficulty, the amount involved, the skill required, the skill employed, and the like. So the defense had a right to prove these same general matters, or the negation of them, as, for example, that this was a plain case, requiring but little labor or skill, learning, or time; or if it required skill and attention, that these were not bestowed. The value of a lawyer's services depends upon his skill and learning, and the attention he gives to the business of the client. It is evident, therefore, that proof of his skillful conduct of his case, or of his negligent and unskillful treatment of it, is an important inquiry. It does not follow by any means, that because a trial results in a verdict for the client, there has been no negligence in the Attorney. In consequence of the negligence, the client may have been put to great trouble and expense, though, by accident or otherwise, he happened to gain the case; and though the Court below may have decided on the trial of a case that errors negligently committed were not fatal, yet the defendant might show, when sued for fees by the Attorney, that the Judge was mistaken in thus holding. Besides, a case may be negligently conducted even when it is not eventually lost by neglect. It may put the client to great trouble, expense, and delay, to get rid of blunders of his lawyer. If, for example, an Attorney should, by his neglect, consent to a bill of exceptions full of errors and misstatements, and raising unnecessarily many difficult and embarrassing questions of law for revision in the Appellate Court, which questions, as the case, in fact, was presented below, did not arise, no one would pretend, that though the cause was, after long delay and much loss, gained in the Supreme Court, the Attorney would not be amenable to the charge of neglect; or if the Attorney suffered testimony to be introduced plainly inadmissible, and the client was put to the expense and trouble of summoning many witnesses to counteract it, though he at length did so successfully, the same objection would lie; and in both these instances, the Attorneys would be held entitled to a less sum on *quantum meruit*, than if a contrary course had been pursued. What pa-

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ticular errors, if any, were committed on the trial of *Paige v. O'Neill*, or what particular acts of negligence done, were not disclosed, the Court refusing to hear any testimony on that subject. We have not the record of that case before us, and cannot look into it. It seems that the judgment of the Court below was partially affirmed in this Court on appeal, but not, we believe, before this trial below, nor does it appear whether the matters of alleged negligence proposed to be proven were considered here. Indeed, we cannot look into any record before us, not legally offered as proof, for any purpose of the application of the facts of that record to any other case as evidence in the latter case.

It may be that the record of *Paige v. O'Neill* showed no negligence; and the rulings of the learned Judge below, on the motion for a new trial, would seem at the first blush to establish this fact; but we cannot know, in the face of the offer to prove the contrary, that the defendant would necessarily have been unsuccessful; nor do we understand from the broad proffer of proof, that the negligence imputed was confined to errors as shown by the record.

Judgment reversed, and cause remanded.

See *Terry v. Stobles*; ante; *Angulo v. Sunol*, 14 Cal.

PFEIFFER & WIFE v. RIEHN & SCANNELL.

In an equity case, submitted by the Court to a jury, this Court will not review the testimony, if any proof sustains the verdict and judgment.

A jurat to an answer is, in form and substance, an affidavit, and may be taken before a County Recorder.

Where husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife.

Owrey v. Tice, (6 Cal. 629,) that the Legislature may determine in what manner and how the homestead is to be protected, affirmed.

In a mortgage of the homestead, the premises need not be described as the homestead.

Where the jury and Court are satisfied that the wife understood English, at the time of executing and acknowledging a note and mortgage upon the homestead, there was no necessity for an interpreter to explain the contents of the mortgage.

In a foreclosure suit, on a note and mortgage of the homestead, executed by husband and wife, the wife alone answered, but did not verify her answer. On suit brought to vacate the decree rendered in the foreclosure, the wife, having been served with process, cannot complain that her answer was not

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verified. And her failure, by excusable negligence, to make defense to the foreclosure, is no ground to vacate the decree, if it be shown that in fact she had no defense.

▲ A decree, in an equity case, is not vitiated because based on the verdict of a jury, even though it might have been made without a jury.

APPEAL from the Twelfth District.

Facts stated by the Court. Scannell, as Sheriff, is made party in order to enjoin him from making a deed of the premises to Riehn, who bought at the foreclosure sale, and to whom, it is averred, the Sheriff is about to make a deed. Plaintiffs appeal from a judgment for defendant.

Gregory Yale, for Appellant.

I. The note and mortgage, so far as they affect the interest of the plaintiff, Theckla, and her children, in the homestead, are void.

1. As to the note. The note of a married woman is void, except so far as she may bind her separate property in equity. Her note cannot bind her interest in the homestead, as the estate is joint, in the husband and wife, with the interest in the children.

2. The premises were not described as a homestead in the mortgage. The word "homestead" does not occur in the mortgage, or in the complaint to foreclose, or in the summons, or in the decree of foreclosure. The term "homestead" has a distinct legal signification; and the term, as used in the Constitution and the Act, must be interpreted according to that known signification. (1 Bouv. Dic. 641; see, also, *Woodman v. Lane*, 7 N. H. 245.)

This point is important in connection with the character of the acknowledgment to be made by the wife. The Notary in this case merely states in his certificate that she executed the same, (the mortgage,) for the uses and purposes therein mentioned, and "after being made acquainted with the contents of said instrument" acknowledged, etc. She may have been made acquainted with the contents of the mortgage, and yet have known nothing of the mortgage of the homestead. The Homestead Act, say the Court, *Pease v. Barbiers*, (10 Cal. 440,) refers the mode of acknowledgment to the law relating to conveyances.

3. That part of the Act authorizing a forced sale of the home-

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stead, is unconstitutional. "Forced sale," in the Constitution, is used as contradistinguished to "voluntary sale." The constitutional provision is, in effect, a prohibition against a forced sale. It may be, that, until the Legislature acted, no protection against a forced sale was provided by the mere constitutional mandate. (*Groves v. Slaughter*, 15 Pet.) But the Legislature, having acted upon the subject, could only act within the scope of the constitutional provision. It could not impair the force of the provision by qualifying it. It is doubtful whether value has anything to do with the exemption under the Constitution. The principle is to protect the family residence.

What is said upon this subject in *Cary v. Tice*, (6 Cal. 629,) is not only a *dictum*, but contrary to express authority under a constitution from which our provision was adopted. (*Sampson et al. v. Williamson*, 6 Texas, 102; *Benedict v. Burnell*, 7 Cal. 246.)

II. The proceedings and judgment in the suit of Riehn to foreclose the mortgage, so far as affects the plaintiff, Theckla's, interest in the homestead, are nullities.

This results from the character of the estate, being a joint tenancy, requiring the husband and wife to unite in an action to defend the homestead. (*Revalk v. Kraemer*, 8 Cal. 66; *Poole v. Guard*, Id.; *Kraemer v. Revalk*, Id. 74; *Van Reynegan v. Revalk*, Id. 75; *Marks & Wife v. Marshe*, 9 Id. 90; *Moss v. Warner*, 10 Id. 296; *Sargeant v. Wilson et al.* 5 Cal. 507.)

Neither will the acts or declarations of the husband bind the wife, as to the homestead. (*Dunn v. Tozer*, 10 Cal. 167.) His default could not affect her. If he could cause a loss of the homestead by default, he could by sale, or abandonment. The answer of the wife is a nullity. Her failure to defend, under the circumstances, was excusable neglect. (Pr. Act, Sec. 68.) The trial by jury was wrong. (*Sanders v. Still & Wife*, 8 Cal. 281.)

IV. The evidence proves that the plaintiff, Theckla, was not sufficiently acquainted with the English language to comprehend the character of the mortgage.

The statute makes no provision for the employment of interpreters where acknowledgments of foreigners are taken to deeds. If an interpreter is employed, or, if the officer taking

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the acknowledgment uses any other than the English language, in communicating with the person making the acknowledgment, the certificate should state the fact. See *Moore v. Peralta*, (McAllister's C. C. R.) as to the practice in chancery of appointing interpreters on filing answers, where the party does not understand English.

Equity will relieve against this deed, signed in ignorance of her rights. (4 Young & Coll. 42.)

Campbell & Turk, for Respondent.

I. The question of fact has been determined by a jury. The Court below has sanctioned that determination.

It is immaterial whether any, and, if any, what, errors were committed in the original suit; they could not be corrected in this proceeding.

II. The note of a married woman is not void, but only voidable, and though Theckla might have availed herself of this defense in the first suit, she failed to do so, and has not shown any sufficient excuse for her *laches*. Doubtless the judgment was entered against her personally through inadvertence, and, upon suggestion, the judgment would have been so modified as to correct the error. But this would not have prevented the sale of the homestead under the mortgage. That instrument was not invalidated by the fact of her signing her note; the remedy would have been just as perfect against the property if she had never seen the note.

III. The Constitution is advisory. It does not pretend to limit the Legislature. If no legislation had been adopted on the subject the entire property of the debtor would now be liable to execution. The extent to which the Legislature shall act is not regulated by the Constitution. The nature of the subject precludes the possibility of laying down any fixed rule.

IV. If the proceedings and judgment in the case of Riehn to foreclose the mortgage, so far as they affect the plaintiff, Theckla's, interest in the homestead, are nullities, she has no standing in Court. The nullity is apparent, if at all, on the face of the papers. If they are not nullities, but errors merely, they can be corrected on appeal, and a bill in equity does not lie. That, in

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a suit to claim the homestead, husband and wife are necessary parties is not disputed; but that does not tend to prove that where A commences a suit against B and his wife to foreclose a mortgage executed by them, A is bound to, or can, compel them to set up any particular defense whatsoever; they, or either of them, may defend if they please, or suffer judgment to go against them, or either of them, by default.

There is nothing in the objection to the jury trial, as a verdict in these cases is advisory only. So, as to the jurat to the answer, the term "affidavit" embraces the verification.

BALDWIN, J. delivered the opinion of the Court—TERRY, C. J. concurring.

This bill was filed by the female plaintiff, in conjunction with her husband, to set aside a certain decree for the sale of property which she claims as homestead, situate in San Francisco. This lot was sold on a decree for the foreclosure of a mortgage, which was executed to Riehn by Pfeiffer and wife, in the form required by statute. The female plaintiff charges that she was ignorant of the English language. That she was requested by her husband to sign a note, and a mortgage to secure it, on this property, which she did without knowing the contents; that the mortgage purports to be acknowledged before one Moore, Notary Public, the certificate being in the usual form, but she denies the truth of the facts therein stated—as the examination and her being made acquainted with the papers. The same averments are made in relation to another mortgage.

Bill avers that defendant, Riehn, in January, 1857, commenced an action for the foreclosure of his mortgage against the plaintiffs, etc. The summons was returned as executed on them the 21st January, 1857; that neither of the defendants, except the female plaintiff, answered, and, on the 20th June, 1857, a default was entered in the Clerk's office against all the defendants except the female plaintiff. That, on the 10th February, 1857, she filed her answer, signed by a law firm, denying the execution of the note and mortgage, and claiming a homestead. On the 27th June, 1857, a verdict was returned for the plaintiff.

She avers, that, at the time she received the summons, from the Deputy Sheriff, she handed the same over to her husband as

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a matter pertaining to his business alone; and, at the time of the trial, and for a long time before, she was sick; that she was dependent on her husband to employ counsel and defend the suit, etc.; that he employed one Parker, but never told him of the defense as here set up. Parker accordingly did not set up any such defense. She is advised that the answer—denying the execution of written documents on which the action was founded—not being verified was a mere nullity; that no Attorney was present at the trial; avers that the consideration on which the mortgage was given was a mere nullity—it being a joint note of her and her husband; that she could make no joint contract except as connected with her separate estate—which this was not.

Bill prays that the verdict may be set aside and the decree of foreclosure entered thereon opened up, and plaintiff admitted to make a defense, etc.

The defendants answered, denying the material averments in respect to the execution and acknowledgment of the mortgage, and averring that she acknowledged it as the certificate states, knowing the contents, which were explained to her.

The Court below submitted the case to a jury, who returned a verdict for the defendants.

It would be no easy task, perhaps, for the plaintiff to maintain this bill, even upon proof of all its averments. But upon looking at the proofs, though they do not agree, we have no hesitation in arriving at the conclusion that the jury were right in their verdict. It is not our habit to review the testimony; it is unnecessary here; because if any proof sustains the verdict and judgment, we should not disturb it.

Some points are made by the Appellant, which we will briefly notice:

1. A motion to strike out the defendants' answer because it was not verified—the bill having been sworn to. The ground of this objection is, that the verification was before the County Recorder, who had no authority, as Appellant contends, to administer oaths. But the statute giving authority "to Recorders to take affidavits to be used in any Court of Justice in this State," comprehended the power to take and certify the jurat—which is, in form and substance, an affidavit.

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2. It is said that a married woman cannot make a note except as affecting her separate estate, and, therefore, this mortgage founded on this note, is void. We think otherwise. Even if the note of the wife is void as to her, it was good as to the husband, and the property is bound by the mortgage, independent of the note of the wife — if otherwise valid.

3. It is argued that the Constitution protects the property from forced sale by decree of foreclosure of a mortgage, as well as otherwise, and some cases from Texas are cited. But the Texas Constitution is different from ours. In the case of *Carey v. Tice*, (6 Cal. 629,) the same point was made. The Court say: "Upon the point that the Legislature can direct in what manner this species of property may be sold, or the tenancy destroyed, we have no doubt. The Constitution is inoperative of itself, and looks to legislation; and in acting upon this subject, it was a matter entirely within the discretion of the Legislature to determine how far, and in what manner, the homestead should be protected." It is true, the case might have been decided without this last proposition, but it arose from the facts and was fully argued. We regard the decision as binding, upon the rule of *stare decisis*, as important rights have vested under it, even if we were satisfied — which we are not — that the doctrine was originally questionable.

4. We think there was no necessity for the mortgage to define the premises as the homestead. The grantors interested in property are presumed to know what they are granting when they use expressions which accurately describe the property.

5. There was no necessity for an interpreter, for it seems the jury and the Court below were satisfied that the wife understood English.

6. Having been served with process, the wife was bound by the judgment in the first suit. She cannot complain that her answer was not verified. And if she, by excusable negligence, failed to make defense, the very thing found against her now is that she had none.

7. The decrees might have been made in both suits without a jury, but we do not see that they were vitiated because of the verdicts.

Decree affirmed.

CASES NOT REPORTED.

THE following cases were decided at the April, July, and October Terms, 1859, but are not of sufficient importance to report:

AFFIRMED.—*Parburt v. Monroe, et al.*; *Batterton v. Fair*; *Young v. Le Count*; *State of California v. City and County of San Francisco*, on authority of *Hyman v. Read, (case)*; *People v. Jenkins*—no evidence in record to point exceptions; *People v. Elder, Id.*; *Sallentine et al. v. Steamer Maria*; *Algier et al. v. Steamer Maria*; *Howard v. Low*; *Knowles v. Calderwood*; *Head v. Barney*; *Gregory v. Haynes*, (No. 2511); *Wilson v. Cummings*; *Bender v. Aubrey*; *Inches v. Van Valkenburgh*; *McCoy v. Shepard*.

REVERSED.—*Gift v. Hunsacker*, on authority of *Hickman v. O'Neal*, (10 Cal. 292); *Macleeta, Ex'r, v. Packard, Administ'r*, (No. 2524); *Haynes v. Weeks*; *Crary v. Bowers*.

DISMISSED.—*Brown v. Henderson*, for want of jurisdiction; *Haag v. Damas*, *Id.*; *Simmons v. Brainard, Id.*; and, *held*, that an offset being plead, which, added to the amount sued for, exceeded two hundred dollars, does not give jurisdiction; *Myres v. Lining*; *Edwards v. Read*; *Burnett v. McQueen*.

EXTRA ANNOTATION
TO
PRECEDING VOLUME



VOLUME XIII.

By CHARLES T. BOONE.

Revised to include citations to Volume 147, by CHARLES L. THOMPSON.

13 Cal. 9-11. BARKER v. KONEMAN.

Husband and Wife.—Deed of gift from husband to wife, of his separate real estate, he being at the time free from debts and liabilities, is valid as against creditors, p. 11.

Commented on and distinguished, *Kohner v. Ashenauer*, 17 Cal. 581, in which case the conveyance was not of any separate property of the husband, and it did not appear that the property was transferred as a gift, or in exchange for any separate property of the wife, and it was held that the property therefore continued subject to the disposition of the husband after the title was placed in the wife's name, as it was previously, and that the conveyance in no respect affected the validity of a mortgage subsequently given by the husband on the same property. Explained, *Peck v. Brummagim*, 31 Cal. 445, 447, 89 Am. Dec. 199, 200, extending the rule to a gift of either real or personal property, and to that which at the time was the community property of the husband and wife. And so in *Dow v. Gould etc. Min. Co.*, 31 Cal. 653; *Rico v. Brandenstein*, 98 Cal. 469; 35 Am. St. Rep. 196. Ruling approved, *Furrow v. Athey*, 21 Neb. 672; 59 Am. Rep. 868; and cited as authority, *Cooke v. Bremond*, 86 Am. Dec. 642, note, treating of conveyance from husband to wife. Also cited, *Tillaux v. Tillaux*, 115 Cal. 671, holding that there is no presumption of undue influence in case of a conveyance from one spouse to the other, but the deed prima facie conveys whatever its terms embrace.

Same.—The law favors provisions made by the husband, when in solvent circumstances, for the wife and family, against possible future misfortunes, p. 11.

Approved, *Tillaux v. Tillaux*, 115 Cal. 669, holding that a deed from husband to wife, conveying an absolute title in fee, with an expressed consideration of "love and affection," and "for her better maintenance and support," requires no other consideration to support it. So, to same effect, *Emmons v. Barton*, 109 Cal. 671.

13 Cal. 11-13. WAUGH v. CHAUNCEY.

Board of Supervisors.—Powers of are administrative, legislative, and judicial, and jurisdiction over roads, ferries, and bridges, is given to such board by statute, p. 12.

Cited as authority, *Fall v. Payne*, 23 Cal. 303; and *Bixler v. County of Sacramento*, 59 Cal. 702; so in *Kimball v. Alameda County*, 46 Cal. 24, holding that such boards may exercise jurisdiction in opening public highways across public lands; so in *Belser v. Hoffschneider*, 104 Cal. 460, holding that the action of a city council in the matter of an appeal from an assessment was judicial; so in *State v. Ormsby County*, 7 Nev. 397, and applied to duties of county commissioners.

Same.—The judgments or orders of such board cannot be attacked collaterally, any more than the judgments of courts of record, p. 12.

Approved, *Fall v. Paine*, 23 Cal. 303, and *Levee District v. Farmer*, 101 Cal. 181, holding that its judgment may be reviewed upon certiorari, where the jurisdiction of the board has been exceeded. So in *Gilbert v. Commissioners*, 11 Utah, 387, applied to judicial acts of board of police and fire commissioners. Cited as authority for the doctrine stated, 65 Am. Dec. 543, n.

13 Cal. 13-15. HAFFLEY v. MAIER.

Estoppel.—Mortgagor having mortgaged land as his own is estopped, as are also his privies in estate, from saying it is public land, p. 14.

Approved, *Kirkaldie v. Larrabee*, 31 Cal. 457; 89 Am. Dec. 206. Principle applied, *De Frieze v. Quint*, 94 Cal. 659; 28 Am. St. Rep. 153, holding that the grantor of land is estopped by his deed of grant, bargain, and sale, purporting to convey an absolute title to the land, from denying that before and at the time of that deed he had such absolute title, and by that deed conveyed it to the grantee.

Mortgage is a Mere Security for a debt, and does not pass the fee, nor give a right of entry, p. 14.

Approved, *Goodenow v. Ewer*, 16 Cal. 468; 76 Am. Dec. 544, and *Dutton v. Warschauer*, 21 Cal. 621; 82 Am. Dec. 768, holding that a mortgage is not a conveyance vesting in the mortgagee any estate in the land either before or after condition broken. So in *Willis v. Farley*, 24 Cal. 498, and *Jackson v. Lodge*, 36 Cal. 39, holding that a mortgage passes by an assignment of the debt, is discharged by a payment of the debt, and is barred by the statute of limitations when the debt is barred. Cited as authority on the ruling stated, *McMillan v. Richards*, 70 Am. Dec. 675, n.

Judgment.—If right, will not be reversed, though a wrong reason was given for it, p. 15.

Approved, holding that an erroneous conclusion of law constitutes

no ground for reversal, if the judgment was right, *Spencer v. Duncan*, 107 Cal. 426.

Parties.—Where land mortgaged is sold, the vendee of the mortgagor cannot be ousted from possession by a purchaser under the decree of foreclosure and sale, unless he was made a party to the foreclosure suit, p. 15.

Principle of the ruling applied, *Barrett v. Blackmar*, 47 Iowa, 570.

13 Cal. 15-24. **CRANDALL v. BLEN.**

Execution.—Whether a chose in action, calling for a definite sum without condition, is the subject of levy and sale, questioned, p. 22.

Referred to, *Davis v. Mitchell*, 34 Cal. 89, holding that a promissory note, being the property of the defendant in an attachment and execution, is liable to seizure and sale thereunder, and discussing, but not deciding, whether the sale will be valid without a delivery of the note to the purchaser. Also referred to in *McBride v. Fallon*, 65 Cal. 303, in which case it is held that a judgment cannot be levied upon and sold under execution as personal property capable of manual delivery, but only in the mode prescribed in section 542, Code of Civil Procedure. Cited, defining the term "property," 55 Am. Dec. 405, note; also, 92 Am. Dec. 416, note, as questioning *Adams v. Hackett*, 7 Cal. 187.

13 Cal. 24-23. **HOUSTON v. WILLIAMS.** 73 Am. Dec. 565.

Constitutional Duty of Supreme Court is discharged by the rendition of its decisions, and the legislature cannot require it to give the reasons of its decisions in writing, p. 25.

Cited as authority to the same ruling, *Vaughn v. Harp*, 49 Ark. 161; *Jordan v. Andrus*, 26 Mont. 42, act of March 9, 1901, providing that transcripts on appeal may be printed or typewritten at the election of appellant is invalid; *Ex parte Griffiths*, 118 Ind. 85, 66, 10 Am. St. Rep. 109, holding that a statute requiring judges of the supreme court to prepare syllabi of their decisions was unconstitutional and void; denying power in the legislature to trench upon the powers of the judges, or to prescribe the mode in which they shall discharge their duties, *State v. Smith*, 5 Mo. App. 430, *De Votie v. McGere*, 14 Colo. 592; *Saint Croix Lumber Co. v. Pennington*, 2 Dak. Ter. 473; and *Smythe v. Boswell*, 117 Ind. 366, and referred to in this connection, *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 593; and *Nudd v. Burrows*, 91 U. S. 442; 13 Bank. Reg. 295. Distinguished, *In re Jessup*, 81 Cal. 485, construing constitutional provision as to the granting of rehearings in bank after decision by a department.

Same.—A decision of the court is its judgment, the opinion is the reasons given for that judgment, p. 27.

Cited in *Wilson v. Wilson*, 64 Cal. 94, holding that the opinion of the judge of the trial court is not a part of the record. Distinguished,

Pierce v. State, 109 Ind. 536, the terms "opinion" and "decision" being sometimes used interchangeably in the Indiana statute, so that an exception to the "opinion" of the court has been sustained as proper; *Board v. State*, 7 Kan. App. 623, *Adams v. Yazoo etc. Co.*, 77 Miss. 304, and *Buckeye etc. Co. v. Fee*, 62 Ohio St. 556, 78 Am. St. Rep. 745, construing local statutes; *Eureka Co. Bank v. Clarke*, 130 Fed. 326, opinion of court is not proper subject for assignment of errors; *State v. Gray*, 42 Or. 268, where terms of decree conflict with statements of fact in court's opinion, decree is controlling; *Hammer v. Downing*, 39 Or. 523, judgment for costs in favor of prevailing party entered before a petition for rehearing has been filed is not premature, and cannot be vacated. Cited as to distinction stated, 85 Am. Dec. 396, note; 87 Am. Dec. 523, note; 7 Am. St. Rep. 245, note; and as to the power of courts over their records, 79 Am. Dec. 437, note; 80 Am. Dec. 192, note; and 82 Am. Dec. 175, note.

13 Cal. 28-31. DUMPHY v. GUINDON.

Jurisdiction.—Costs are only incidental to the action, and for the purpose of testing jurisdiction constitute no part of the "matter in dispute," p. 30.

Affirmed, *Zabriskie v. Torrey*, 20 Cal. 174; *Bolton v. Landears*, 27 Cal. 107; and *Henigan v. Ervin*, 110 Cal. 40. Distinguished, *Meeker v. Harris*, 23 Cal. 286, holding that the costs of an action may become a matter in dispute, and that when they amount to a sum sufficient to bring the case within the jurisdiction of the court, its jurisdiction attaches. Distinguished, also, in *Dashell v. Slingerland*, 60 Cal. 657, noting that the constitution of 1849 did not exclude interest in fixing the appellate jurisdiction of the supreme court; and explained in dissenting opinion of Morrison, C. J., in same case. Cited, bearing on jurisdiction of supreme court, 70 Am. Dec. 724, note.

13 Cal. 31-33. BRADY v. REYNOLDS.

Guarantor and Indorser.—The contract of indorsement is, primarily, that of transfer; the contract of guaranty is that of security, p. 32.

Cited, *Ford v. Hendricks*, 34 Cal. 675, holding that one who indorses a promissory note, over his signature, "I hereby waive demand, notice of nonpayment and protest," is a guarantor. Also cited, *Fessenden v. Summers*, 62 Cal. 486, in which case it is held that one not a party to a note, who indorses it in blank before delivery, is an indorser, and not a guarantor; and again cited, *First Nat. Bank v. Babcock*, 94 Cal. 102, 28 Am. St. Rep. 96, asserting the rule that one who indorses a non-negotiable promissory note to give it credit is a guarantor. Cited, collecting the authorities on the subject, 56 Am. Dec. 359, note.

13 Cal. 33-40. ORTMAN v. DIXON.

Seal.—By the common law, the equitable title to realty may be

conveyed by an instrument not under seal, if otherwise sufficient, p. 36.

Approved in *Marling v. Marling*, 9 W. Va. 95; 27 Am. Rep. 548, holding that a court of equity will effectuate a gift of lands by a father to his child, evidenced only by an unsealed instrument delivered to the child. So in *Le Franc v. Richmond*, 5 Sawy. 603, holding that rights to water privileges on public lands may pass by simple unsealed bills of sale. Distinction between sealed and unsealed instruments abolished, *Garden v. Derrickson*, 95 Am. Dec. 289, note.

Water, Prior Appropriation.—Extent of right to appropriate water depends on the nature and uses of the appropriation, p. 38.

Principle approved, *McKinney v. Smith*, 21 Cal. 381, 383; *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 313; *Smith v. O'Hara*, 43 Cal. 375, 376; *Lux v. Haggin*, 69 Cal. 447; *Edgar v. Stevenson*, 70 Cal. 290, 291; *De Necochea v. Curtis*, 80 Cal. 405; *Ball v. Kehl*, 95 Cal. 614; *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 365; *Thorp v. Freed*, 1 Mont. 658; *Gassert v. Noyes*, 18 Mont. 222; *Lobdell v. Simpson*, 2 Nev. 277; 90 Am. Dec. 539; *Simmons v. Winters*, 21 Oreg. 42; 28 Am. St. Rep. 731; *Atchison v. Peterson*, 20 Wall. 514, 679; *Boyle v. San Diego Land and Town Co.*, 46 Fed. Rep. 711; *Hewitt v. Story*, 64 Fed. Rep. 515; *Union Mill and Mining Co. v. Danberg*, 81 Fed. Rep. 95, 106; *Lobdell v. Hall*, 3 Nev. 517, holding in the last case cited that an Indian who has appropriated water on the public lands of the United States may maintain an action for its diversion. Cited in *Cache etc. Co. v. Water etc. Co.*, 25 Colo. 171, 71 Am. St. Rep. 139, discussing priority of appropriation; *Colorado etc. Co. v. Larimer etc. Co.*, 26 Colo. 49; *Mattis v. Hosmer*, 37 Or. 530, and *Hague v. Nephi etc. Co.*, 16 Utah, 430, 67 Am. St. Rep. 639, as to limitation of appropriation; *Last Chance Min. Co. v. Bunker Hill etc. Min. Co.*, 49 Fed. Rep. 434, denying the right to change the place of use of water. Distinguished, *Keeney v. Union Mfg. Co.*, 39 Conn. 581, as resting upon the peculiar law of California. Cited, treating of right of prior appropriation, *Heath v. Williams*, 43 Am. Dec. 279, 282, note; and 60 Am. St. Rep. 802, note; and referred to on same subject, *McDonald v. Mining Co.*, 13 Cal. 239, n.

Findings in equity cases will not usually be disturbed, where the proofs are conflicting, p. 40.

Cited, *Lyons v. Lyons*, 18 Cal. 449, holding that when there are findings in an equity case, they are not to be disregarded.

13 Cal. 40-43. CRAVENS v. DEWEY.

The granting of nonsuit on the facts is a question of law, p. 42.

Cited as authority, *Schroeder v. Schmidt*, 74 Cal. 460; *Hammond v. Wallace*, 85 Cal. 527; 20 Am. St. Rep. 240; *Warner v. Darrow*, 91 Cal. 311; *Craig v. Hesperia etc. Water Co.*, 107 Cal. 675; *Kleinschmidt v.*

McAndrews, 4 Mont. 225; Jones Lumber etc. Co. v. Paris, 6 S. Dak. 115; 55 Am. St. Rep. 815; and Sanford v. Elevator Co., 2 N. Dak. 10.

In reviewing ruling by court below in granting a nonsuit, the appellate court will consider every fact as proven which the evidence tended to prove, p. 42.

Approved as authority, Dow v. Gould etc. Min. Co., 31 Cal. 650; and Herbert v. King, 1 Mont. 479; so, to same effect, Masten v. Griffing, 33 Cal. 114. Cited in dissenting opinion, Mulcahey v. Dow, 131 Cal. 80, main opinion holding nonsuit justified.

13 Cal. 43-44. HOLVERSTOT v. BUGBY.

Motion for nonsuit should specify the grounds upon which it is made, p. 44.

Approved, Daley v. Russ, 86 Cal. 117. Cited in Williams v. Hawley, 144 Cal. 99, discussing rule with reference to motion for new trial made upon minutes.

13 Cal. 45-49. HASKELL v. CORNISH.

Agency.—Agent signing his own name to a promissory note made on behalf of his principal is not personally liable as a maker if the instrument itself discloses the intention to bind his principal and not himself, p. 48.

Principle of the decision approved and applied in the similar case of Shaver v. Ocean Min. Co., 21 Cal. 47; so in Hall v. Crandall, 29 Cal. 571; 89 Am. Dec. 66; Love v. Sierra Nevada etc. Min. Co., 32 Cal. 654; 91 Am. Dec. 607; and to same effect, Gillig v. Lake Bizler Road Co., 2 Nev. 223. Cited, Zeigler v. Wells, Fargo & Co., 28 Cal. 265, which was an action against the defendant for not complying with a contract to carry and deliver a draft. The complaint alleged that the draft was signed "John Q. Jackson," and the proof showed that it was signed "John Q. Jackson, Agent," and the variance was held to be immaterial. Cited as authority to the ruling stated, Mott v. Hicks, 18 Am. Dec. 563, note; and Southern Pac. Co. v. Dredger Co., 118 Cal. 371, holding that parol evidence may be employed to determine whose contract it is.

13 Cal. 50-53. HUTCHINSON v. BOURS.

Judgment.—Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for a new trial was taken under advisement, p. 51.

Cited as authority, Casement v. Ringgold, 28 Cal. 340, holding that the clerk may perform the ministerial duty of entering judgment in vacation; and so in In re Cook, 77 Cal. 225; 11 Am. St. Rep. 271.